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1961

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1961

MEMORANDA

1960.

Dec. 30. THE HON. SIR AUBREY MELFORD STEED STEVENSON, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the Queen's Bench Division.

1961.

Jan. 1. SIR JOCELYN EDWARD SALIS SIMON, Q.C., M.P., Solicitor-General since 1959, was sworn a member of the Privy Council.

Jan. 5. THE RIGHT HON. LORD KEITH OF AVONHOLM, a Lord of Appeal in Ordinary since 1953, retired.

Jan. 9. THE HON. SIR HAROLD OTTO DANCKWERTS, a Justice of Her Majesty's High Court of Justice, Chancery Division, since 1949, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.

Jan. 9. THE HON. SIR COLIN HARGREAVES PEARSON, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1951, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.

Jan. 9. THE HON. SIR WILLIAM ARTHIAN DAVIES, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, since 1952, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.

Jan. 9. STEPHEN GERALD HOWARD, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Jan. 9. GEOFFREY DE PAIVA VEALE, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Jan. 9. GEORGE GILLESPIE BAKER, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.

Jan. 9. JOHN MEGAW, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Jan. 9. RICHARD ORME WILBERFORCE, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Chancery Division, and a knighthood was conferred upon him.

Jan. 9. FREDERICK HORACE LAWTON, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Jan. 9. LESLIE GEORGE SCARMAN, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.

Jan. 9. JOHN PASSMORE WIDGERY, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Jan. 10. JOHN ANTHONY PLOWMAN, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Chancery Division, and a knighthood was conferred upon him.

1961.

Jan. 11. THE HON. SIR JAMES DALE CASSELS, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1939, retired.

Jan. 12. THE HON. MR. JUSTICE DIPLOCK was appointed to be President of the Restrictive Practices Court, and the HON. MR. JUSTICE MEGAW was appointed a member of that court.

Jan. 20. LORD GUEST, a Senator of the College of Justice in Scotland from 1957, was appointed a Lord of Appeal in Ordinary with the style and title of Baron Guest of Graden in the County of Berwick, and was sworn a member of the Privy Council.

Sept. 30. THE HON. SIR GONNE ST. CLAIR PILCHER, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1942, retired.

Sept. 30. THE HON. SIR AUSTIN ELLIS LLOYD JONES, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1945, retired.

Oct. 2. BERNARD MAXWELL MACKENNA, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Oct. 2. ALAN ABRAHAM MOCATTA, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Oct. 2. JOHN THOMPSON, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Oct. 3. JOHN OSWALD MAIR HUNTER, ESQ., Q.C., was appointed to be a Senator of Her Majesty's College of Justice in Scotland.

Oct. 5. THE RIGHT HON. LORD TUCKER, a Lord of Appeal in Ordinary from 1950, resigned.

Oct. 11. THE RIGHT HON. SIR PATRICK ARTHUR DEVLIN, a Lord Justice of Appeal since 1960, was created a Lord of Appeal in Ordinary with the style and title of Baron Devlin of West Wick in the County of Wiltshire.

Oct. 12. THE HON. SIR WILLIAM JOHN KENNETH DIPLOCK, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1955, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.

Oct. 12. THE HON. MR. JUSTICE RUSSELL was appointed to be President of the Restrictive Practices Court, and the HON. MR. JUSTICE MOCATTA was appointed a member of that court.

Nov. 8. ROGER FRAY GREENWOOD ORMROD, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.

Nov. 10. THE HON. SIR ARCHIE PELLOW MARSHALL, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the Queen's Bench Division.

Dec. 8. JOHN DRURY PENNINGTON, ESQ., Assistant Editor of *The Weekly Law Reports*, died, age 51.

The Mode of Citation of the Volumes of the *Law Reports* for 1961 is as follows:

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

J. C.*

1960

Oct. 6.

COMMERCIAL BANKING CO. OF SYDNEY LTD. . . . . APPELLANT;

AND

EDWARD ROLF MANN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Banking—Cheque—Conversion—Bank draft—Drawn on partnership account—Fraud by partner—Claim in conversion by other partner against paying bank—Drafts obtained in fraud of, and without authority of, claimant partner — Never his property — Action not maintainable—Whether ratification.

Australia—New South Wales—Banking—Claim in conversion on fraudulently obtained bank cheques.

A partnership agreement under which the respondent, a solicitor, and R. carried on business provided, inter alia, that all the assets of the partnership, including money in any partnership banking account, were the property of the respondent, and that cheques might be drawn on the partnership banking account by either partner. R., in purported exercise of that authority, drew 13 cheques on the partnership "trust account" with the A.N.Z. bank in the form "Pay bank cheque" in favour of W., and in each case made application in the firm's name "per R." for a bank cheque in favour of W. for an amount equal to that of the cheque. The A.N.Z. bank debited the partnership account with the amount of each cheque and issued a bank cheque for an equal amount in favour of W. or bearer. The cheques were taken by W. to the appellant bank, where he had an account, and there cashed. In due course each of the cheques was paid by the A.N.Z. bank to the appellant bank against delivery.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST.

R. had acted fraudulently throughout; W. was not a client of the partnership and no client had authorised the payment to him of any money held in the trust account. On a claim in conversion by the respondent against the appellant bank for the amount paid on the cheques:—

Held, (1) that R. having obtained the bank cheques in fraud of the respondent and without his authority, express or implied—R.'s authority only extended to the drawing of cheques for the proper purposes of the partnership—they did not become the respondent's property and accordingly the claim in conversion failed.

Union Bank of Australia Ltd. v. *McClintock* [1922] 1 A.C. 240, P.C. applied.

The principle that the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities of title, has no application to a case of misappropriation of funds by an agent and their subsequent application for his own purposes.

Cundy v. *Lindsay* (1878) 3 App.Cas. 459, H.L. considered.

(2) That the respondent had also failed to prove a conversion by the appellant bank of cheques which he sought to make his own by ratification, for, if he ratified at all, he ratified the dealing by W. and the appellant bank with the cheques, and, if he did not ratify, nothing had been converted that ever belonged to him.

McClintock's case (supra) and *Bird* v. *Brown* (1850) 4 Exch. 786 applied.

Judgment of the Supreme Court of New South Wales reversed.

APPEAL (No. 33 of 1960) from a judgment of Walsh J. in the Supreme Court of New South Wales (April 27, 1960) in favour of the respondent, Edward Rolf Mann, a solicitor, in an action in which he sought to recover from the appellant, the Commercial Banking Company of Sydney Ltd., the sum of £3,505 on each of two counts, the first that the appellant had received that sum to his use, the second that the appellant had converted 13 documents described as bank cheques, the property of the respondent.

The following facts are taken from the judgment of the Judicial Committee: The respondent was at all material times a solicitor practising his profession at Sydney in partnership with Gordon Arthur Richardson under the firm name of E. R. Mann & Co. The appellant carried on the business of banking in the

Commonwealth of Australia. At the Pitt and Hunter Street branch at Sydney of the Australia and New Zealand Bank Ltd. (which will be called the A.N.Z. bank) the respondent and Richardson maintained a "trust account" in the name of the partnership. Under the partnership agreement all the assets of the partnership, including all money to the credit of any bank account in the partnership name, were the property of the respondent, but Richardson was entitled to the income of the partnership save for small weekly drawings by the respondent.

It was also a term of the partnership that cheques might be drawn on its banking account by either partner and that the respondent should give the necessary authority for that purpose. Such authority was given to the A.N.Z. bank.

The transactions which gave rise to these proceedings were as follows: Between August 6, 1954, and May 8, 1956, Richardson in purported exercise of the authority that has been mentioned drew 13 cheques on the trust account of the partnership with the A.N.Z. bank. In each case after the printed word "Pay" in the printed form of cheque was written "Bank cheque favour "H. Ward" or "Bank cheque H. Ward": the printed words "or bearer" were not struck out. In each case an application upon a printed form for a bank cheque in favour of H. Ward for an amount equal to the amount of the first-mentioned cheques was completed and signed "E. R. Mann & Co. per G. Richard-"son." Those documents were taken to the A.N.Z. bank: in each case the bank debited the trust account of the partnership with the amount of the cheque and at the same time issued a bank cheque for an equal amount in the form "Pay H. Ward or "bearer." It did not appear whether these cheques were handed to Richardson or Ward or some third person, but each one of them was taken by Ward to the Maroubra branch of the appellant, where he had an account, and was cashed over the counter. In due course each of the cheques was paid by the A.N.Z. bank to the appellant against delivery.

From first to last the part played by Richardson was fraudulent. Ward was not a client of the partnership and no client had authorised the payment to him of any money held in the trust account. Richardson concealed his fraud by fictitious entries in the books of the partnership.

Walsh J. found for the respondent on each of the two counts in the sum of £3,505 and directed judgment to be entered accordingly. The appellant bank appealed.

1960. July 19, 20. *J. D. Holmes Q.C.*, *R. M. Hope* and *P. A. Twigg* (all of Australia) for the appellant. There are two main questions: (1) When, if ever, did the respondent become the owner of the bank cheques alleged to have been converted by the appellant? (2) if the respondent became the owner of the bank cheques by electing to ratify the fraudulent acts of Richardson, did he by so electing defeat rights acquired by the appellant in relation to the bank cheques before such ratification? Those questions are of such importance to bankers in Australia, where bank cheques are treated as equivalent to cash, that the appellant, in the event of success, does not ask for costs in this appeal. It is submitted on the facts that the respondent (1) had no title to these cheques; (2) could not obtain title otherwise than by electing to ratify the action of Richardson in procuring the issue of the bank cheques; and (3) could not elect to ratify the action of Richardson without also ratifying the transfer of the bank cheques by Ward to his bank (the appellant) and the banker's action. Alternatively to (3) (supra), the respondent could not elect to ratify the action of Richardson so as to defeat the rights acquired by the appellant. The decision of this Board in *Union Bank of Australia Ltd.* v. *McClintock* [1] is clear authority for the first three of the above propositions; that case lies at the centre of the submissions for the appellant here, and the Board's judgment really answers the judgment in that case of the Full Court of the Supreme Court of New South Wales.[2] Walsh J. in the present case tried to get back to what was said in that case by the Full Court below and he misconceived what this Board decided.

Richardson had no authority to obtain the bank cheques—his authority only extended to the drawing of cheques for the proper purposes of the partnership—and the respondent must ratify the transactions before the cheques become his property; until he does so he has no title which entitles him to sue in conversion; that really puts the vital issue. The submission is that the judge has either confused the two authorities—the authority as between Mann and Richardson and between Mann and the A.N.Z. bank—or has misread what the Board decided in *McClintock's* case.[3] The judge began to fall into error when he said that "Mann was "the owner of the bank cheque, and although he did not have "physical possession of it, Richardson's possession was really

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[1] [1922] 1 A.C. 240, P.C.

[2] (1920) 20 N.S.W., S.R. 494, 500.

[3] [1922] 1 A.C. 240, P.C.

"Mann's possession and Mann had the right to the immediate "possession of the cheque." The bank cheques could only be Mann's property if he elected to ratify the transaction, and this ratification would necessarily extend to the delivery of the bank cheques to Ward, and thus to Ward's title to the bank cheques. Walsh J. further said that "It was a case in which the bank, at "the request of the firm of E. R. Mann & Co., handed bank "cheques to that firm, the hand which took them being the hand "of Richardson. In such circumstances, although indeed his "act in making that request was not authorised as between him-"self and Mann, I am of opinion that the cheques belonged to "Mann." That cannot be right without ratification, and is directly contrary to what was said in *McClintock's* case,[3] which makes it clear that the title to the bank cheques was not in Mann when they were issued.

Any ratification by the respondent of Richardson's unauthorised acts took place long after the appellant had acquired the bank cheques for value and without notice of the respondent's rights, if any, and been paid the amount thereof by the A.N.Z. bank. No ratification by the respondent could operate to divest or otherwise prejudicially affect the appellant's rights in respect to the bank cheques which it acquired before that ratification. [Reference was made to Story on Agency (1882), paras. 259, 389; and to *Bolton Partners* v. *Lambert*[4] and *Bird* v. *Brown*.[5]] Further, any ratification extends to the whole transaction because it is all one, and that included the right of Ward to collect and therefore to give the appellant title; the other view is that even if the transaction can be split up, that cannot be permitted if the effect is to divest rights which have already vested.

D. A. Staff Q.C., *Russell Bainton* and *P. G. Saywell* (all of Australia) for the respondent. The first question, which is in two parts, comes, it is submitted, to this: (1) Does the title to personal property purchased by an agent for his principal from a third party in the exercise of a general authority to purchase property of that description pass to the principal or to the agent upon delivery by the vendor of the relevant personal property? (2) If the agent, secretly in fraud of his principal, exercises that general authority so as to bind his principal by contract with the vendor, does title pass to the agent personally or to the principal? The question of the person to whom title passes from a vendor normally depends on the intention of the vendor at the time of delivery by him, and so in the case posed by the first of the above suggested questions there can be no doubt that the title to the property subject to the contract passes to the principal. In the case of the second question, it is submitted that although the agent for fraudulent purposes of his own makes a binding contract with a third party, that is a contract binding on his principal and the third party can have no intention when he delivers the property to deliver it to anyone but the principal—the party on whose behalf the agent purports to contract. That, it is submitted, is the present case.

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[3] [1922] 1 A.C. 240, P.C.

[4] (1889) 41 Ch.D. 295, 307; 5 T.L.R. 201, 357, C.A.

[5] (1850) 4 Exch. 786, 799–800.

Richardson having made out and signed the trust account cheques in the form " Pay H. Ward," and having completed the requisition to the A.N.Z. bank asking for bank cheques to issue in favour of Ward, took or sent those documents to the bank. Each of those documents purported to be addressed by Mann & Co. to the A.N.Z. bank, and the submission is that the act of delivering those documents constituted an offer by Mann & Co. to purchase from the bank pieces of personal property, namely, bank cheques, and that offer was accepted by the bank when it delivered the bank cheques to whoever picked them up. From this analysis, there was a contract between the A.N.Z. bank and the respondent Mann for the purchase of the bank cheques; the bank before it delivered the bank cheques to Richardson plainly had the title to them, it could transfer that title from the bank to Richardson only in performance of its contractual obligation to Mann & Co. In short, there is nothing to suggest that the A.N.Z. bank, when it delivered these bank cheques to whoever collected them, intended to deliver or to pass the title to anyone other than the person with whom it had made its contract. It had no contract with Ward or Richardson personally. [Reference was made to *Cundy* v. *Lindsay*.[6]]

The whole question in *McClintock's* case [7] turned on whether McClintock had a general authority to bind his principal by contract or not. *Australian Bank of Commerce Ltd.* v. *Perel* [8] illustrates the basis on which *McClintock's* case was determined; there was, of course, no question that McClintock's fraudulent act was outside the scope of his actual authority; the real question was, what was the scope of his general authority in relation to transactions of this type. [Reference was made to *Great Western Railway Co.* v. *London and County Banking Co.*

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[6] (1878) 3 App.Cas. 459, 465, H.L.

[7] [1922] 1 A.C. 240, 244.

[8] [1926] A.C. 737, 741, P.C.

Ltd.[9]] To hold against the respondent's contention here would defeat the whole object of these bank cheques, which are used for professional purposes. The bank could not have intended to pass title to anybody but the respondent, and no question of ratification arose. If it becomes necessary to rely on ratification to prove title, *McClintock's* case [10] is the basis of the theory that the issue of the writ may be treated as ratification. In any event, the only acts which Richardson purported to do on behalf of Mann were to obtain the bank cheques; it is clear that he never purported to transfer the cheques to Ward on behalf of the partnership.

Holmes Q.C. in reply. The first argument for the respondent here was put in *McClintock's* case [10] and rejected. Being in fraud of Mann, nobody determined precisely what was the authority between Mann and Richardson. What the Board were dealing with in *McClintock's* case [10] was whether McClintock had authority from the trustees to procure the issue of the bank cheques in that case; he had no such authority and the cheques when issued did not become the property of the plaintiffs. In the present case the same result comes about in point of reasoning because there is the finding of the judge that what was done here by Richardson was outside any authority which he could have had from Mann. Mann can only get title to the bank cheques by ratification, and even assuming that there was ratification, it must go the whole way and ratify Ward's title, and that is an end of the matter because the appellant takes its title from Ward.

October 6. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who, after stating the nature of the appeal, said: Bank cheques are similar to "bank drafts" as known in the United Kingdom and are commonly used by solicitors in the settlement of conveyancing transactions and by other persons engaged in commercial transactions where it is inconvenient to use cash but the creditor wishes for some further assurance of payment than the debtor's personal cheque. They are in legal significance promissory notes made and issued by the bank.

The relevant facts are not in dispute, though there are some gaps in the evidence which could to advantage have been filled. [His Lordship stated the facts set out above and continued:] Their Lordships will follow the course taken by the judge and in the first place consider the respondent's claim that the appellant converted the bank cheques in question. It appears to have been assumed (and, as their Lordships think, rightly assumed) that, if the claim in conversion fails, so also must the alternative count in money had and received to the use of the respondent. The claim in conversion can be maintained only if the cheques were the property of the respondent and it was sought to maintain it in alternative ways. In the first place it was contended that they became the property of the respondent from the moment that they were issued and never ceased to be his property: in the second place it was contended that they became his property by his ratification of the acts of his partner Richardson. No other act of ratification was advanced than the issue of the writ in the action. It appears to their Lordships that both these contentions must fail.

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[9] [1901] A.C. 414, 418, 423; 17 T.L.R. 700, H.L.

[10] [1922] 1 A.C. 240, P.C.

It is important to distinguish between what was Richardson's authority in relation on the one hand to the A.N.Z. bank and on the other to Mann. No question arises in these proceedings between Mann and the A.N.Z. bank. It is clear that Mann could not as between himself and the bank question Richardson's authority to draw cheques on the trust account. The position as between Mann and Richardson was different. Richardson had no authority, express or implied, from Mann either to draw cheques on the trust account or to obtain bank cheques in exchange for them except for the proper purposes of the partnership. If he exceeded those purposes, his act was unauthorised and open to challenge by Mann. It is in these circumstances that the question must be asked whether, as the judge held, the bank cheques were throughout the property of Mann. It is irrelevant to this question what was the relation between Richardson and Ward and whether the latter gave any consideration for the bank cheques that he received and at what stage Mann learned of the fraud that had been practised upon him. The proposition upon which the respondent founds his claim is simple enough: Richardson was his partner and in that capacity was able to draw upon the trust account and so to obtain from the bank its promissory notes: therefore the notes were the property of the partnership and belonged to Mann, and Richardson could not give a better title to a third party than he himself had.

At this stage it is convenient to refer to *Union Bank of Australia Limited* v. *McClintock*,[1] which in its facts and the law applicable to them bears a remarkable resemblance to the present

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[1] [1922] 1 A.C. 240, P.C.

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COMMERCIAL BANKING CO. OF SYDNEY v. MANN.

case. It came before the Judicial Committee on appeal from the Full Court of the Supreme Court of New South Wales which had set aside a verdict in favour of the appellant bank upon a trial before judge and jury. The relevant facts were as follows. The plaintiffs in the action, of whom one was named McClintock, as trustees of a will carried on the business of newspaper proprietors and in that business employed as general manager a person also named McClintock. He opened an account under the fictitious name of Robert Haynes with the appellant bank and, having done so, drew on the plaintiffs' account with the bank a number of cheques which were duly signed and counter-signed in accordance with the authority given by the plaintiffs to him and obtained in exchange from the bank its own cheques for similar amounts in favour of R. Haynes, Robt. Haynes, Robert Haynes or Robert Haynes Esq. These cheques were endorsed or purported to be endorsed by the payees and were paid into the " Robert Haynes " account which was operated by McClintock. The plaintiffs accordingly brought their action against the bank for conversion of the bank cheques, alleging that they were their property either from the time of their issue or at least by subsequent ratification. Their Lordships note how close is the parallelism of the two cases.

As has been said, the jury returned a verdict in favour of the bank, and it is clear from the summing-up of the Chief Justice, which their Lordships have taken the opportunity of studying in the Privy Council record of proceedings, that they could only have done so upon the footing that the cheques did not become the property of the plaintiffs and that that was so because the acts of McClintock in procuring them were as between himself and the plaintiffs unauthorised. Upon appeal to the Full Court that court held by a majority that McClintock as general manager acted within the scope of his authority in obtaining the bank cheques, that he received them solely as the servant of the plaintiffs and that accordingly they were the property of the plaintiffs and had been converted by the bank: it was unnecessary to have recourse to the doctrine of ratification. Gordon J., who dissented, held that the plaintiffs had no such property in the cheques as to enable them to sustain the plea of conversion. For him, too, the crucial point was whether McClintock had the plaintiffs' authority to procure the bank cheques in question, but he rightly considered that the relevant authority was that given by the plaintiffs to McClintock. Thus the question was plainly posed. Were the acts of McClintock in obtaining the bank cheques authorised by the plaintiffs, not as between themselves and the bank but as between themselves and him? If they were, the bank cheques became the property of the plaintiffs: if not, not. In the latter event the further question of ratification arose.

Upon the case coming before their Lordships' Board the main question was dealt with somewhat summarily. The issue was raised in the formal reasons of the parties, the appellant bank submitting that the plaintiffs (respondents) failed to establish that the bank cheques were their property, the plaintiffs that they became immediately on issue their property. Lord Sumner, delivering the judgment of the Board, said [2]: "This evidence was "used to show that, as in some cases it might be necessary—or "at least common and advantageous—to obtain a bank cheque, "it must be deemed to have been within a general manager's "actual authority to do so whenever he thought proper. It is "enough to say that it was for the jury, if they thought proper, "not to accept either the contention or the grounds for it, and "their Lordships think that their general verdict for the defen-"dants shows that they negatived the plaintiffs' case on this "issue—namely, that the bank cheques were theirs when their "agent and manager obtained them, but were forthwith con-"verted by the appellants." This is a direct decision that, if the acts of McClintock were unauthorised in the relevant sense of that word, the bank cheques did not when issued become the property of the plaintiffs. It appears to their Lordships that the majority of the Full Court in *McClintock's* case erred in regarding as decisive the fact that as between the plaintiffs and the bank McClintock was authorised to obtain bank cheques, whereas the relevant question was whether McClintock was as between the plaintiffs and himself authorised to obtain the particular cheques that were converted. Upon the verdict of the jury that he was not so authorised, they should have come to the opposite conclusion. In the same way in the present case the judge, having found that Richardson obtained the bank cheques in question in fraud of Mann and without his authority, should have gone on to hold that they did not become the property of Mann. Whether they became his by his subsequent ratification of the acts of Richardson is another question, which their Lordships will examine just as it was examined in *McClintock's* case. Upon what has been called the main question they observe that they could not hold that the respondent acquired a property in the bank cheques without directly contradicting a decision which has in 40 years been the subject of no adverse comment. And they would add that it appears to be in accordance with principle. They agree with the analysis of the transaction which was submitted by counsel for the appellant. In effect Richardson, by means of unauthorised cheques, misappropriated moneys in the trust account and used them to acquire bank cheques from the A.N.Z. bank which bound that bank to pay Ward or bearer out of its own money the amounts specified in the cheques. Their Lordships were not referred to any case in which in such circumstances property so acquired has been held to belong automatically to the party defrauded. In the present case, as in *McClintock's* case, counsel sought to rely on such cases as *Cundy* v. *Lindsay*,[3] but it appears to their Lordships, as it must have done to the Board in *McClintock's* case, that the principle that the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities of title has no application to a case of misappropriation of funds by an agent and their subsequent application for his own purposes. That there is a remedy, perhaps more than one, available to the person defrauded is obvious, but that is not to say that the property so acquired at once belongs to him so that he can sue in conversion a third party into whose hands it has come.

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[2] [1922] 1 A.C. 240, 246.

Their Lordships turn to the alternative contention that the bank cheques became the property of the respondent by reason of his ratification of Richardson's acts. This is necessarily stated somewhat vaguely, for it is nowhere specifically pleaded what acts of Richardson Mann ratified nor how he ratified them. It rests on the argument of counsel that the ratification was effected by the issue of the writ in the action, but even so it remains obscure what acts the issue of the writ is supposed to ratify. It will be remembered that by the time the writ was issued the wheel had gone full circle: the bank cheques had been issued to Richardson (or to Ward) and had been purchased by the appellant bank from Ward and had been duly honoured on presentation by the issuing bank. It appears to their Lordships that both upon principle and on the direct authority of *McClintock's* case[4] it is impossible for the respondent to pause at any point in this chain of events and claim to ratify the act of Richardson in obtaining the issue of bank cheques in favour of "H. Ward or bearer" without also ratifying the subsequent dealing with the cheques by him and the appellant bank. To adopt the words used in *McClintock's* case, the respondent fails to prove a conversion by the appellant of cheques which he seeks to make his own by ratification, for, if he ratifies at all, he ratifies the dealing by Ward and the appellant with the cheques, and, if he does not ratify, nothing has been converted that ever belonged to him. Their Lordships think, with great respect to the judge, that the minor differences of fact in the two cases which he points out do not prevent the application to them both of the same principle. If authority is needed, reference may be made to the full exposition of the principle by Rolfe B. in *Bird* v. *Brown.*[5]

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[3] (1878) 3 App.Cas. 459, H.L.

[4] [1922] 1 A.C. 240.

Their Lordships will for the reasons that have been stated humbly advise Her Majesty that the appeal should be allowed and the action dismissed with costs.

Counsel for the appellant intimated that in the event of success he would not ask that the respondent should pay the costs of the appeal. Therefore there will be no order as to the costs of the appeal.

Solicitors: *Bell, Brodrick & Gray; Light & Fulton.*

C. C.

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[5] (1850) 4 Exch. 786.

J. C.*
1960
Oct. 11.

CATHERINE LEE . . . . APPELLANT;

AND

LEE'S AIR FARMING LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Company—Director—Governing director—Whether servant of company—Accident while working for company for wages—Whether company liable for compensation—" Worker "—Workers' Compensation Act, 1922 (*No.* 39) (*New Zealand*), *ss.* 2, 3 (1).

Master and Servant—Company director—Whether servant of company—Governing director employed as chief pilot.

New Zealand—Workers' compensation—Company—Accident to governing director while employed by company—Whether company liable for compensation—" Worker "—Workers' Compensation Act, 1922 (*No.* 39), *ss.* 2, 3 (1).

Workmen's Compensation—Governing director—Accident while working for company for wages—Liability of company for compensation—New Zealand.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

Section 3 (1) of the Workers' Compensation Act, 1922, of New Zealand, provides that if "personal injury by accident arising out "of and in the course of the employment is caused to a worker, "his employer shall be liable to pay compensation," and "worker" is defined in section 2 as "any person who has entered into or "works under a contract of service . . . with an employer . . . "whether remunerated by wages, salary, or otherwise."

The appellant's husband, who had formed the respondent company for the purpose of carrying on the business of aerial top-dressing, was the controlling shareholder of the company, and was by its articles of association appointed governing director and employed at a salary as its chief pilot. In his capacity as governing director and controlling shareholder he exercised full and unrestricted control over all the operations of the company. Pursuant to its statutory obligations the company had insured itself against liability to pay compensation in the case of accident to him. While piloting an aircraft belonging to the company in the course of aerial top-dressing operations the aircraft crashed and he was killed. On a claim by the appellant against the respondent company for compensation, alleging that at the time of the accident her husband was a "worker" employed by the respondent company within the meaning of the Workers' Compensation Act, 1922, as amended:—

Held, that the deceased was a "worker" within the meaning of the Act. His position as sole governing director did not make it impossible for him to be a servant of the company in the capacity of chief pilot, for he and the company were separate and distinct legal entities which could enter, and had entered, into a valid contractual relationship, which was not invalidated by the circumstances that the deceased was sole governing director in whom was vested the full government and control of the company and also the controlling shareholder. They were separate legal entities also so as to enable the company to give orders to the deceased. One person may function in dual capacities, and acting in one capacity give orders to himself in another capacity. The contractual relationship was that of master and servant, and a contract of service was entered into and operated and the deceased was a "worker" within the statutory definition.

Salomon v. *Salomon & Co.* [1897] A.C. 22; 13 T.L.R. 46, H.L.; *Inland Revenue Commissioners* v. *Sansom* [1921] 2 K.B. 492, C.A.; and *Fowler* v. *Commercial Timber Co. Ltd.* [1930] 2 K.B. 1, C.A. considered.

Brown v. *Okiwi Farms Ltd.* [1957] N.Z.L.R. 1073 must be regarded as turning on its own facts.

Judgment of the Court of Appeal of New Zealand [1959] N.Z.L.R. 393 reversed.

APPEAL (No. 18 of 1960), by special leave, from a judgment of the Court of Appeal of New Zealand (December 18, 1958) holding on a case stated by the Compensation Court of New Zealand under the Workers' Compensation Rules, 1939, that on the facts set out in the case the appellant's deceased husband could not hold the office of governing director of the respondent company and also be a servant of the company.

The following facts are taken from the judgment of the Judicial Committee: The judgment of the Court of Appeal of New Zealand, from which this appeal was brought, was given as their opinion upon a case stated by the judge of the Compensation Court. It was provided by rule 5 of Chapter VIII of the Workers' Compensation Rules, 1939, that "In any action or other proceed-" ing the court or a judge thereof may state a case for the opinion " of the Court of Appeal on any point of law arising in the action " or proceeding." This procedure was adopted by the judge of the Compensation Court in the action which was brought by the appellant in respect of the death of her husband. She claimed £2,430 compensation on behalf of herself and her four infant children and she also claimed a sum for funeral expenses. The claim was made in reliance upon the provisions of the Workers' Compensation Act, 1922, as amended by later statutes. The appellant's late husband died in an aircraft accident in Canterbury, New Zealand, on March 5, 1956, while engaged in the capacity of an aircraft pilot in aerial top-dressing operations. The claim of the appellant rested upon her allegation that at the time of his death her husband was a "worker" in that he was employed by the respondent company. The respondent company denied that the deceased was a "worker" within the meaning of the Workers' Compensation Act, 1922, and its amendments. It was provided by section 3 (1) of the Act as follows: "3.—(1) " If in any employment to which this Act applies personal injury " by accident arising out of and in the course of the employment " is caused to a worker, his employer shall be liable to pay " compensation in accordance with provisions of this Act."

Under the relevant part of the statutory definition the term " worker" meant "any person who has entered into or works " under a contract of service or apprenticeship with an employer, " whether by way of manual labour, clerical work, or otherwise, " and whether remunerated by wages, salary, or otherwise." The denial of the respondent company that the deceased was a " worker" was based on the fact that the deceased was at the time of the accident the controlling shareholder and governing director of the respondent company. In 1954 the deceased had instructed a firm of public accountants in Christchurch to form a company for the purpose of conducting an aerial top-dressing business. On August 5, 1954, "Lee's Air Farming Limited," the respondent company, was incorporated. The nominal capital of the company was £3,000 divided into three thousand shares of £1 each. The deceased was allotted 2,999 shares; the remaining share according to the memorandum of association was to be taken by a solicitor. The articles of association included the following:

"32. Subject as hereinafter provided Geoffrey Woodhouse Lee "shall be and he is hereby appointed governing director and "subject to the provisions of clause 34 hereof shall hold that "office for life and the full government and control of the company shall be vested in him and he may exercise all the powers "and authorities and discretions vested in the directors generally and that notwithstanding he is the sole director holding "office and he may exercise all the powers of the company which "are not by statute required to be exercised by the company in "general meeting and any minute entered in the minute book of "the company's proceedings signed by the governing director "shall, in any matter not expressly required by statute to be done "by the company in general meeting have the effect of a resolution of the company.

"33. The company shall employ the said Geoffrey Woodhouse "Lee as the chief pilot of the company at a salary of £1,500 per "annum from the date of incorporation of the company and in "respect of such employment the rules of law applicable to the "relationship of master and servant shall apply as between the "company and the said Geoffrey Woodhouse Lee.

"34. The governing director may retire from office upon giving "one month's notice in writing of his intention so to do, and the "office of governing director shall be vacated if the governing "director (*a*) ceases to be a director by virtue of section 148 of "the Act; or (*b*) becomes bankrupt or enters into a composition "with his creditors; or (*c*) becomes prohibited from being a director by reason of any order made under section 216 or 268 of the "Act; or (*d*) becomes of unsound mind or becomes a protected "person under the Aged and Infirm Persons Protection Act, "1912; or (*e*) becomes incapable of carrying out the duties of a "director.

"35. The governing director may at any time convene a "general meeting of the company.

"36. The governing director shall not be disqualified by his "office from holding any office or place of profit in the company

" or from contracting with the company whether as vendor, purchaser or otherwise, nor shall any such contract or arrangement " or any contract or arrangement entered into by or on behalf " of the company in which the governing director shall be " interested be avoided nor shall the governing director be liable " to account for any profit realised by any such contract or " arrangement by reason of the governing director holding such " office or of the fiduciary relations thereby established.

" DIRECTORS

" 37. If and whenever there shall cease to be a governing " director the number of directors of the company shall not be " more than four or less than two who shall forthwith be appointed " or elected by the company in general meeting.

" 38. A director need not hold any share qualification in the " capital of the company."

" 43. No director shall be disqualified by his office from holding " any office or place of profit under the company or under any " company in which this company shall be a shareholder or " otherwise interested or from contracting with the company " either as vendor purchaser or otherwise nor shall any such " contract or any contract or arrangement entered into by or on " behalf of the company in which any director shall be in any way " interested be avoided nor shall any director be liable to account " to the company for any profit arising from any such office or " place of profit or realised by any such contract or arrangement " by reason only of such director holding that office or of the " fiduciary relations thereby established but it is declared that the " nature of his interest must be disclosed by him as provided by " section 155 of the Companies Act, 1933."

The deceased was appointed governing director of the respondent company, and the secretary was Mr. Sugden, a public accountant and a member of the firm of public accountants who had been instructed by the deceased to form the company.

On August 16, 1954, article 33 was amended by deleting the words " a salary of £1,500 per annum from the date of incorpora- " tion of the company " and inserting the words " a salary to be " arranged by the governing director." That resolution was effected by a minute signed by the deceased.

The case stated recorded that one of the assets of the respondent company was an " Auster " aircraft equipped for topdressing and that the deceased was a duly-qualified pilot. The case further recorded that while the respondent company was in the course of being incorporated Mr. Sugden negotiated and obtained different forms of insurance cover for the benefit of the respondent company and its employees. Mr. Sugden supplied to the insurance brokers an employer's statement of wages relative to employer's liability insurance pursuant to section 8 of the Workers' Compensation Amendment Act, 1950, and duly received an assessment of premium. Certain personal accident policies were taken out in favour of the deceased: the premiums in respect of these were paid by the respondent company and were debited to the personal account of the deceased in the books of the company.

Under the provisions of the Workers' Compensation Amendment Act, 1950, every employer of a worker in any employment to which the Act of 1922 applied was (subject to certain exceptions) under obligation to insure with an authorised insurer against his liability to pay compensation and was required to deliver a statement of wages to such authorised insurer.

Certain other findings recorded in the case stated were as follows:

"10. Following its incorporation the defendant company "started operating its aerial top-dressing business and the "deceased worked for the defendant company as its pilot con-"tinuously thereafter until his death on 5th March, 1956.

"11. On the 8th day of July, 1955, the said Clyde Leslie Sug-"den forwarded to the said brokers an employers' statement of "wages for the year ended 31st March, 1955, and on the same "date wrote a letter to the said brokers discussing the apportion-"ment of the salary of the deceased. A copy of the said letter is "annexed hereto. The relevance of the said letter was that a "higher premium was payable on that part of the salary of the "deceased attributable to his work as a pilot.

"14. In his capacity as governing director and controlling "shareholder of the defendant company the deceased exercised "full and unrestricted control of the affairs of the defendant "company and he expressly or impliedly authorised the acts and "conduct of any other employee or officer of the defendant "company including the said Clyde Leslie Sugden.

"15. In his capacity as aforesaid the deceased made all "decisions relating to contracts for aerial top-dressing, contract "prices, the manner in which the defendant company's aircraft "was to be employed and the methods to be employed in carrying "out the work of the defendant company, and in general he "exercised complete and unfettered control over all the operations "of the defendant company at all material times.

"16. On the 5th day of March, 1956, while the deceased was "piloting the said 'Auster' aircraft during the course of aerial "top-dressing operations in Canterbury the said aircraft stalled "and crashed to the ground and burst into flames and was "destroyed and the said deceased was killed as a result of the "crash.

"17. The plaintiff and her said four infant children were totally "dependent on the deceased and the salary payable to the "deceased up to the time of his death was such that if the "defendant company is liable in this action it must pay the said "sums of £2,430 and £50 claimed by the plaintiff in the action."

The question which was raised for the opinion of the Court of Appeal was whether at the time of his accident the deceased was employed by the respondent company "as a 'worker' within the "meaning of the Workers' Compensation Act, 1922, and its "amendments." The case stated came on for hearing in the Court of Appeal of New Zealand (Gresson, North and Cleary JJ.) on November 27, 1958, and the reasons for judgment were delivered by North J. on December 18, 1958. In the course of his judgment the judge said [1]: "We interpret the question to mean "whether on the admitted facts of this case the deceased could "hold the office of governing director of the company and also be "a servant of the company." Their Honours answered: "the "question in its amended form" in the negative. The formal judgment records the judgment in these words: "This court doth "answer in the negative the question raised in the case stated "and as amended by this court, namely, whether on the admitted "facts of the case the deceased could hold the office of governing "director of the company and also be a servant of the company."

Mrs. Lee appealed.

1960. July 6, 7. *A. C. Perry* (New Zealand) and *J. G. Le Quesne* for the appellant. At the time when the accident happened the Workers' Compensation Act, 1922, was in force; it has been amended over the years and was consolidated and re-enacted in 1956, but the relevant sections so far as this case is concerned have not been changed. The facts are not in dispute.

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[1] [1959] N.Z.L.R. 393, 397.

The contest is between the appellant and the respondent company and the latter's insurers. The first submission is that Lee was undoubtedly a servant of the company. The matter may be tested first on the basis of disregarding the facts that he was a controlling shareholder and governing director: (1) Article 33 of the company's articles of association provided that he should be employed as the company's pilot and that the rules applicable to the relationship of master and servant should apply. (2) It is a fact that he did at the commencement of operations work for the company; and he was the only person flying the aircraft. (3) He was paid wages, and a wages book was maintained. (4) The profits earned belonged first to the company and not to him. (5) He worked in close co-operation with another employee, the tractor driver, concerning whose position there could be no doubt. (6) The aircraft which he flew was owned by the company, as was all the other equipment of the company. (7) The aircraft was insured under a policy one of the conditions of which was that it should be operated only by Lee or other approved pilot. (8) The company insured him as a servant, and the insurance company, knowing all the facts, accepted such insurance over a period of two years.

On those facts there can be no doubt but that, putting aside for the moment his position as governing director and controlling shareholder, Lee was a servant and not, say, an independent contractor. The contract was one of service and not for services. The whole question is whether that position can also be held when he is governing director of the company. There appear to be considerable doubts as to what tests are to be applied in determining whether the relationship of master and servant exists, but it is submitted that no matter what tests are applied Lee was a servant but for this dual relationship of governing director. The test of control over the worker and his work is of importance: *Simmons* v. *Heath Laundry Co.*[2]; *Short* v. *J. & W. Henderson Ltd.*[3]; *Cassidy* v. *Ministry of Health*[4]; *Stevenson, Jordan and Harrison* v. *MacDonald and Evans.*[5]

There is clear authority for the view that it would not be inconsistent for a director also to be a servant of the company: *In re Beeton & Co. Ltd.*[6]; see also *Anderson* v. *James Sutherland*

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[2] [1910] 1 K.B. 543; 26 T.L.R. 326, C.A.

[3] 1946 S.C.(H.L.) 24, 33.

[4] [1951] 2 K.B. 343, 351; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[5] [1952] 1 T.L.R. 101, 110, C.A.

[6] [1913] 2 Ch. 279, 285.

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(Peterhead) Ltd.[7] North J. in the present case said that there may be the dual capacity of director and servant, and *Anderson's* case[7] has gone a step further and establishes that a managing director can be a servant. There is nothing unusual in a person being the sole director of a company. It would appear that the case of a governing director has only once come before the courts: *Inland Revenue Commissioners* v. *Sansom.*[8] In the judgment in the present case the Court of Appeal said: "Therefore he "became in effect both employer and worker. True the contract "of employment was between himself and the company (see "*Booth* v. *Helliwell*[9]), but on him lay the duty both of giving "orders and obeying them. In our view the two offices are "clearly incompatible." The company is, of course, the employer, but the judgment seems to merge the company in the deceased. In the case of bankruptcy the liquidator would manage the affairs of the company, and the deceased would remain an employee unless and until dismissed.

That a person may possess dual roles is shown by *Fowler* v. *Commercial Timber Co. Ltd.*[10]; although it may be an artificial position, it is one which the House of Lords has so clearly upheld that it should be maintained: *Salomon* v. *Salomon & Co.*[11]; the sanctity of that case was reaffirmed in *E.B.M. Co. Ltd.* v. *Dominion Bank.*[12] The present decision of the Court of Appeal introduces confusion into company law, and the only way in which the established principle can be maintained is by holding that Lee's company was a separate and distinct legal entity from him and that it was his employer. The contract between Lee and the company was a valid contract between two different legal persons, even if the company in making the contract acted through Lee. One cannot change this contract merely because of the difficulties one encounters in company law.

In *Brown* v. *Okiwi Farms Ltd.*,[13] which preceded the present case in the Compensation Court, it was held that Brown was not a "worker" within the meaning of the Act. That case, it is submitted, was wrongly decided or was a decision on its particular facts; the judge's remarks there[14] merely illustrate the difficulties one gets into if one goes behind the legal entity of the company. [Reference was also made to *Wilsons & Clyde Coal*

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[7] 1941 S.C. 203, 213, 218.

[8] [1921] 2 K.B. 492, 515, C.A.

[9] [1914] 3 K.B. 252.

[10] [1930] 2 K.B. 1, 6, C.A.

[11] [1897] A.C. 22, 33, 53; 13 T.L.R. 46, H.L.

[12] [1937] 3 All E.R. 555, 563, P.C.

[13] [1957] N.Z.L.R. 1073.

[14] Ibid. 1075.

Co. v. *English*.[15]] Here, as governing director, Lee engaged himself as pilot, and thereby created the contract between the company and himself. The company was entitled under the contract to control both what Lee did and how he did it, and this control remained the control of the company whoever might be the agent empowered by the company to exercise it. *Allen* v. *Minister of Pensions and National Insurance* [16] was a decision on its own facts and in complete contrast with the present case —it has no relevance to a company law case. In all these cases it is important that the contract should be clear cut. Lastly, if the present case was rightly decided below, then *F.A.M.E. Insurance Co. Ltd.* v. *Garvey's Coal Co. Ltd.*,[17] in which the present case did not go without comment, was wrong, but it is submitted that it was rightly decided. The deceased here was a "worker."

J. G. Le Quesne following. The Court of Appeal below said that the company was sufficiently independent of Lee to be able in law to make a contract with him, but later said that it was impossible for the company to give any orders to Lee. Those two propositions contradict each other. It is not only contradictory but is also contrary to the authority which the court is professing to follow: *Salomon's* case.[18] In *Sansom's* case [19] there was a company controlled by Sansom—the position is exactly comparable with Lee here—and if it is to be said that Lee was in effect the employer and employee, and that that was an impossibility, it should have been said of Sansom. Lord Sterndale M.R. held that it was legally possible for the company to make a loan to Sansom in the circumstances in which it did, circumstances which are indistinguishable from those which prevailed here. Sansom's case is inconsistent with the view taken by the Court of Appeal here; that case was the correct view of the position between a company and its sole director.

Martin Jukes Q.C. and *J. H. C. Goldie* for the respondents. The present problem has been considered as early as 1937 in New South Wales, and from that time onwards has been answered by the New South Wales and the New Zealand courts always in the same way. A number of those cases were referred to in the *Okiwi* case.[20] The test to apply is that of control; if there is no control over his work, then he is not a servant. The test to determine whether a managing, a governing or an ordinary director is a "worker" is whether he is under a contract of service, not for services. The trend of authority seems to show that that is a question of fact to be determined on the evidence: *Hanson* v. *Hansons Ltd.*[21]—the test applied was that of actual control. In the present case one has to consider the relationship of one man to himself. If the appellant's case here is correct, the Supreme Court of New South Wales went wrong in *Ross* v. *Ross & Bowman Pty. Ltd.*[22] It was said for the appellant that Lee was the agent of the company, that in exercising control he exercised it on behalf of the company, and therefore the company's control remained. If that is the way it is put, it could equally apply to the director in the *Ross* case.[22] In *Kemp* v. *Northern Roof Tiles Pty. Ltd.*[23] the same judge held that Kemp was a worker of the company—applying the test of control he came to the opposite conclusion from the previous case. See also *Blennerhassett* v. *Blennerhassett's Institute of Accountancy*[24] and *Dugan* v. *Wagga Publications Pty. Ltd.*,[25] which, though not so strong as the present case, was one where substantial control passed over to the man who ran the business; it was there said that there was no likelihood that the deceased would be dismissed, and there again the present case is very close.

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[15] [1938] A.C. 57, 64, 73–74; 53 T.L.R. 944; [1937] 3 All E.R. 628, H.L.

[16] The Times, March 29, 1956.

[17] Sup.Ct. of N.Z., June 16, 1960.

[18] [1897] A.C. 22.

[19] [1921] 2 K.B. 492, 497, 509, 515.

[20] [1957] N.Z.L.R. 1073.

The business was carried on in an informal manner here; Lee was not only employed as a pilot but also as a general worker; his wages were allocated in part to his work as a pilot and in part to his general work. *Allen* v. *Minister of Pensions and National Insurance*[26] is the nearest case to this and is the correct approach; Havers J. rightly applied the test of control as it has been applied in Australia and New Zealand. The difficulty here is to find out what is the contract; Lee, as governing director, had power to make a contract with himself; it is a very difficult concept how he could have that dual capacity at one and the same time—how could he give himself orders? He cannot exercise control over himself; can he dismiss himself for misconduct? Can a person be a servant when he himself is in control? It is submitted that as a practical matter he cannot. Control means a real living person to control another real living person. It was said in *Gould* v. *Minister of National Insurance*[27] that "the real "question is one of the degree of control exercised." *John Shaw*

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[21] [1937] W.C.R.(N.S.W.) 165.
[22] [1942] W.C.R.(N.S.W.) 37.
[23] [1949] W.C.R.(N.S.W.) 76.
[24] [1954] W.C.R.(N.S.W.) 50.
[25] [1955] W.C.R.(N.S.W.) 219.
[26] The Times, March 29, 1956.
[27] [1951] 1 K.B. 731, 734; [1951] 1 T.L.R. 341; [1951] 1 All E.R. 368.

& Sons (*Salford*) *Ltd.* v. *Shaw*[28] does not carry the matter any further. For the working out of the tests, see *Simmons* v. *Heath Laundry Co.*[29]; and see *Humberstone* v. *Northern Timber Mills*[30] for the view expressed by Dixon J. on the test to be applied under the Workers' Compensation Act, 1928–1946, of Victoria; he thought that the classical tests enumerated by Lord Thankerton in *Short* v. *J. & W. Henderson Ltd.*[31] applied to that case, those tests being: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal. Applying those four tests to this case, one finds as a fact that there is no contract of service; if he controls himself, that is not control. Lastly, Lord Shaw's short judgment in *Smith* v. *General Motor Cab Co. Ltd.*[32] shows how the matter has to be looked at. The true view here is that the relationship of the company and Lee was not that of master and servant and he was not a worker within the meaning of the Act.

Goldie following. Lord Thankerton in *Short's* case,[33] after stating his four tests, went on to say that " the principal requirement of a contract of service is the right of the master in " some reasonable sense to control the method of doing the " work "; but where, as here, one gets the controller and the controlled person residing in the same person there is no control in any " reasonable sense "—it is wholly illusory. The Court of Appeal of New Zealand answered the problem correctly on the facts of this particular case and applied the right test.

Perry in reply. It is said in *Swabey* v. *Port Darwin Gold Mining Co.*[34] that " The articles do not themselves constitute a " contract, they are merely the regulations by which provision is " made for the way the business of the company is to be carried " on." Under the articles in this case Lee as a servant was to be employed as a pilot and the master and servant relationship was to apply. Havers J. in *Allen's* case[35] relied on *Gould's* case,[36] but the latter did not fully set out what Lord Thankerton had said in *Short's* case[37]; he qualified the tests and was obviously not prepared to accept more. [Reference was also made to *Kilboy* v. *South Eastern Fire Area Joint Committee.*[38]] Control was in the company here; it can be shown by change of circumstances—if a liquidator were appointed or there was a change of shareholding the contract between the company and its servants would not be affected. Lee was never anything else than the agent for the company. This was a contract of service. [*Anderson's* case[39] and the *E.B.M. Co.'s* case[40] were referred to.]

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[28] [1935] 2 K.B. 113, C.A.

[29] [1910] 1 K.B. 543, 549, 552; 26 T.L.R. 326, C.A.

[30] (1949) 79 C.L.R. 389, 404.

[31] 1946 S.C.(H.L.) 24, 33.

[32] [1911] A.C. 188, 192; 27 T.L.R. 370, H.L.

[33] 1946 S.C.(H.L.) 24, 34.

[34] (1889) 1 Megone's Company Cases 385, 386–387, C.A.

[35] The Times, March 29, 1956.

[36] [1951] 1 K.B. 731.

[37] 1946 S.C.(H.L.) 24, 33–34.

Oct. 11. The judgment of their Lordships was delivered by LORD MORRIS OF BORTH-Y-GEST, who stated the facts set out above and continued: The Court of Appeal recognised that a director of a company may properly enter into a service agreement with his company, but they considered that, in the present case, inasmuch as the deceased was the governing director in whom was vested the full government and control of the company he could not also be a servant of the company. After referring in his judgment to the delegation to the deceased of substantially all the powers of the company, North J. said[1]: "These powers were "moreover delegated to him for life and there remained with the "company no power of management whatsoever. One of his first "acts was to appoint himself the only pilot of the company, for, "although article 33 foreshadowed this appointment, yet a con-"tract could only spring into existence after the company had "been incorporated. Therefore, he became in effect both "employer and worker. True, the contract of employment was "between himself and the company: see *Booth* v. *Helliwell*,[2] "but on him lay the duty both of giving orders and obeying them. "In our view, the two offices are clearly incompatible. There "could exist no power of control and therefore the relationship of "master-servant was not created."

The substantial question which arises is, as their Lordships think, whether the deceased was a "worker" within the meaning of the Workers' Compensation Act, 1922, and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the company. On this view it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane which belonged to the company and when he was carrying out the operation of top-dressing farm lands from the air. He was paid wages for so doing. The company kept a wages book in which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were with the company alone. It cannot be suggested that when engaged in the activities above referred to the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor in their Lordships' view could it reasonably have been suggested) that the company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If, then, it be accepted that the respondent company was a legal entity their Lordships see no reason to challenge the validity of any contractual obligations which were created between the company and the deceased. In this connection reference may be made to a passage in the speech of Lord Halsbury L.C. in *Salomon* v. *Salomon & Co.*[3]: "My Lords, the learned judges "appear to me not to have been absolutely certain in their own "minds whether to treat the company as a real thing or not. "If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in "its constitution as a company, it appears to me to follow as a "consequence that it is impossible to deny the validity of the "transactions into which it has entered." A similar approach was evidenced in the speech of Lord MacNaghten when he said[4]: "It has become the fashion to call companies of this class 'one "'man companies.' That is a taking nickname, but it does not "help one much in the way of argument. If it is intended to "convey the meaning that a company which is under the "absolute control of one person is not a company legally incor-"porated, although the requirements of the Act of 1862 may have

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[38] 1952 S.L.T. 332, 335.

[39] 1941 S.C. 203, 218.

[40] [1937] 3 All E.R. 555, P.C.

[1] [1959] N.Z.L.R. 393, 399.

[2] [1914] 3 K.B. 252; 30 T.L.R. 529.

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[3] [1897] A.C. 22, 33; 13 T.L.R. 46, H.L.

[4] [1897] A.C. 22, 53.

"been complied with, it is inaccurate and misleading: if it merely "means that there is a predominant partner possessing an over-"whelming influence and entitled practically to the whole of the "profits, there is nothing in that that I can see contrary to the "true intention of the Act of 1862, or against public policy, or "detrimental to the interests of creditors."

Nor in their Lordships' view were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was vested the full government and control of the company. Always assuming that the company was not a sham then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the company in its negotiation. The deceased might have made a firm contract to serve the company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed his contract would not have been affected. The circumstance that in his capacity as a shareholder he could control the course of events would not in itself affect the validity of his contractual relationship with the company. When, therefore, it is said that "one of his first acts was to appoint himself the "only pilot of the company," it must be recognised that the appointment was made by the company, and that it was none the less a valid appointment because it was the deceased himself who acted as the agent of the company in arranging it. In their Lordships' view it is a logical consequence of the decision in *Salomon's* case [4] that one person may function in dual capacities. There is no reason, therefore, to deny the possibility of a contractual relationship being created as between the deceased and the company. If this stage is reached then their lordships see no reason why the range of possible contractual relationships should not include a contract for services, and if the deceased as agent for the company could negotiate a contract for services as between the company and himself there is no reason why a contract of service could not also be negotiated. It is said that therein lies the difficulty, because it is said that the deceased could not both be under the duty of giving orders and also be under the duty of obeying them. But this approach does not give effect to the circumstance that it would be the company and not the deceased that would be giving the orders. Control would remain with the company whoever might be the agent of the company to exercise it. The fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the company to give the orders does not alter the fact that the company and the deceased were two separate and distinct legal persons. If the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the company is recognised. Just as the company and the deceased were separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased.

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[4] [1897] A.C. 22.

An illustration of the validity of transactions entered into between a company comparable to the respondent company and its sole governing director is found in the case of *Inland Revenue Commissioners* v. *Sansom*.[5] Sansom sold his business as a going concern to a private company, John Sansom Ltd. He became the sole governing director of the company, and the whole direction, control and management of the business and affairs of the company were in his hands. The company made large profits but no dividends were ever declared. He was the only director. The capital of the company was £25,000 divided into 2,500 shares of £10 each. Sansom held 2,499 shares and had given one share to someone who had previously been employed by him. By its memorandum the company had power to lend money to such persons and on such terms as it should think fit. The company made what were described in the balance sheets as "loans or "advances" to Sansom. They were made without interest and without any security. Sansom was assessed to super-tax on the loans; he was so assessed on the basis that the amounts received by him were in fact not "loans or advances" but constituted an income received by him from the company. Sansom appealed to the commissioners. They found that the company was a properly constituted legal entity: that it had power to make loans to such persons and upon such terms as it should think fit: that it did make such loans to Sansom, and that such loans did not form part of Sansom's income for the purposes of super-tax. On appeal by the Crown on a case stated the judge made an order remitting the case to the commissioners to find whether in point

[5] [1921] 2 K.B. 492, C.A.

of truth and in fact the company did carry on the business or whether Sansom really carried it on to the exclusion of the company: whether if the company did carry on the business it carried it on as agent for Sansom who was to be regarded as a principal standing outside the company: whether the company carried on the business on its own behalf and for the benefit of the corporators. On appeal to the Court of Appeal it was held that the findings of the commissioners being on questions of fact were conclusive and involved the negativing of the questions which the judge had directed to be put to them: accordingly, the order remitting the case to the commissioners was discharged. In his judgment Younger L.J. said[6]: "It is conceded that the "entire property in this business was bought and paid for by "the company, that it passed to the company nearly ten years "ago, that every transaction thereafter was carried out by and in "the company's name, and has now been carried to completion "in a liquidation regularly constituted. In those circumstances "unless the company's legal status is to be denied to it—and "this is expressly disclaimed by the learned judge—there appears "to me to be no room on this case as stated for directing any "such inquiry." He further said[7]: "In my judgment so long "as such a company as this was is recognised by the legislature "there can be no reason why the contracts and the engagements "made in its name or entered into on its behalf, and themselves "ex facie regular, should not everywhere until the contrary is "alleged and proved be regarded as the company's. . . ."

An illustration of circumstances in which a person may possess dual roles is seen in *Fowler* v. *Commercial Timber Co. Ltd.*[8] In that case the plaintiff was appointed managing director of the defendant company (which was not a so-called "one man com-"pany") for a period of years. The company did not prosper and the time came when it became clear that if it were not voluntarily wound up it would be compulsorily wound up. The directors, including the plaintiff, resolved that it was desirable to wind up the company voluntarily. An extraordinary general meeting was called at which the plaintiff was present and it was unanimously resolved to wind up the company voluntarily. The liquidators gave the plaintiff notice that his agreement was terminated and that his services were no longer required. He claimed damages for wrongful dismissal, and it was held that there was no implied term in his agreement that he should lose his right to recover damages for breach of his agreement if the company went into voluntary liquidation with his assent or approval. Scrutton L.J. said[9]: "Such a complicated term "cannot be implied for this reason: the two positions of the "plaintiff (1) as managing director, who claims damages for "breach of the contract of employment, and (2) as a director and "shareholder of the company who thinks that in its own interests "the company ought to stop business are quite consistent."

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[6] [1921] 2 K.B. 492, 516, C.A.
[7] Ibid.
[8] [1930] 2 K.B. 1, C.A.

In the present case their Lordships see no reason to doubt that a valid contractual relationship could be created between the respondent company and the deceased even though the deceased would act as the agent of the company in its creation. If such a relationship could be established their Lordships see no reason why it should not take the form of a master and servant relationship. The facts of the present case lend no support for the contention that if a contract existed it was a contract for services. Article 33, recited above, shows that what was designed and contemplated was that after its incorporation the respondent company would, as a master, employ the deceased, as a servant, in the capacity of chief pilot of the company. All the facts and all the evidence as to what was actually done point to the conclusion that what purported to be a contract of service was entered into and was operated. Unless this was an impossibility in law, then the deceased was a worker within the statutory definition as referred to above. It is said that the deceased could not both give orders and obey them and that no power of control over the deceased was in existence. It is true that an inquiry as to whether a person is or is not employed upon the terms that he will, within the scope of his employment, obey his master's orders may constitute an important inquiry if it is being tested in a particular case whether there is a contract of service as opposed to a contract for services: see *Simmons* v. *Heath Laundry Co.*[10] and *Short* v. *J. & W. Henderson Ltd.*[11] But in the present case their Lordships can find nothing to support the contention that there was or may have been a contract for services but not a contract of service.

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Ex facie there was a contract of service. Their Lordships conclude, therefore, that the real issue in the case is whether the position of the deceased as sole governing director made it impossible for him to be the servant of the company in the capacity of chief pilot of the company. In their Lordships' view, for the reasons which have been indicated, there was no such impossibility. There appears to be no greater difficulty in holding that a man acting in one capacity can give orders to himself in another capacity than there is in holding that a man acting in one capacity can make a contract with himself in another capacity. The company and the deceased were separate legal entities. The company had the right to decide what contracts for aerial top-dressing it would enter into. The deceased was the agent of the company in making the necessary decisions. Any profits earned would belong to the company and not to the deceased. If the company entered into a contract with a farmer, then it lay within its right and power to direct its chief pilot to perform certain operations. The right to control existed even though it would be for the deceased in his capacity as agent for the company to decide what orders to give. The right to control existed in the company, and an application of the principles of *Salomon's* case [12] demonstrates that the company was distinct from the deceased. As pointed out above, there might have come a time when the deceased would remain bound contractually to serve the company as chief pilot though he had retired from the office of sole governing director. Their Lordships consider, therefore, that the deceased was a worker and that the question posed in the case stated should be answered in the affirmative.

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[9] [1930] 2 K.B. 1, 6.

[10] [1910] 1 K.B. 543; 26 T.L.R. 326, C.A.

[11] 1946 S.C.(H.L.) 24.

Their Lordships find it unnecessary, as did the Court of Appeal, to review the judgment of the Compensation Court in *Brown* v. *Okiwi Farms Ltd.*,[13] though they agree with the Court of Appeal that the phrase "incorporated partnership" is not a happy one. That case must be regarded as turning upon its own facts.

Their Lordships were referred to and have considered certain reported decisions of cases in the Workers' Compensation Commission of New South Wales in which, under comparable legislative provisions, questions have arisen and with varying results have been decided as to whether persons were employed under contracts of service. As these cases have not been under review, and as they so largely depend upon a consideration of their own particular facts and circumstances, their Lordships do not include an analysis of them in this judgment.

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[12] [1897] A.C. 22.

[13] [1957] N.Z.L.R. 1073.

J. C.
1960
LEE
v.
LEE'S AIR
FARMING
LTD.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the question in the case stated should be answered in the affirmative. The respondent company must pay the costs before their Lordships' Board and in the Court of Appeal and the Compensation Court.

Solicitors: *Blyth, Dutton, Wright & Bennett; Goldingham, Wellington & Co.*

C. C.

[HOUSE OF LORDS.]

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1959
July 15, 16, 20, 21, 22;
Nov. 5.

WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION) . . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

RAMSHAW COAL CO. LTD. (IN LIQUIDATION) . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION) . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

[CONSOLIDATED APPEALS.]

Revenue—Income tax—Basis of assessment—Case III—Case VI—Whether payments assessable in respect of year in which received or year in respect of which they were paid—Meaning of "income "arising"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III, r.* 2, *Case VI, r.* 2—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 131 (1), (2), 128 (1), 135.

Revenue—Income tax—Crown—Payments by—Whether Case III can apply—Crown immunity—Income Tax Act, 1918, *rr.* 19, 21 *of*

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE and LORD KEITH OF AVONHOLM.

Note.—LORD REID and LORD TUCKER were present at the hearing of the appeals but were not present on the consideration of the report of the Appellate Committee for the reasons stated by VISCOUNT SIMONDS in his opinion.

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RAMSHAW COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

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General Rules, Sch. D, Case III, r. 1 (*a*)—*Income Tax Act*, 1952, *ss.* 169, 170, 123 (1).

Revenue — Income tax — " Annual payment "—Coal nationalisation—Interim income payments—Coal Industry Nationalisation Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 5 (1), 19, 21, 22—*Coal Industry* (*No.* 2) *Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *r.* 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*), *Case VI, r.* 2—*Income Tax Act*, 1952, *ss.* 170, 123 (1), 128 (1), 135.

Revenue — Income tax — " Interest of money " — Statutory payment calculated as sum equal to interest on compensation to which it is added — Coal Industry Nationalisation Act, 1946, *s.* 22 (2) (*a*) — *Income Tax Act*, 1918, *Sch. D, Case III, r.* 1 (*a*)—*Income Tax Act*, 1952, *s.* 123 (1).

Mines and Minerals — Coal — Nationalisation — Compensation—Interim income payments—Whether to be included in actual income of year of receipt or of year or period in respect of which it was paid — Coal Industry Nationalisation Act, 1946, *s.* 5 (1).

Meaning of " income."

The W. P. Coal Co. Ltd. carried on the trade of a colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied, and was an " investment company " within the meaning of section 20 (1) of the Finance Act, 1936. The company received from time to time payments from the Ministry of Fuel and Power of interim income under (1) section 22 (2) (*a*) of the Act of 1946, and (2) section 22 (3) thereof, and section 1 of the Coal Industry (No. 2) Act, 1949, some or all of such payments being avowedly paid by the Ministry as income of periods preceding the revenue year of receipt.

The company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51, and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

On the question whether, in computing the actual income of the company for the purpose of such apportionments, interim income should be included in the actual income of the year in which it was received, or (as the company contended) of the year or period in respect of which it was paid:—

Held, (1) (unanimously) on the assumption that the payments in question were annual payments within Case III of Schedule D, rules 19 and 21 of the General Rules were inapplicable since the payer was the Crown (post, pp. 59, 66, 74).

(2) (Lord Radcliffe dissenting). But that did not of itself preclude such payments from falling within Case III since rules 19 and 21 were general rules applicable to all Schedules and must not be taken to control the applicability of Case III, r. 1 (*a*) (post, pp. 60, 81). All the payments were in the nature, when received,

of pure income profit and were of a recurring character and, accordingly, they fell within Case III (post, pp. 61, 72–73).

Inland Revenue Commissioners v. *Butterley Co. Ltd.* [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411 considered.

(3) That for the purposes of Case III, r. 2, in the case of a non-trader, "income" did not "arise" until the date of its receipt (post, pp. 63–64, 81).

Lambe v. *Inland Revenue Commissioners* [1934] 1 K.B. 178; 18 T.C. 212; *Dewar* v. *Inland Revenue Commissioners* [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561 and *Grey* v. *Tiley* (1932) 16 T.C. 414 considered.

(4) That, in any event, income, once it had been received, could not be regarded as having arisen not only before it was received but even before it was payable and whilst it was merely accruing (post, p. 64). Accordingly, the payments in question arose in the years in which they were received, and must be treated as income of such years.

Per Lord Radcliffe. The payments in question fell within Case VI of Schedule D as being in the nature of casual payments, since although they could and were indeed likely to recur in the sense that several payments might well be so called for before full compensation was provided, they were essentially the temporary product of an exceptional measure of State expropriation, and as such were oddities more fitted to Case VI than to Case III (post, p. 66). Further, that it was both right in principle and in accordance with previous authority to attribute these various payments to the years or parts of years in respect of which they were paid (post, p. 68).

Meaning of "income" (post, pp. 61–62), *per* Viscount Simonds.

Decision of the Court of Appeal sub nom. *Inland Revenue Commissioners* v. *Whitworth Park Coal Co.* (*In Liquidation*) [1958] Ch. 792; [1958] 2 W.L.R. 815; [1958] 2 All E.R. 91 affirmed.

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RAMSHAW COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

APPEALS from the Court of Appeal (Jenkins, Romer and Ormerod L.JJ.).

This was an appeal, consolidated on October 6, 1958, by leave of the House of Lords, from three orders of the Court of Appeal dated March 12, 1958, dismissing an appeal by the appellants, three former colliery companies, from three orders of Harman J. dated July 31, 1957, whereby the appeals of the Commissioners of Inland Revenue from three determinations of the Commissioners for the Special Purposes of the Income Tax Acts were allowed and the decisions of the commissioners were reversed.

The Whitworth Park Coal Co. Ltd. (hereinafter called "the "company") carried on the trade of colliery proprietors until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946. At all material times the Ramshaw Coal Co. Ltd.

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held shares in the company, and the Brancepeth Coal Co. Ltd. held shares in the Ramshaw Coal Co. Ltd.

The matter arose upon directions being made upon the company under the provisions of section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51. In consequence of the said directions the actual income of the company for each of the said three years was apportioned among its members (including the Ramshaw Coal Co.) and a part thereof was sub-apportioned to the members of the Ramshaw Coal Co. (including the Brancepeth Coal Co.).

It was not disputed that at all material times the company was an investment company within the meaning of section 20 (1) of the Finance Act, 1936, and that section 21 of the Finance Act, 1922, applied to it, or that the Ramshaw Coal Co. and the Brancepeth Coal Co. were companies to which section 21 of the Finance Act, 1922, applied. It followed that there was no dispute as to the actual making of the directions; the only issue in the appeals was as to the manner of computing the income of the Whitworth Park Coal Co. which fell to be apportioned and sub-apportioned by virtue of the provisions referred to above.

Accordingly, the appeal of the Whitworth Park Coal Co. Ltd. alone was argued, since the decision in that case governed the other two appeals. The following facts relating to the appeal of the Whitworth Park Coal Co. Ltd. are taken from the case stated.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 28, 1955, the company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

The sole question for determination was whether, in computing the actual income of the company for the purpose of the apportionments, interim income received by the company under the provisions of the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, should be included in the actual income of the year in which it was received or (as the company contended) of the year or period in respect of which it was paid, it being (for the purpose of the hearing) conceded by the company that authorities binding on the commissioners would preclude

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them from holding that the sums received were of the nature of capital and should not be included in the company's actual income at all.

The company carried on the trade of colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Act of 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied and was an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936.

The company received from time to time payments from the Ministry of Fuel and Power for or in respect of interim income under the provisions (in the case of some of such payments) of the Act of 1946 and (in the case of others of such payments) of that Act and of the Act of 1949. Those payments are set out in tabular form below, and were made under deduction of income tax; each payment was accompanied by a letter from the Ministry and a certificate of deduction of income tax.

Serial Number	Date of receipt	Gross amount of payment	Net amount paid	Period for which it is stated to be paid in accompanying letter
(1)	August 7, 1948.	£9,068	£4,987	Eighteen months ended June 30, 1948.
(2)	January 26, 1949.	£2,733	£1,503	Half-year ended December 31, 1948.
(3)	September 12, 1949.	£68	£37	From January 1 to September 12, 1949.
(4)	March 28, 1950.	£1,837	£1,011	For the year ended December 31, 1949.
(5)	July 14, 1950.	£1,616	£889	Half-year ended June 30, 1950.
(6)	August 11, 1950.	£5	£3	From July 1 to August 11, 1950.
(7)	November 13, 1950.	£7	£4	From July 1 to November 13, 1950.
(8)	February 21, 1951.	£1,519	£835	Half-year ended December 31, 1950.
(9)	May 25, 1951.	£1,343	£705	Two years ended December 31, 1948.
(10)	August 9, 1951.	£810	£425	Half-year ended June 30, 1951.

The payments numbered 3, 6 and 7 in the above table were payments of the interest addition under section 22 (2) (*a*) of the Act of 1946 made on the occasions of payment under section 21 (1) (*b*) of the Act of 1946 of partial compensation for transferred assets.

The payments numbered 1 and 2 in the above table were made under section 22 (3) of the Act of 1946 after deductions of £7 and £86 respectively in respect of adjustments for compensation already satisfied made under the provisions of regulation 20 of Statutory Rules & Orders, No. 1946 of 1947. The accompanying letters stated: (in the case of payment No. 1) "It should be noted "that the gross amount allowed is an instalment subject to audit. "Any adjustment necessary will be made in a future payment," (and in the case of payment No. 2) "It should be noted that "the gross amount allowed is a provisional instalment subject to "audit of the statutory revenue payment. Any adjustments in "respect of over-payments or under-payments will be payable "forthwith to or by the Minister." An adjustment to the said two payments was made by deducting a sum of £1,394 in calculating the gross amount of payment No. 4. This deduction (referred to as an "Overpayment (provisional)") was based on an estimate of the comparable ascertained revenue, and a further and final adjustment was made by payment No. 9, the accompanying letter to which stated that the comparable ascertained revenue had been approved by the Minister.

Payments Nos. 4, 5, 8 and 10 in the above table were made under the Act of 1949. In the case of 4, 5 and 8 the accompanying letters showed that the payments were calculated with reference to a provisional calculation of the comparable ascertained revenue, and each such letter stated: "It should be noted that where the "amount now payable is based on provisional comparable ascertained revenue, any necessary adjustment will be made later, "after the comparable ascertained revenue has been finally "approved by the Ministry." Payment No. 10 was based on the comparable ascertained revenue as approved by the Ministry. The payments Nos. 4, 5, 8 and 10 were each expressed to be subject to the provision contained in section 1 (5) of the Act of 1949 to the effect that if the said payments should exceed the interim income towards satisfaction of which they were paid, the excess would be repayable by the company. The letter accompanying payment No. 5 (dated July 14, 1950, and in respect of the half-year to June 30, 1950) showed that in arriving at the gross sum of £1,616 a deduction was made in respect of interest at 3 per cent. per annum for the half-year in respect of compensation satisfied before June 30, 1950. A footnote to the letter stated that "Any necessary adjustments as a result of S.I. 1950, No. "967, dated June 12, 1950, which prescribes an interest rate of "3 per cent. per annum for the period January 1, 1949, to June "30, 1949, and 3½ per cent. per annum for the period July 1, "1949, to June 30, 1950, will be made at a later date." Adjustments were duly made in computing payment No. 8.

The company's accounts were made up to March 31 in each year. In the accounts for the year ended March 31, 1948, there

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appeared on the credit side of the revenue account the item "interim income provision (gross) £6,050 0s. 0d." In the accounts for the year ended March 31, 1949, there was credited to the revenue account "Interim income" (net) £2,500 7s. 3d. In the accounts for the year ended March 31, 1950, there was credited to the revenue account "interim income (net) £37 4s. 11d." In the accounts for the year ended March 31, 1951, there was credited to the revenue account "interim income (net) £2,741 11s. 8d."

For the purposes of the apportionments under appeal, each of the payments set out above was treated as forming part of the actual income of the company of the year in which such payment was received by the company. The said payments made by the Ministry were not payable out of profits or gains brought into charge to income tax.

The commissioners held that the payments in question were chargeable to income tax under the provisions of Case VI of Schedule D to the Income Tax Act, 1918, and were not chargeable under Case III of the said Schedule nor under Schedule C. They further held that the payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods. They confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income (as agreed between the parties in accordance with their decision) of £5,422 14s. 0d., for 1948–49, £3,453 15s. 0d., for 1949–50 and £2,949 3s. 0d., for 1950–51.

F. N. Bucher Q.C. and *Peter Rowland* for the company. The question is: into what fiscal years should payments received by the company under the Coal Acts be placed for the purposes of assessment to income tax? The Crown submit that payments made pursuant to the Coal Acts are taxable income at the date of their receipt by the company irrespective of the year or period for which these payments were assigned by the Acts. The company submit that such payments are taxable income of the company for the year or period in respect of which they were assigned by the Coal Acts, that is, the period in which the income compensation was earned, the company having lost its assets without receiving at the same time any quid pro quo.

The company's assets were transferred to the National Coal Board pursuant to section 5 of the Coal Industry Nationalisation Act, 1946, and the provisions concerning the satisfaction and disposal of compensation are for present purposes to be found in sections 19, 21 and 22 of that Act and section 1 of the Coal Industry (No. 2) Act, 1949. The compensation payments in question fall to be taxed under Schedule D to the Income Tax Act, 1918: see paragraphs 1 and 2 thereof. The Crown contend (i) that these payments made in respect of interim income were annual payments within the meaning of rule 1 (*a*) of Case III of Schedule D, and consequently payable (as they were in fact paid) under deduction of tax at the standard rate in force at the time of payment as provided by rule 21 of the General Rules, and that, accordingly, by virtue of section 39 (2) of the Finance Act, 1927, each such payment was to be deemed to be income of the year in which it was paid; (ii) that even if Case III is inapplicable and recourse must be had to the sweeping provisions of Case VI, as contended for by the company, the same result follows, namely, that each payment in respect of interim income must be treated as income of the year in which it was paid. The Court of Appeal rejected the Crown's submissions on Case III but, nevertheless, found for the Crown under Case VI.

As to Case VI, it is submitted: (1) Income tax is not chargeable unless and until there is a receipt of income by the taxpayer. The general rule is, and it is not disputed by the Crown, that receivability without receipt is nothing. (2) The principle of the Income Tax Acts is to charge the income, when received, in the period in which it was earned or arises. (3) Accordingly, the income which is created by a contract or a statute should be related to the period to which it is assigned by the contract or the statute which gives the taxpayer his title or other legal right to the income. (4) Likewise, where the income is represented by "profits or gains," which must be calculated by setting expenses against receipts, the receipts should be related to the period in which the receipts were earned. (5) Here, the interim income was assigned by the Coal Acts to the period beginning on January 1, 1947; it was earned during the period in which the company's assets were enjoyed by the National Coal Board without any payment by way of compensation. It was, therefore, properly related to this period by the appellate Special Commissioners. (6) The Court of Appeal were wrong to construe the word "arising" in Case VI as if it meant "received." (7) The correct method to calculate profits or gains under Case VI is to make up an account and to set expenses against receipts of the period in which the receipts were earned, as the Special Commissioners did here.

As to Case III, it is submitted that these payments do not fall within it because their character is not such as to make them annual payments within the meaning of rule 1 (*a*) of Case III or rules 19 and 21 of the General Rules, which are a necessary corollary of rule 1 (*a*) and which must be read together with it. The concept of rules 19 and 21 is that of the transfer of a slice of one taxpayer's income to another *taxpayer*. Rule 21 postulates a collector who can be a taxpayer. Accordingly, since a Minister of the Crown cannot in his official capacity be a taxpayer, rule 21 is inapplicable where, as here, the collector is the Minister of Fuel and Power. [Reference was made to *Trustees of Psalms and Hymns* v. *Whitwell*[1]; *Lawrence* v. *Inland Revenue Commissioners*[2]; *Hill* v. *Gregory*[3]; *Howe (Earl)* v. *Inland Revenue Commissioners*.[4]] As regards so much of the payments made as fall under section 22 (2) (*a*) of the Act of 1946 there is authority for regarding them as "an indemnity against loss suffered by "the deferment" of compensation: *per* Lord Radcliffe in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[5] But this description of such payments cannot be equated with "interest of "money" within the meaning of rule 1 (*a*) of Case III. Interest is an award or compensation in return for a loan; this is an indemnity for the loss of income arising from the compulsory acquisition of a capital asset.

The Court of Appeal considered the scope of rule 1 (*a*) of Case III in relation to an "annual payment" under four heads or propositions.[6] Each of these propositions dealt with something akin to an annuity which, although lacking a particular feature of an annuity, has nonetheless been held by the courts to be an "annual payment" within the meaning of the rule. But it is illogical to add up, as it were, the authorities there considered and thereby conclude that interim income, which lacks any natural resemblance to an annuity, is like an annuity because it contains the attributes dealt with in each of those propositions. The Court of Appeal neither state nor inquire whether interim income *did* resemble "interest of money" or an "annuity." This is emphasised by the case of patent royalties, for which the legislature found it necessary to make special provision in section 25 of the Finance Act, 1907, although, prima facie, they would appear to satisfy the four propositions laid down by the Court of

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[1] (1890) 7 T.L.R. 164; 3 T.C. 7.

[2] (1940) 23 T.C. 333.

[3] [1912] 2 K.B. 61, 70, 71; 6 T.C. 39.

[4] [1919] 2 K.B. 336, 352, 353; 35 T.L.R. 461; 7 T.C. 289.

[5] [1957] A.C. 32, 58, 59; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

[6] [1958] Ch. 792, 815.

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Appeal in the present case. The present payments are in the nature of instalments which are part of a capital sum and therefore not annual payments within the meaning of the rule: see *per* Pollock C.B. and Channell B. in *Foley* v. *Fletcher*.[7]

Rule 21 of the General Rules first appeared in section 24 (3) of the Customs and Inland Revenue Act, 1888: see the observations thereon in *London County Council* v. *Attorney-General*.[8] In construing the words "interest," "annuity," "annual payment," the implication is that where one finds those words in rule 19 of the General Rules, they bear the same meaning as they do in rule 1 (*a*) of Case III of Schedule D and, similarly, those words in rule 21 have the same meaning as in rule 1 (*a*) because rule 21 is concerned with any interest. It is of significance that in section 24 (3) of the Act of 1888, the precursor of rule 21, there appear only the words "any interest of money or annuities." It was the Income Tax Act, 1918, which, in rule 21, added the words "other annual payment," and, therefore, these words must be ejusdem generis with interest and annuities since otherwise the rule would be making an amendment in what is, in fact, a consolidating Act. Not all annual payments come within rule 1 (*a*) of Case III. Annual payments payable out of public funds fall to be taxed under Schedule C or Schedule E. This emphasises the fact that for an annual payment to come within rule 1 (*a*) it must bear an affinity to interest and annuities charged under Schedule D.

It is because the payments in question are of a peculiar and special nature that the company contend that these payments are not happily married to the provisions of Case III but fall more naturally under the sweeping provisions of Case VI. All these payments stem from a single right given by the Coal Act of 1946. The Court of Appeal were correct in holding that interim income payments fall under Case VI and not under Case III but the court failed to notice that revenue payments were in substitution for section 22 (2) (*a*) payments and should have applied the same principle to them, namely, that they also fell under Case VI.

The Crown nevertheless contend that even if Case VI is applicable here, the general principle of the income tax is that payments, irrespective of the date when they were actually due, must be treated as part of the income of the year in which they were actually received. It is submitted that there is no such principle, and that the true principle is the one adumbrated in proposition (2) above, although it is conceded that there are exceptions to it, such as, where the system of deduction of tax by the paying agent has been brought in, for example, Schedule C.

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[7] (1858) 3 H. & N. 769, 779, 787.

[8] [1901] A.C. 26, 34 et seq.; 4 T.C. 265.

In support of the company's contention it is to be observed that under Cases I and II of Schedule D it is not the date of receipt but the date of earning which governs the computation of the taxable profit; and under Case III, up to the year 1927, it was an accruing factor which applied in so far as rule 19 was applicable. The criterion of the date of payment introduces a more artificial standard than the accruing principle where the income is payable pursuant to the provisions of a contract or a statute. [Reference was made to *Johnson (Inspector of Taxes)* v. *W. S. Try Ltd.*[9]] The principle is supported by the observations of Viscount Cave L.C. in *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners*,[10] and *Inland Revenue Commissioners* v. *Gardner, Mountain and D'Ambrumenil Ltd.*[11] establishes (a) that the principle is not exceptional but general and well-established; (b) it is one which is not derived from any specific statutory provision; (c) even if the sum in question is payable in futuro, for tax purposes, the sum should be placed in the year in which it was earned.

In *In re Sebright*[12] Vaisey J. held that where a Case III payment was governed by rule 19 and section 39 (1) of the Finance Act, 1927, the relevant date for the purposes of deduction of tax and, therefore, the relevant date for placing the tax was not the date of receipt but the date of entitlement. Further, *Simpson* v. *Maurice's Executors*,[13] the only reported decision on Cases IV and V of Schedule D, emphasises the importance of the date when the income arises. Case VI sweeps up all manner of income which would not fall under Case I, and, accordingly, when one finds in Case VI a subject-matter to which the rules of Case I are appropriate, then the rules of Case I should be applied to it. [Reference was made to *Forth Conservancy Board* v. *Inland Revenue Commissioners*[14]; *Coltness Iron Co.* v. *Black*[15]; *Wylie* v. *Inland Revenue (Eccott)*.[16]]

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[9] (1946) 62 T.L.R. 355, 358; [1946] 1 All E.R. 532; 27 T.C. 167, 181, C.A.

[10] (1927) 43 T.L.R. 476, 477; 12 T.C. 951, H.L.

[11] (1947) 29 T.C. 69, 89, H.L.

[12] [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547.

[13] (1929) 45 T.L.R. 581; 14 T.C. 580, 591, 604, 606, C.A.

[14] [1931] A.C. 540; 47 T.L.R. 429; 16 T.C. 103.

[15] (1881) 6 App.Cas. 315; 1 T.C. 287.

[16] 1913 S.C. 16; 6 T.C. 128.

Rowlatt J.'s decision in *Grey* v. *Tiley*[17] would appear to support the Crown's contention that the date of receipt is the relevant factor, but that case is distinguishable, for the judge was limiting his decision to the case of a single casual payment and, therefore, cases such as *Holden (Isaac) and Sons Ltd.* v. *Inland Revenue Commissioners*[18] and *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners*[19] would not be in point: see also *Lambert Brothers Ltd.* v. *Inland Revenue Commissioners.*[20] The present case does not concern a mere single casual profit. In the alternative, it is submitted that *Leigh* v. *Inland Revenue Commissioners*[21] and *Grey* v. *Tiley,*[22] which followed *Leigh's* case,[23] were wrongly decided. It is submitted that the earlier decision of Rowlatt J. in *Hawley* v. *Inland Revenue Commissioners*[24] is irreconcilable with his decision in *Leigh's* case.[25] [Reference was also made to *Inland Revenue Commissioners* v. *Earl of Haddington*[26]; *Lambe* v. *Inland Revenue Commissioners*[27]; *Champney's Executors* v. *Inland Revenue Commissioners*[28]; *Dewar* v. *Inland Revenue Commissioners.*[29]]

In conclusion, to revert to the argument on Case III, it is submitted: (1) Where one finds that rule 19 of the General Rules grew out of paragraph (*a*) of rule 1 of Case III of Schedule D and that rule 21 of the General Rules is complementary to rule 19 thereof and that these rules contemplate annual payments which are competent to be paid by a *taxpayer*, there is some ground for the inference that paragraph (*a*) of rule 1 of Case III is not concerned with annual payments which are incapable of being paid by a taxpayer. (2) This inference becomes compelling when one finds that annual payments payable out of the public revenue are expressly dealt with in Schedule C and paragraph (*d*) of rule 1 of Case III of Schedule D and Schedule E. (3) This inference is recognised by the legislature in the Electricity Act, 1947, and the Transport Act, 1947. (4) The Court of Appeal approached the question under rule 1 (*a*) by stating, in effect, that annuities have certain qualities; interim income has those qualities, and, therefore, interim income is an annuity. This is faulty reasoning because the qualities referred to do not exhaust the qualities of annuities. [Reference was also made to section 35 of the Finance Act, 1926; section 25 of the Finance Act, 1927; section 18 of the Finance Act, 1930; *Inland Revenue Commissioners* v. *City of London (as Conservators of Epping Forest)*[30]; *Curtis Brown Ltd.* v. *Jarvis*.[31]]

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[17] (1932) 16 T.C. 414.

[18] (1924) 12 T.C. 768.

[19] (1927) 12 T.C. 951.

[20] (1927) 12 T.C. 1053, 1067.

[21] [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590.

[22] 16 T.C. 414.

[23] [1928] 1 K.B. 73.

[24] (1925) 9 T.C. 331.

[25] [1928] 1 K.B. 73.

[26] 1924 S.C. 456; 8 T.C. 711.

[27] [1934] 1 K.B. 178; 18 T.C. 212.

[28] (1934) 19 T.C. 375, 383, 385, C.A.

[29] (1935) 19 T.C. 561; on appeal [1935] 2 K.B. 351, 364, 365, 368, 369, 371, 372; 51 T.L.R. 536; 19 T.C. 568.

Rowland following. As to Case VI, it is submitted: (1) Income tax is an annual tax and its purpose is to tax the true income of the year in question. The word "arising" is intended to achieve this. When the Act of 1918 meant "received" it said it: see Case V. (2) *Grey* v. *Tiley*[32] was wrongly decided. If the sum in question was not assessable in the year in which it was earned it was not assessable at all. There was no *source* of income in the year of receipt. A debt is not a source, nor payment of a debt income. (3) *Grey* v. *Tiley*,[32] if right, would make liability to tax capricious and, in part, at the taxpayer's own will. (4) When it is difficult to ascertain the actual income from a source an estimate may be made or a provisional assessment made; alternatively, there may be an additional assessment, so there is no difficulty in practice.

As to Case III: (1) In popular speech "annuity" is normally used in a very narrow sense; its strict meaning in law is different, but is also very narrow: see the definition in Halsbury's Laws of England, 2nd ed., Vol. 28, p. 175, which is adopted. (2) Certain payments, though not any of the three types of interim income, closely resemble annuities in the strict sense, and the term "annuity" in a wide sense is sometimes applied to them. (3) "Other annual payment" in Case III is merely intended to ensure that annuities in this wider sense are included; on a true construction, the phrase means "other annual payments like, or "closely resembling, an annuity." This construction is supported by the following considerations: (a) The term "annuity" is used more than once to cover "annual payment" (see section 2 of the Income Tax Act, 1853, section 39 of the Income Tax Act, 1842 and section 24 (3) of the Customs and Inland Revenue Act, 1888). (b) "Annual payment" was incorporated in General Rule 21 by the Income Tax Act, 1918, notwithstanding that the Act was only a consolidating Act. (c) Rule 1 (*a*) of Case III covers payments outside annuities in the strict legal sense and "other annual payment" therefore had to be added; on the other hand, there is nothing in that rule to suggest that anything not closely resembling an annuity was intended to be covered. (d) The wide meaning given to "other annual payment" by the court below is not consistent with the terms of section 25 of the Finance Act, 1907, or of section 25 of the Finance Act, 1927, which deal with patent and copyright royalties, respectively. Nor is it consistent with the dicta of Hamilton J. in *Hill* v. *Gregory*.[33] If "other annual payment" had been intended to include payments not closely resembling annuities, section 102 of the Act of 1842 would have so stated, especially in view of the serious consequences to the payer if he makes a mistake. Contrast the list given in Schedule A, No. IV, rule 10, of that Act. (e) It is unlikely that it would have been intended to place on the payer the burden of finding out what, in a particular payee's circumstances, amounted to pure profit income. No such difficulty would arise with annuities proper either in the narrow or in the wider sense contemplated by the "additional "words" of rule 1 (*a*). (4) The construction of "annual pay- "ment" in the sense contended for is consistent with the practice (which presumably has lasted over a hundred years) of paying copyright royalties gross and assessing them under Case VI where Case II is inapplicable: see *Lawrence* v. *Inland Revenue Commissioners*[34] and *Curtis Brown Ltd.* v. *Jarvis*.[35] It is also consistent with the treatment of the payments in *Humber Conservancy Board* v. *Bater*.[36] (5) There is no decided case in which payments have been held to be annual payments which have not been annuities or something closely resembling them. To hold that these odd, sui generis, payments fall within Case III would be a new departure. (6) Payments under the Coal Act of 1949 are also not annual payments because they are payments on account of a single income sum assessable under Case VI. The contrary view would take no account of repayments. Repayments must be made gross: regulation 21 of the Coal Industry Nationalisation (Satisfaction of Compensation) Regulations, 1947 (S.R. & O. 1947, No. 1946).

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[30] [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.

[31] (1929) 14 T.C. 744.

[32] 16 T.C. 414.

John Pennycuick Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown. The issues between the parties are: (1) Are these payments made under the Coal Acts annual payments within Case III of Schedule D and rule 21 of the General Rules? and (2) if they are not and fall within Case VI as, on that basis, is admitted by the company, are they income of the year of receipt? The further issue has also emerged that these payments may be within Case III but not within rule 21. Hitherto, it has been the company's contention on Case VI that payments when received must be related back to the year of entitlement; it is now suggested that these payments were in the full sense income of the year of entitlement and assessable in that year. It is submitted that this argument is not open to the taxpayer at this stage of the proceedings: see the judgment of the Court of Appeal.[37]

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[33] [1912] 2 K.B. 61, 69, 70; 6 T.C. 39, 47.

[34] (1940) 23 T.C. 333.

[35] 14 T.C. 744.

[36] [1914] 3 K.B. 449; 6 T.C. 555.

In brief, the Crown contend that these payments are annual payments within Case III of Schedule D and within rule 21 of the General Rules. There then arises the question that, if apart from the fact that the payer is the Crown these payments do fall within Case III and rule 21, is the operation of rule 21 excluded by reason of the fact that the payer is the Crown? If the payments are within Case III but not within rule 21 because the Crown is excluded by its terms, then it is submitted that they are chargeable by direct assessment under rule 2 of Case III. Finally, if these are not annual payments within Case III at all, then it is common ground that they fall within Case VI. In that event they are chargeable as actual income of the year of receipt and there is no spreading back over the years of entitlement.

So far as is known the current of authority is uniform that under Schedule D tax is chargeable upon receipt of income and not upon entitlement: *Dewar* v. *Inland Revenue Commissioners*[38] and *Simpson* v. *Maurice's Executors*.[39] The cases in which it has been held or suggested that income should be spread back after receipt—*Inland Revenue Commissioners* v. *Earl of Haddington*[40]; *Hawley* v. *Inland Revenue Commissioners*[41]; Finlay J.'s dictum in *Lambe* v. *Inland Revenue Commissioners*,[42] and *In re Sebright*[43]—all turn upon the question as to what year is tax chargeable for surtax purposes and they have no application to cases concerning tax at the standard rate. There is therefore no conflict in the authorities. There is no suggestion that this taxpayer carried on a trade or undertaking in the nature of a trade in the relevant years; it was an investment company.

In support of the contention that payments under the Coal

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[37] [1958] Ch. 792, 830, 831.
[38] [1935] 2 K.B. 351.
[39] 45 T.L.R. 581; 14 T.C. 580, 591.
[40] 1924 S.C. 456; 8 T.C. 711.
[41] 9 T.C. 331.
[42] [1934] 1 K.B. 178, 186.
[43] [1944] Ch. 287.

Acts are annual payments within Case III and rule 21 reliance is placed on the observations of the Court of Appeal[44] as to the scope of rule 1 (*a*), which are adopted in their entirety: see in particular the observations in *Inland Revenue Commissioners* v. *City of London (as Conservators of Epping Forest)*[45]; *Moss' Empires Ltd.* v. *Inland Revenue Commissioners*[46]; *In re Hanbury*[47]; *Williamson* v. *Ough.*[48] The words "annual payment" must have some meaning, and such a payment must have certain attributes. The only attributes which emerge from the decisions are those of recoverability and of being a pure income profit. If there is some further attribute required, as seems to be alleged by the taxpayer here, the appellants so far have failed to put it forward. Further, where the taxpayer has been overpaid what is repayable is a net, not a gross, sum. The liability to repay is not an incident of this particular series of payments which takes them out of the class of annual payments.

As to interim income payable under section 22 (2) (*a*) of the Coal Act, 1946, the Court of Appeal held[49] that these payments did have the attribute of recurrence and therefore were not annual payments within Case III. But this takes too narrow a view and omits the fact that they formed part of a series of payments. Section 19 of the Act of 1946 gives a right to interim income from the primary vesting date until there has been full satisfaction of compensation. The whole series of payments provided for by section 19 should be treated as having the necessary quality of recurrence. The interim income payments should not be differentiated merely because they are payable only when there is a payment of compensation. There is no distinction in principle between *Riches* v. *Westminster Bank Ltd.*[50] and the present case in respect of interest addition payments. The principle is that it is necessary to determine the character of the interest and it is not sufficient merely to find that the statute under which the money is payable does not describe the sums in question as interest. [Reference was made to *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[51]]

The reason why there is express provision made in the taxing Acts to bring patent royalty payments within the ambit of the phrase "interest of money, annuity or other annual payment" is that unless there were such an express provision there might well be doubt whether any given royalty payment was a pure income profit. In the simple case where the owner of the patent grants a licence in consideration of a royalty it is income received in return for a right which the owner of the patent has granted to the payer of the royalty. Accordingly, such a provision throws no light on the meaning of " annual payment " in the present connection.

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[44] [1958] Ch. 792, 815–821.
[45] [1953] 1 W.L.R. 652.
[46] [1937] A.C. 785; 53 T.L.R. 867; [1937] 3 All E.R. 381; 21 T.C. 295.
[47] (1939) 20 A.T.C. 333.
[48] [1936] A.C. 384; 20 T.C. 194.
[49] [1958] Ch. 792, 820, 821.
[50] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469; 28 T.C. 159.
[51] [1957] A.C. 32.

The next question is whether the Court of Appeal were correct in holding that rule 21 of the General Rules does not apply where the payer is the Crown. Apart from the present case it is impossible to imagine an annual payment which does not come within either rule 19 or rule 21 of the General Rules. It is said that the terms of rule 21 are such that the Crown cannot be regarded as a " person " within the meaning of the rule. The scheme of the rule, read in conjunction with rule 3 of Case III, is that the charge to tax is upon the annual payment as an item of income in the hands of the recipient. In order to collect that tax rule 21 prescribes the procedure that the payer of the sum shall deduct the amount of tax and pay over such deduction to the Crown. It is a provision wholly for the convenience of the Crown. It is to be noted that the person entitled to the annual payment is still subject to charge by direct assessment if the payer fails to account to the Crown for the amount deducted: see *Glamorgan Quarter Sessions* v. *Wilson.*[52] The effect of the rule is that the recipient bears the ultimate charge to tax. The payer is only the machinery for collecting the tax. It would be surprising if under this rule the Crown as the payer were unable to deduct and return the tax. There is no machinery where this is more appropriate than where the Crown is the payer. Rule 21 (1) is the main piece of machinery; and the supplementary provisions of sub-rule (2) are incidental. The Crown is a " person " within sub-rule (1). The supplementary provisions of sub-rule (2) which were substituted by section 26 of the Finance Act, 1927, are not necessary where the Crown is the payer.

The ambit of the decision in *Madras Electric Supply Corporation Ltd.* v. *Boarland*[53] is that the charging provisions of the income tax Acts do not apply to the Crown. Apart from those provisions it is a question of construction whether in the particular context the word " person " does or does not include the Crown.

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[52] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

[53] [1955] A.C. 667; [1955] 2 W.L.R. 632; [1955] 1 All E.R. 753; 35 T.C. 612.

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If rule 21 was a charging provision, in the sense that it threw a burden on the Crown, it is conceded that the present case would be governed by the *Madras* case,[53] but it is not. There is, therefore, no reason why " person " in rule 21 should not apply to the Crown as to any other person who pays an annual sum. It is a provision for the benefit of the Crown, enabling the Revenue to collect tax more conveniently. No question of the Royal Prerogative arises in this connection. It is purely a question of the construction of this particular rule. It should not be so construed as to prejudice the Crown.

If the above contention be rejected, it is still submitted that these payments fall within Case III, and the result is the same although the tax is chargeable by direct assessment. The relevant year is the year in which the income is received. Equally, if the Crown is relegated to Case VI, the income is chargeable by direct assessment and is income of the year in which it is received. On this aspect of the questions at issue the same argument applies to Case VI as to Case III.

The question ultimately is: what is meant by the word " arising " in the rules applicable to Case III. This necessitates consideration of the other cases of Schedule D—" arising " is always used in the same sense in this Schedule. As to Cases I and II of Schedule D, the principle is that the profit on which tax is charged is the balance of receipts over outgoings ascertained according to ordinary commercial accounting principles. One of those principles is that trade debts are brought in as receipts or outgoings notwithstanding that the amount of the debt has not been paid in the year of account. The same principle applies to debts incurred for services rendered. What is chargeable to tax is the profit and not the particular items. Trade debts are not charged as items of income.

As regards Cases III, IV, V and VI of Schedule D, " arising " means simply " received," and there is no authority for the proposition that one charges under any of those Cases the right to income in the future. [Reference was made to *Johnson* v. *W. S. Try Ltd.*[54]] Viscount Simon's observations in *Inland Revenue Commissioners* v. *Gardner Mountain and D'Ambrumenil Ltd.*[55] are directed solely to the computation of the profits of a trade.

In so far as the appellants base their contentions on rule 19 of the General Rules and section 39 (1) of the Finance Act, 1927,

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[53] [1955] A.C. 667.

[54] 27 T.C. 167, 181.

[55] 29 T.C. 69, 93.

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which amended section 5 (3) of the Income Tax Act, 1918, it is submitted that they do not assist in the present connection, for those provisions are concerned with questions relating to super-tax and surtax, and not with the question here, namely, whether under Cases III, IV, V and VI income is charged in the year that it arises for the purposes of ascertaining tax at the standard rate by direct assessment under rule 21 of the General Rules.

The appellants contended that for the purposes of direct assessment under Cases II to VI " arises " means " entitled " and not " received." The assent of authority is all the other way. Further, such a construction would lead to results which would be inconvenient and unjust in the highest degree to the taxpayer, and in some instances it is difficult to see how it would work at all. *St. Lucia Usines and Estates Co.* v. *St. Lucia (Colonial Treasurer)* [56] is authority for the proposition that the expression " arising or accruing " does not cover rights to income due but not paid. What is charged is income and not debts. *Lambe's* case,[57] *Dewar's* case [58] and *Grey* v. *Tiley* [59] are all cases where the argument was rejected that a taxpayer is chargeable to income tax before receipt of the income in question. Further, cases which appear to support the appellants' argument, for example, the *Newcastle Breweries* case,[60] are decisions under Case I of Schedule D. In *Simpson* v. *Maurice's Executors* [61] there was no suggestion that the income became that of the taxpayer at any moment before it was received by the German bank on his behalf.

As to the spread back contention of the taxpayer in relation to Cases III and VI, this would entail writing words into the relevant rules of those Cases. The word " arising " may mean " entitled " or " received." In rule 2 of Case VI it would entail using the word " arising " in two different senses in the same sentence. If it were given the first meaning there would be no ground for waiting until receipt before charging income. If it were given the second meaning there would be no ground for writing in words as to spreading back. The appellants rely on the *Earl of Haddington's* case [62] and *Hawley's* case,[63] but these cases are distinguishable as decisions on section 5 (3) of the Income Tax Act, 1918, relating to super-tax. They would be very material if the Crown were resisting a claim to spread back based on rule 19 of the General Rules. [Reference was also made to section 207 of the Income Tax Act, 1918, Fifth Schedule, Case IX; the Electricity Act, 1947; the Transport Act, 1947.]

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[56] [1924] A.C. 508, P.C.
[57] [1934] 1 K.B. 178.
[58] [1935] 2 K.B. 351.
[59] 16 T.C. 414.
[60] 12 T.C. 927.
[61] 14 T.C. 580, 607.
[62] 8 T.C. 711.
[63] [1928] 1 K.B. 578.

Stamp following on the question of the Crown prerogative. In the ordinary case, the recipient of a rule 21 payment is bound to allow deduction of tax at the standard rate. That liability is one imposed upon him for the benefit of the Crown, for the Crown has the right to have the tax deducted. If a rule 21 payer refused to deduct the tax it would be open to the Crown to proceed against him and obtain an injunction to restrain him from paying over the gross sum.

The appellants are invoking the Crown prerogative to *defeat* the rights of the Crown. Their contention, if accepted, would lead to the extraordinary situation that as between two rule 21 payers, one the Crown and the other an ordinary taxpayer, the recipient from the Crown would receive the sum in question without deduction of tax and if such a recipient resided abroad it might be very difficult to obtain payment of the tax from him.

Bucher Q.C. in reply. Rule 21 of the General Rules places a positive duty on the "person" to deduct tax and there are no express words to include the Crown. The Crown's contention strains the meaning of the word "person" in the rule. If one takes the rule as it stood in 1918 it is unnatural to say that A shall deduct tax and shall account for it to A and it shall be a debt payable to A. Where a statute contemplates the Crown as payer it is expressly so provided: see Schedule E, rule 11.

The Crown's contention also strains the meaning of the phrase "any annual payment." The correct approach is to examine the nature of the payment and ascertain the attributes given to it by the Coal Acts. These payments lack both the hallmark of an annuity and of interest and therefore do not come within the ambit of the kind of annual payment envisaged by rule 1 (*a*) of Case III of Schedule D.

On the question of the relevant year into which payments are to be placed for the purpose of liability to tax, Case VI relates to income which is primarily made up into a trading account because it is concerned with profits and gains. It is not satisfactory to confine trade debts to Cases I and II. Case III contemplates under rule 2 thereof the commercial account type of case and this is an instance of where there would have to be such an account.

The Crown are wrong in their contention that the sphere for bringing in late receipts into the income of the year of "arising" is confined to trade debts. It is true that the reported decisions are confined to trade debt cases, but that is not a valid argument for the contention that that principle should not be applicable to other items made up as a commercial account: see *Isaac Holden & Sons Ltd.* v. *Inland Revenue Commissioners*.[64] *South Behar Railway Co. Ltd.* v. *Inland Revenue Commissioners* [65] strongly supports the view that although it would be wrong to say that the appellants were carrying on a trade or an undertaking in the nature of a trade after the primary vesting date, nevertheless they were carrying on something in the nature of commercial activities necessitating the making up of a commercial account in respect of these payments.

It is emphasised that "arising" means "accruing or "entitling" and is opposed to "receiving."

There is nothing in the language of section 39 of the Finance Act, 1927, which limits its operations to surtax. If, however, it is so held, then it is submitted that the present is a surtax case.

[Reference was also made to Schedule E, rule 1; *Williamson* v. *Ough* [66]; *In re Hanbury* [67]; *Johnson* v. *W. S. Try Ltd.*[68]; *Simpson* v. *Maurice's Executors* [69]; *Inland Revenue Commissioners* v. *Earl of Haddington* [70]; *Leigh* v. *Inland Revenue Commissioners* [71]; *Lambe* v. *Inland Revenue Commissioners* [72]; *Hawley* v. *Inland Revenue Commissioners* [73]; *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia (Colonial Treasurer)* [74]; *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[75]; *Riches* v. *Westminster Bank Ltd.*[76]]

Their Lordships took time for consideration.

November 5, 1959. VISCOUNT SIMONDS. My Lords, at the conclusion of the argument in this case I found myself in full agreement with my noble and learned friend LORD REID. He thereafter wrote an opinion, to which, since I concurred in it at all points, I intended to add nothing. He has, however, been prevented by illness from taking his seat in your Lordships' House in the present Parliament and cannot speak in it. I have therefore, with his permission, adopted his opinion as my own and I will now state it.

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[64] 12 T.C. 768.

[65] [1925] A.C. 476; 41 T.L.R. 328; 12 T.C. 657.

[66] [1936] A.C. 384.

[67] 20 A.T.C. 333.

[68] 27 T.C. 167, 180.

[69] 14 T.C. 580.

[70] 8 T.C. 711.

[71] [1928] 1 K.B. 73.

[72] [1934] 1 K.B. 178.

[73] 9 T.C. 331.

[74] [1924] A.C. 508.

[75] [1957] A.C. 32.

[76] [1947] A.C. 390.

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My noble and learned friend LORD TUCKER, who is also unable to be here today, has intimated to me that he takes the same view.

The first appellant, which I shall call "the company," owned and operated a colliery until January 1, 1947, when its colliery assets were vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946. Thereafter it was an investment company to which the provisions of section 21 of the Finance Act, 1922, and section 14 of the Finance Act, 1939, had to be applied. Directions under these sections were given to the company with regard to the years 1948–49, 1949–50 and 1950–51 under which its "actual income" for those years fell to be apportioned among its members, so that surtax would become payable as if the amounts so apportioned were parts of the incomes of the members. When another company is a member of such a company a sub-apportionment has to follow and the second and third appellants are only concerned with such sub-apportionments. No separate point arises in their cases: it is agreed that the decision of the company's appeal must rule these other cases and I shall therefore say no more about them.

The "actual income" from any source of a company subject to such a direction is, under paragraph 6 of the schedule to the Act of 1922, the income from that source estimated in accordance with the provisions of the Income Tax Acts. Under some of these provisions the income of the tax-payer for a particular year is the income which he actually receives during that year. Under others that is not so and it may make a great difference to liability for surtax if particular income payments are included in the actual income of one year rather than in that of another. For example, if five years' arrears of interest are paid in one year it is clearly to the advantage of the surtax payer that these arrears should be spread back so as to be regarded as income of the years when the interest fell due or accrued rather than that the whole sum should be regarded as income of the year of receipt.

The income payments with which this case is concerned are a number of payments made to the company by the Ministry of Fuel and Power under the Act of 1946 and the Coal Industry (No. 2) Act, 1949, during the three years which I have mentioned. The contention of the Crown is that all these payments form part of the actual income of the company for these years and that is denied by the company. So it is necessary to decide which provisions of the Income Tax Act applied to these payments and that depends on the nature of the payments. Then, having decided which provisions apply, it will be necessary to decide what they mean.

When the Act of 1946 was passed it was realised that it would take a considerable time to work out and satisfy the rights to compensation which arose under it, and this Act provided rights to interim income under sections 19 and 22, of which the relevant parts are as follows:

" 19.—(1) Compensation in respect of a transfer of transferred " interests or of an overhead expenses increase shall be due on " the primary vesting date, subject to determination of the " amount thereof. (2) For the period between the primary " vesting date and the date on which any such compensation is " fully satisfied, there shall be a right to interim income, to be " satisfied in accordance with the provisions of section twenty-" two of this Act. (3) Provisions may be made by regulations " for authorising the partial satisfaction of such compensation " before the determination of the amount thereof has been " completed."

" 22.—(1) The right conferred by subsection (2) of section " nineteen of this Act to interim income for the period between " the primary vesting date and the date of the satisfaction in " full of compensation in respect of a transfer of transferred " interests, or of an overhead expenses increase, shall be satisfied " in accordance with the provisions of this section. (2) Subject " to the provisions of subsections (3) and (4) of this section as to " the revenue payments therein mentioned—(*a*) the said right " conferred by subsection (2) of section nineteen of this Act shall " be satisfied, so far as regards interim income for the period " between the primary vesting date and the time when any " amount of compensation in respect of a transfer of transferred " interests or of an overhead expenses increase is satisfied, by " making, in addition to the issue of the stock then issued in " satisfaction of that amount of compensation or to the making " of the money payment then made in satisfaction of that amount " of compensation, as the case may be, a money payment of an " amount equal to interest for that period on that amount of " compensation at such rate or rates as may be prescribed as " respects that period or different parts thereof by order of the " Treasury; (3) The following provisions of this subsection shall

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"have effect as to the making to colliery concerns, and to "subsidiaries within the meaning of the First Schedule to this "Act of such concerns, of payments in respect of each of the two "years beginning with the primary vesting date and the first "anniversary thereof respectively, that is to say—(*a*) a colliery "concern or such a subsidiary shall be entitled in respect of each "of the said two years to a payment of an amount equal to one "half of the comparable ascertained revenue of the concern, or "of the subsidiary, as the case may be, attributable to activities "thereof for which the transferred interests thereof were used or "owned; (*b*) the payments to be made under the last preceding "paragraph are in this section referred to as 'revenue payments,' "and shall be money payments; (*c*) . . . (Method of computing "comparable ascertained revenue); (4) The provision made by "the last preceding subsection shall be deemed, in the case of "any colliery concern or of any such subsidiary, to be in "substitution for the provisions of subsection (2) of this section, "so far as regards additions thereunder for the said two years or "any part thereof to compensation for a transfer of transferred "interests being compensation attributable to transferred interests "of that concern or subsidiary, except as to any excess of the "aggregate amount of such additions over the aggregate amount "of the revenue payments of that concern or subsidiary. (5) The "Minister may by regulations make such provision supplementary "to or consequential on the provisions of this section as appears "to him to be necessary or expedient, and in particular, but "without prejudice to the generality of this subsection, provision "may be made by regulations made thereunder for making "adjustments requisite for giving effect to the last preceding "subsection and for making good any underpayment or over-"payment to a colliery concern or such a subsidiary which may "occur in consequence of the making of additions or revenue "payments under this section before all the facts relevant for "giving effect to the last preceding subsection have become "ascertainable."

Section 22 (2) is comparatively simple. Whenever a part of the compensation is satisfied, the company is to be paid a sum equal to interest on that part from January 1, 1947, until the date when that part is satisfied. But then subsection (3) confers a further right to receive "revenue payments" which are to be equal to half the "comparable ascertained income" for the years

1947 and 1948; and subsection (4) provides that these are to be in substitution for the provisions of subsection (2) at least, so far as they go. Then further provision was apparently thought necessary, and that further provision is contained in section 1 of the Act of 1949. All these provisions are extremely complicated, but I think that it is sufficient to say that in effect the Act of 1949 provides for further payments analogous to revenue payments under section 22 (3) of the Act of 1946 in respect of 1949 and subsequent years. I do not think that a meticulous examination of these provisions is necessary, and I do not propose to quote from the Act of 1949.

I can now turn to the case stated and I would set out the main parts of paragraphs 2 and 4: "2.—(A) The sole question "for our determination was whether, in computing the actual "income of the company for the purpose of the said apportion- "ments, interim income received by the company under the "provisions of the Coal Industry Nationalisation Act, 1946 (here- "inafter called the Act of 1946) and the Coal Industry (No. 2) "Act, 1949 (hereinafter called the Act of 1949), should be included "in the actual income of the year in which it was received or "(as the company contended) of the year or period in respect of "which it was paid,

. . . .

"4.—(1) The company received from time to time payments "from the Ministry of Fuel and Power (hereinafter called 'the "'Ministry') for or in respect of interim income under the pro- "visions (in the case of some of such payments) of the Act of "1946 and (in the case of others of such payments) of that Act "and of the Act of 1949. The said payments are set out in "tabular form below, and were made under deduction of income "tax; each payment was accompanied by a letter from the "Ministry and a certificate of deduction of income tax in the "form of (or in a form similar to) the letter and certificate both "dated January 26, 1949, copies of which are annexed hereto, "marked A1 and A2 respectively, and form part of this case. "The other letters and tax deduction certificates which were "produced to us are not annexed hereto but are available for "reference if required. Each such letter states that the payment "relates to a claim by the company for interim income for a "stated period.

H. L. (E.)

1959

WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS.

RAMSHAW COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

Viscount Simonds.

" Serial " Number	Date of receipt	Gross amount of payment	Net amount paid	Period for which it is stated to be paid in accompanying letter
" (1)	August 7, 1948.	£9,068	£4,987	Eighteen months ended June 30, 1948.
" (2)	January 26, 1949.	£2,733	£1,503	Half-year ended December 31, 1948.
" (3)	September 12, 1949.	£68	£37	From January 1 to September 12, 1949.
" (4)	March 28, 1950.	£1,837	£1,011	For the year ended December 31, 1949.
" (5)	July 14, 1950.	£1,616	£889	Half-year ended June 30, 1950.
" (6)	August 11, 1950.	£5	£3	From July 1 to August 11, 1950.
" (7)	November 13, 1950.	£7	£4	From July 1 to November 13, 1950.
" (8)	February 21, 1951.	£1,519	£835	Half-year ended December 31, 1950.
" (9)	May 25, 1951.	£1,343	£705	Two years ended December 31, 1948.
" (10)	August 9, 1951.	£810	£425	Half-year ended June 30, 1951."

There follow a number of particulars about these 10 payments, but, again, I do not think that in the end these particulars throw light on the present question. It will be observed from the table which I have set out from the case that, although all these sums were paid during the three years in question, to a large extent the periods for which they were stated to be paid fall outside these three years; accordingly, if the appellants are right, a considerable proportion of these payments should not be included in the actual income of the company for these three years.

The only provisions of the Income Tax Acts which could apply to these payments are those of Case III or of Case VI of Schedule D, and it is admitted that one or other of these Cases must apply. The Crown argue that Case III applies and that rule 21 of the general rules applicable to all Schedules also applies. If that is right, then, admittedly, the Crown must succeed. The company, on the other hand, argues that Case III does not apply at all and that the payments fall within Case VI or, alternatively, that even if Case III does apply, rule 21 does not apply. If either of these alternative contentions is right, then difficult questions of construction arise.

The Special Commissioners held " that the payments in " question were chargeable to income tax under the provisions of " Case VI of Schedule D to the Income Tax Act, 1918, and were " not chargeable under Case III of the said Schedule nor under " Schedule C. We further held that the said payments formed " part of the actual income of the company for the years or other " periods for which they were stated to have been paid, and " accrued from day to day throughout such years or periods."

On appeal Harman J. held that these payments were within

Case III, and he also held that rule 21 applied, so he allowed the Crown's appeal. He dealt with rule 21 so shortly that it would seem that the argument against its applicability cannot have been fully developed before him. The Court of Appeal held that rule 21 did not apply to these payments and that, as rule 19 did not apply either, that prevented these payments from falling within Case III. They held that the payments fell within Case VI but they held that under the rules of Case VI these payments were income of the years of their receipt. Accordingly they dismissed the company's appeal.

I must now set out and consider these provisions of the Income Tax Acts.

"Rules applicable to Case III. 1. The tax shall extend to—" (*a*) any interest of money, whether yearly or otherwise, or any " annuity, or other annual payment, whether such payment is " payable within or out of the United Kingdom, either as a charge " on any property of the person paying the same by virtue of " any deed or will or otherwise, or as a reservation thereout, or " as a personal debt or obligation by virtue of any contract, or " whether the same is received and payable half-yearly or at any " shorter or more distant periods;

. . . .

"2.—(1) The tax shall, subject as hereinafter provided, be " computed—(*a*) as respects the year of assessment in which the " profit or income first arises, on the full amount of profits or " income arising within that year; (*b*) as respects subsequent " years of assessment, on the full amount of the profit or income " arising within the year preceding the year of assessment. (2) " Tax shall be paid in the actual amount computed as aforesaid " without any deduction."

The remainder of the rules do not appear to be material for the present purpose.

"Rules applicable to Case VI. 1. The nature of the profits " or gains, and the basis on which the amount thereof has been " computed, including the average, if any, taken thereon, shall " be stated to the Commissioners.

"2. The computation shall be made, either on the full amount " of the profits or gains arising in the year of assessment, or " according to an average of such a period not being greater than " one year, as the case may require . . ."

"General Rules applicable to Schedules A, B, C, D and E.

"Rule 19: (1) Where any yearly interest of money, annuity, "or any other annual payment (whether payable within or out "of the United Kingdom, either as a charge on any property of "the person paying the same by virtue of any deed or will or "otherwise, or as a reservation thereout, or as a personal debt "or obligation by virtue of any contract, or whether payable half-"yearly or at any shorter or more distant periods), is payable "wholly out of profits or gains brought into charge to tax, no "assessment shall be made upon the person entitled to such "interest, annuity, or annual payment, but the whole of those "profits or gains shall be assessed and charged with tax on the "person liable to the interest, annuity, or annual payment, with-"out distinguishing the same, and the person liable to make such "payment, whether out of the profits or gains charged with tax "or out of any annual payment liable to deduction, or from which "a deduction has been made, shall be entitled, on making such "payment, to deduct and retain thereout a sum representing the "amount of the tax thereon at the rate or rates of tax in force "during the period through which the said payment was accruing "due."

"Rule 21: (1) Upon payment of any interest of money, "annuity, or other annual payment charged with tax under "Schedule D, or of any royalty or other sum paid in respect of "the user of a patent, not payable, or not wholly payable out of "profits or gains brought into charge, the person by or through "whom any such payment is made shall deduct thereout a sum "representing the amount of the tax thereon at the rate of tax "in force at the time of the payment. (2) Where any such "payment as aforesaid is made by or through any person, that "person shall forthwith deliver to the Commissioners of Inland "Revenue, for the use of the Special Commissioners, an account "of the payment, or of so much thereof as is not made out of "profits or gains brought into charge, and of the tax deducted "out of the payment or out of that part thereof, and the Special "Commissioners shall assess and charge the payment of which "an account is so delivered on that person. (2A) The Special "Commissioners may, where any person has made default in "delivering an account required by this rule, or where they are "not satisfied with the account so delivered, make an assessment "according to the best of their judgment, and if any person "neglects or refuses to deliver an account so required, he shall "forfeit the sum of one hundred pounds over and above the tax "chargeable."

It will be convenient first to assume that these payments were annual payments within the meaning of Case III and to consider whether on that assumption rule 21 can be applied to them. It was argued, I think rightly, that rule 21 cannot be applied to payments made by the Crown. I do not base my opinion on any presumption or general rule as to applying to the Crown statutory provisions which do not bind it either expressly or by clear implication. In my view an examination of the provisions of rule 21 shows that these provisions cannot be applied and can never have been intended to apply to the Crown. Rule 19 deals with annual payments, etc., "payable wholly out of profits or "gains brought into charge to tax," and rule 21 deals with payments "not payable or not wholly payable out of profits or "gains brought into charge." Neither expression appropriately describes payments out of moneys provided by Parliament, and, moreover, in all ordinary cases the Crown has other authority for deducting tax in making income payments. It can only be in a most exceptional case that the Crown would have to rely on rule 21 as its only warrant for deducting tax. It is plain that between them rule 19 and rule 21 are intended to cover all cases of annual payments, etc., made by a taxpayer. Under both there is provision for deducting tax when making the payment, but the purpose is quite different according to whether or not the money which is paid has already borne tax. If it has, then the Crown has no interest because the same money is not to be taxed twice, and the authority to deduct tax is for the purpose of enabling the taxpayer to recoup himself when he has already paid tax on the money which he has now to pay away; and the payee has to submit to this deduction of tax because it ought in the end to fall on him. But if the money has not borne tax, then the Crown has an interest because the money becomes on payment a part of the taxable income of the payee. So the payer is bound to deduct tax and to pay it to the Revenue. Rule 21 operates not as an authority to deduct tax but as an obligation to do so and to account to the Revenue for the tax deducted, and the whole purpose of rule 21 appears to me to be to enable the Revenue to recover from the payer tax which is really due by the payee. That, I think, appears even more clearly from the original form of rule 21, which first appeared as section 24 (3) of the Customs and Inland Revenue Act, 1888. Before then a payer of interest, etc., out of money which had not borne tax was under no obligation to deduct tax and the tax was payable by the payee, but provisions authorising the payer to retain tax out of money which had already borne tax so as to recoup himself go back to 1842. Section 24 (3) of the Act of 1888 provided that upon payment of interest, etc., not payable or not wholly payable out of profits brought into charge the payer "shall deduct thereout the rate "of income tax in force at the time of such payment and shall "forthwith render an account to the Commissioners of Inland "Revenue of the amount so deducted . . . and such amount shall "be a debt from such person to Her Majesty and recoverable as "such accordingly." In my opinion it would need not interpretation but complete redrafting to turn that provision or its modern equivalent into an authority to the Crown to deduct tax when making payments out of moneys provided by Parliament.

Two questions now arise. Can Case III apply to payments which do not come within either rule 19 or rule 21, and, if it can, is the nature of the payments in this case such that Case III should be applied to them? The Court of Appeal answered the first of these questions in the negative but they gave no reasons, and I do not see why Case III cannot be applied if the nature of the payments is such that apart from this point they would come within the scope of that Case. I would agree with the Court of Appeal if direct assessment were impossible under Case III, either because the rules of Case III are inadequate or for any other reason, but it was not argued that there can never be direct assessment under Case III. Moreover, rules 19 and 21 are not linked with Case III in the Act; they appear among the general rules applicable to all schedules. It is true that all but the most unusual cases under Case III, rule 1 (*a*) do fall within either rule 19 or rule 21, but that does not seem to me to mean that these rules must be held to control the applicability of Case III, rule 1 (*a*). So I pass on to consider whether the nature of these payments is such that Case III cannot apply to them.

It was argued that the decision of this House in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[1] showed that these payments are unique in character and that therefore they cannot be annual payments within the meaning of Case III. "Annual payment" must, it is said, be read in its context and must in some way resemble or be ejusdem generis with interest or annuities, but these payments are sui generis. That argument appears to me to be no more than a play on words. One must look at the true nature of the payments. It is well recognised that many payments which in the ordinary sense of the words might well be called annual payments do not come within Case III. One limitation is that Case III only applies to payments received as pure profit income; that is because no deductions are permitted under Case III. And further, the payments must recur or at least be of a recurring character. I think that the payments in this case comply with both these requirements.

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[1] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

An argument was submitted to the effect that these payments were not received as pure profit income of the company because there ought, on proper accounting principles, to be an allowance in respect of deductions, i.e., expenses necessary to " earn " or achieve these payments. But any such argument must be based on facts and there are no facts in the stated case to support it. On the contrary, paragraph 2 of the case, which I have already quoted, clearly shows that this point was never raised before the commissioners. In my opinion we cannot do otherwise in this case than regard these payments as pure profit income.

On the matter of recurrence the Court of Appeal drew a distinction between those payments which were made under section 22 (2) of the Act of 1946 and the others, but I do not think that there is room for any such distinction. All the payments were payments of " interim income " under section 19 of the Act of 1946 and they should, in my view, be regarded as a single series of payments although their amounts were determined by different provisions of the Acts of 1946 and 1949. Otherwise I agree with the opinion of the Court of Appeal that the requirements of Case III are satisfied in the case of these payments.

If I am right so far the decision of this case depends on the proper interpretation of Case III, rule 2, which enacts the method of assessment of Case III payments. Under that rule the income of any year of assessment is the " income arising " during either that year or the previous year, and I may add that if the payments were held to fall within Case VI, substantially the same question would arise because there the words " profits or gains arising " would have to be construed. To my mind the most difficult question in this case is to determine the meaning of these two words " income arising." Do they include only money which has been received, or do they also include money which is due and payable but has not yet been received, or money which has accrued but is not yet payable?

Most of the argument on this point turned on the meaning of the word " arising " but I do not think that that is the most important word. No income can arise before there is any income and as soon as there is income the income has arisen. The word "income" appears to me to be the crucial word, and it is not easy to say what it means. The word is not defined in the Act and I do not think that it can be defined. There are two different currents of authority. It appears to me to be quite settled that in computing a trader's income account must be taken of trading debts which have not yet been received by the trader. The price of goods sold or services rendered is included in the year's profit and loss account although that price has not yet been paid. One reason may be that the price has already been earned and that it would give a false picture to put the cost of producing the goods or rendering the services into his accounts as an outgoing but to put nothing against that until the price has been paid. Good accounting practice may require some exceptions, I do not know, but the general principle has long been recognised. And if in the end the price is not paid it can be written off in a subsequent year as a bad debt.

But the position of an ordinary individual who has no trade or profession is quite different. He does not make up a profit and loss account. Sums paid to him are his income, perhaps subject to some deductions, and it would be a great hardship to require him to pay tax on sums owing to him but of which he cannot yet obtain payment. Moreover, for him there is nothing corresponding to a trader writing off bad debts in a subsequent year, except perhaps the right to get back tax which he has paid in error.

The case has often arisen of a trader being required to pay tax on something which he has not yet received and may never receive, but we were informed that there is no reported case where a non-trader has had to do this whereas there are at least three cases to the opposite effect—*Lambe* v. *Inland Revenue Commissioners*,[2] *Dewar* v. *Inland Revenue Commissioners*[3] and *Grey* v. *Tiley*,[4] and I would also refer to what was said by Lord Wrenbury in *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia (Colonial Treasurer)*.[5] I certainly think that it would be wrong to hold now for the first time that a non-trader to whom money is owing but who has not yet received it must bring it into his income tax return and pay tax on it. And for this purpose I think that the company must be treated as a non-trader, because the *Butterley* case[6] makes it clear that these payments are not trading receipts.

I would not put it that there is any general or universal principle that sums not yet paid must or must not be brought into assessment to income tax. There are two quite different cases. Traders pay tax on the balance of profits and gains and bring money owed to them into account in striking that balance, but ordinary individuals are not assessable and do not pay tax until they get the money because until then it is not part of their income. There may well be difficult border-line cases which do not clearly fall into either of these classes and I do not attempt to foresee how that should be decided, but the payments in this case being pure profit income and not being trading receipts must, I think, be put in the second of these classes. Part of these sums accrued during the years 1946–47 and 1947–48, but in my view the company could not have been assessed and required to pay tax on amounts which accrued during those years but had not been paid when the assessment was made even if the exact amount which had accrued could have been determined.

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[2] [1934] 1 K.B. 178; 18 T.C. 212.

[3] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561.

[4] (1932) 16 T.C. 414.

[5] [1924] A.C. 508, P.C.

[6] [1957] A.C. 32.

But then it was argued that, although payment of tax could not have been demanded before the sums were received, now that they have been received they can be spread back over the years during which they were accruing. I would willingly accede to that argument if I saw anything in the Income Tax Acts which I thought would warrant it. In a case where the whole or parts of money received during one year had become due and payable in one or more earlier years there is much to be said for the view that, although no part of it can be taxed until it is received, it ought when taxed to be spread back and regarded as income of the year or years when it became due: a debtor ought not to be able to alter his creditor's liability for surtax by delaying payment of his debt. There is some authority for holding that that was the effect of section 5 (3) (*c*) of the Act of 1918. But that has now been superseded. On one view section 39 (1) of the Finance Act, 1927, achieves the same result in the case of payments to which rule 19 applies. But in the case of payments to which rule 21 applies, spreading back has clearly been excluded by section 39 (2) of the Act of 1927. It was not argued that the appellants could in the present case derive any advantage from section 34 of the Act of 1927. And there appears to be no provision expressly dealing with payments to which neither rule 19 nor rule 21 applies. In the present case it appears to me that any authority for spreading back these payments would have to be inferred from the terms of the rules of Case III. I have already stated my view that in this case no income arose until the money was received and I cannot see how receipt of the money can alter the meaning of "income arising" so as to make it possible after receipt to hold that income arose not at the date of receipt but at some earlier date. And if the income had not arisen in the earlier year I can find no ground for taxing it as part of that earlier year's income.

But even if it were possible to spread income back to the years when it became due and payable, that would not cover the present case. In the present case the income can be regarded as accruing during the earlier years, but I do not think that it can be regarded as having become due and payable then in the sense that the company could have demanded payment then. I can find nothing on which to base an inference that income, once it has been received, can be regarded as having arisen not only before it was received but even before it was payable and while it was merely accruing. For these reasons I must hold that these payments were income arising at and not before the dates when they were received by the company, and therefore these appeals should be dismissed.

Lord Radcliffe. My Lords, these appeals raise two questions as to the determination of income for the purposes of the Income Tax Acts. One seems to me to be mainly of technical or administrative significance; the other is of considerable general importance.

The first question is whether the various sums of money paid to the appellants under the Coal Industry Nationalisation Act, 1946, s. 22 (2) (*a*) or (3), or the Coal Industry (No. 2) Act, 1949, s. 1 (2), were assessable under Case III or Case VI of Schedule D. It is not in dispute that they are taxable income under one or other of those heads. Following upon a decision between these two Cases certain arguments are developed for or against the substantial question in issue, whether for the purposes of the surtax direction which has been made under section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, the income of the appellants is to be computed on the basis that each payment forms part of the income of the revenue year in which it was received or, alternatively, is to be written back, when received, over the years in respect of which it was paid.

Under rule 1 of the rules applicable to Case III the subject of charge is "any interest of money, whether yearly or otherwise, "or any annuity, or other annual payment." The payments with which we are concerned are payments of what the statute calls "interim income"; they take the form either (1) of a "revenue payment" for each of the calendar years 1947 and

1948 equal to one-half of the comparable ascertained revenue of the concern before nationalisation, or (2) of a payment for 1949 and subsequent years of a further calculated sum based on the amount by which one-third of the comparable ascertained revenue might exceed interest.on any sum of compensation satisfied before the end of the year, or (3) of a sum " equal to interest " from the vesting date (January 1, 1947), to the date on which any compensation was paid or satisfied, so far as not covered by the other two forms of interim income.

I do not think it necessary or useful to dwell upon the details of these complicated and barely intelligible provisions. It is sufficient to say that all the payments made represented some form of compensation in the form of interim income for the fact that as from January 1, 1947, the concern had been dispossessed of its assets, the use and benefit of which passed to the Crown, and, until compensation in money or stock was provided had been left without the means of earning an equivalent income from the employment of the compensation. Nor do I think it useful to distinguish between the various forms which these payments of interim income took according to the different statutory rules which were their warrant. None of them, in my view, constituted " interest of money " or an " annuity " for the purpose of Case III of Schedule D. It is much more difficult to say whether any of them constituted an " other annual payment " under this Case.

Neither the Acts nor the courts have supplied any definition of these words, " other annual payment." There is authority for saying that " the category is quite a limited one " (*In re Hanbury* [7]). There is ample authority for saying that not all payments that are made annually are annual payments under Case III (*Howe* v. *Inland Revenue Commissioners* [8]; *Hill* v. *Gregory* [9]). The reason for limitation lies in the fact that for the courts Case III annual payments have been inseparably associated with payments from which tax is deductible in accordance with general rule 19 or 21, and it has been thought to be inconsistent with the idea of tax being deducted at the source at the standard rate to allow within the case payments that are likely to be gross receipts of the payee and not " pure income profits." Although this distinction may be a good general guide in determining the scope of Case III it does not in all circumstances throw a very certain light upon the duty of the payer, who is not necessarily in a position to know whether or not the sum he pays will be treated as " pure income " or a gross receipt in the computation of the payee's tax. That, in itself, perhaps, argues for a restricted interpretation of the words " annual payment."

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[7] (1939) 20 A.T.C. 333, 334.

[8] [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 296.

[9] [1912] 2 K.B. 61; 6 T.C. 39.

The word " annual " has not been found to admit of any significant interpretation. To the courts it means no more than " recurrent "—see, e.g., *Moss' Empires Ltd.* v. *Inland Revenue Commissioners* [10]—or even " capable of recurrence." That may be so; but I think that it would be both bad logic and bad law to deduce that merely because a payment is in fact recurrent or capable of recurrence it is therefore to be treated as an annual payment.

In the end, the question what is or is not such a payment is a question of judgment formed in the light of the considerations that I have alluded to. On the whole I should not regard these payments as coming within the description. Although they could and were indeed likely to recur in the sense that several payments might well be so called for before full compensation was provided, they were essentially the temporary product of an exceptional measure of State expropriation. The income provided was in that respect casual. Such temporary and casual incomes appear to me to fit less naturally into Case III, with its interest of money, annuities and other annual payments, than into Case VI, which has always been regarded as the case that covers what I may call the oddities of Schedule D. To my mind, this interim income presents itself as just one of these oddities: and in any choice between the claims of Case III and Case VI, I would favour the claims of the latter.

There is another independent reason for preferring Case VI. That is the reason which determined the judgment of the Court of Appeal on this point. Your Lordships are at one, I believe, in holding that neither rule 19 nor rule 21 of the general rules is so expressed as to be capable of requiring or authorising the deduction of tax from these payments made by the Crown. I agree with that and I need not recite my reasons separately. If so, not only are the payments not income " chargeable with income tax " by way of deduction," with the consequence that section 39 (2) of the Finance Act, 1927, has no application at all, and provides no rule to determine the year to which they are to belong as income; but also there is at any rate strong prima facie ground for saying that payments for which the tax scheme provides no deduction at source are not annual payments within the meaning of Case III. For, as is indicated by the decisions to which I have referred, the courts have tended to treat liability to deduction at source as affording a distinguishing mark of a Case III annual payment; and if here the freedom from deduction would be due not so much to the nature of the payment as to the accident that it is made by the Crown itself and not by a subject, that circumstances serves only to reinforce the point already made that these interim payments are an exceptional form income tax for which the regular scheme of the Income Tax Acts has made no provision.

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[10] [1937] A.C. 785; 53 T.L.R. 867; [1937] 3 All E.R. 381; 21 T.C. 295.

I turn now to the important question whether the sums paid are bound by law to be treated as income of the revenue year in which they were received, regardless of the fact that some or all of them were avowedly paid by the Crown as income of periods preceding the revenue year of receipt. It is sufficient to take as an illustration payments 1, 2 and 9 itemised in paragraph 4 (1) of the case stated. These payments cover the interim income to which the appellants were entitled in respect of the calendar years 1947 and 1948: they were made under section 22 (3) (*a*) of the Act of 1946, which itself describes the payments as due "in "respect of" those two years: and in each case they were accompanied by an official letter identifying the period to which they related. In the most obvious sense they represented income of the three revenue years 1946–47, 1947–48 and 1948–49, and were due to be apportioned between those years accordingly. Yet because the first payment (in respect of the 18 months to June 30, 1948) was not made until August 7, 1948, nor the second payment (in respect of the half-year ended December 31, 1948) until January 26, 1949, the Crown claims that these two payments must be allocated wholly to the revenue year 1948–49; and because the third payment was made on May 25, 1951 (as a further payment in respect of the two years December 31, 1948), it is similarly claimed as income of the revenue year 1951–52, with which, if I may be pardoned for begging the question, it has nothing in the world to do.

Only one or two further points need to be noticed. Neither the Act of 1946 nor 1949 fixed a date of payment for the compensation due by way of interim income. It was left to the Crown to make its payments as and when it could or would, due allowance being made for the vast administrative task involved in ascertaining and checking the multifarious compensation claims to which nationalisation gave rise. Secondly, if the argument of the Revenue on this appeal is well founded, the dates actually

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selected for payment have led to the most unfortunate "bunching" of assessable income for the purposes of surtax, no income at all, for instance, being attributable to the revenue year 1947–48. Surtax is a steeply progressive tax and in connection with it bunching of income is always to be regretted, since it is much to the detriment of any taxpayer with a high marginal rate. I do not make any apology therefore for saying that I should be sorry if I thought that the Revenue's claim was well founded in law.

I am of opinion that it is not. I think that it is both right in principle and in accordance with previous authority to attribute these various payments to the years or parts of years in respect of which they were paid. To take one instance, I think that the first payment of £9,068 (wrongly paid net of income tax) should be distributed between the three years 1946–47, 1947–48 and 1948–49.

It is not easy to give an account of my reasons for this conclusion without burdening the House with an opinion of altogether immoderate length. I believe, however, that the substance of them can be conveyed by the following propositions, for whose brevity of statement I apologise.

1. In computing profits or gains or other income chargeable under Schedule D for any year the basis of computation is the income that "arose or accrued" during that year. The year in which a payment is actually received is not necessarily the year in which the income which it represents arose or accrued.

2. There is no fundamental or general principle of income tax law that the year in which a payment is made must be taken to be the year to which the assessable income belongs.

On the other hand, there may be special statutory rules that do secure just this result, as, for instance, the provision made by section 39 (2) of the Finance Act, 1927, that, in estimating total income, income chargeable with tax by way of deduction at the standard rate in force for any year is to be deemed to be income of that year. This rule could be very injurious to the taxpayer, but was evidently intended that it should not operate to the injury of the payer of super-tax or surtax, since by section 34 of the same Finance Act (see now section 238 of the Income Tax Act, 1952), he is allowed to spread any income affected by the rule as if it accrued from day to day. Nevertheless, where the rule applies, cadit quaestio. But then there arises this dilemma; if this would have been the legal result anyway according to general principle, why introduce the rule in 1927 with regard to the special class of payments made under deduction? And why, if there was such a principle, had rule 19 of the general rules provided until section 39 (1) was enacted that tax was to be deducted "at the "rate or rates of tax in force during the period through which the "payment was accruing due"? Lastly, does section 34 of the Act of 1927 represent a principle or an exception from a principle?

3. Subject to the operation of any such special rules, when a payment is received in one year, and it can be clearly seen that it ought to be treated as income arising in another year, the law not only permits but requires that it should be attributed to that other year. This principle has been frequently acted upon in the case of traders—see *Isaac Holden & Sons* v. *Inland Revenue Commissioners* [11]; *Lambert Bros.* v. *Inland Revenue Commissioners* [12]; *Ensign Shipping Co.* v. *Inland Revenue Commissioners* [13]—and has twice received the indorsement of this House—see *Inland Revenue Commissioners* v. *Newcastle Breweries* [14]; *Inland Revenue Commissioners* v. *Gardner Mountain & D'Ambrumenil Ltd.*[15]

4. In the case of trading income the ordinary test for determining the year to which a payment "belongs" is to ascertain the year in which it was "earned" or in which entitlement to the payment arose. As Viscount Cave L.C. said in the *Newcastle Breweries* case [16]: "The rum was taken in 1918, and the right "to some payment arose at once, though there was delay in "ascertaining the amount to be paid." The present case reproduces that situation precisely; but it is so much the clearer as to the date of entitlement in that the Nationalisation Act itself prescribed the date from which the right to payment arose and the periods of time to which each payment of income was to relate.

5. The principle applied in the cases I have just mentioned is not attributable to any special quality of trading income or other income chargeable under Case I or Case II. There is no relevant distinction involved in the fact that Case I income is computed on the "balance" of the profits or gains. What distinction could that be? To put it in its simplest form, the balance is merely the gross receipts less the expenses, and it is the excess of those receipts that is brought to charge. Case II income is not described as computable on the "balance." Yet if a professional income is computed on the basis that debts are receipts, as nearly all such incomes are today, is not the same principle to be applied?

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[11] (1924) 12 T.C. 768.

[12] (1927) 12 T.C. 1053.

[13] (1928) 12 T.C. 1169.

[14] (1927) 43 T.L.R. 476; 12 T.C. 951.

[15] (1947) 29 T.C. 69; [1947] 1 All E.R. 650.

[16] 43 T.L.R. 476, 477.

6. Neither is it a relevant distinction that in computing Case I income trade debts are habitually treated as receipts. The suggestion which appears in *Johnson* v. *W. S. Try Ltd.*,[17] that this practice, which governs a very considerable slice of the total tax yield, is somehow an anomaly because a departure from a fundamental conception of income tax legislation that profits are ascertained in reference to receipts, is, with great respect to the learned Master of the Rolls [Lord Greene] who made it, a misconception. For this purpose trade debts are receipts. The truth, as I understand it, is that very long ago it was accepted by traders that to measure receipts by trade debts rather than by cash incomings gave a truer measure of the year's profit income. I hope that it is not pedantic to point out that in our economy there are few payments that amount to anything more than transfers of debts. I do not think that appreciation of the fact that some debts are equivalent to receipts need be confined to traders or professional men, but obviously such a method of computation can have only a limited application to other forms of income—see e.g., *Lambe* v. *Inland Revenue Commissioners*.[18] I should myself have thought that Crown debts created by statute were a sufficiently solid category and that we need not look for an allowance for bad debts. But no part of this interesting question is directly in point here.

7. The proof of what I have said lies, I think, in the fact that in none of the cases in which the principle of "writing "back" was applied was this principle based by the court on any practice of computing income that was peculiar to traders or even on the supposition that at the close of the year in which the profit was held to have arisen anything could have been entered as a receipt in respect of the right to or the expectation of the future payment which ultimately matured. Such a point is simply not noticed as relevant. It was relevant, of course, that the payment made had its origin in a trading transaction or a transaction analogous to trade, because otherwise the receipt would not have been taxable at all. But that is a different point. In fact in two of the cases there was no debt—merely an uncovenanted payment—see, e.g., Rowlatt J. in the *Isaac Holden* case [19]: "It was uncertain whether they would ever receive more "at that time: they certainly had no right to demand more," and the remarks of Viscount Simon L.C. in the *Gardner Mountain*

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[17] (1946) 27 T.C. 167, 181; 52 T.L.R. 355; [1946] 1 All E.R. 532.

[18] [1934] 1 K.B. 178; 18 T.C. 212.

[19] 12 T.C. 768, 772.

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case.[20] In my opinion, therefore, it is not only safe but necessary to treat these decisions as directed wholly upon the general principle of relating back payments made in one year to the year or years in which the income which they represent can be seen to have arisen. They are decisions upon the meaning or rather upon the application of the word " arising " in connection with Schedule D.

8. There have been other decisions which have more or less bearing on the present issue. In *Inland Revenue Commissioners* v. *Hawley*[21] Rowlatt J. decided a super-tax appeal relating to two payments covering several years' income in accordance with the principle of " spreading ": in *Grey* v. *Tiley*[22] he decided a case, not obviously distinguishable, in accordance with the principle of " bunching." The latter case was settled by the Crown before it was heard by the Court of Appeal. His decision in *Grey* v. *Tiley*[23] was, he thought, required by his own earlier decision in *Leigh* v. *Inland Revenue Commissioners*,[24] a case which in fact turned on the meaning of the word " receivable " in the Income Tax Act, 1918, s. 5 (3) (*c*), the section which was repealed to make way for new provisions in 1927. But *Leigh's* case[25] contains a passage about receivability without receipt for the purpose of income tax being nothing at all, which is, in my view, too widely expressed. In any event the proposition is of no assistance when the situation is reached that money has been received and the question has then to be answered in which revenue year it should be treated as arising. It is not then of any significance to ask whether there could have been an assessment on some debt or estimated claim at the close of the earlier year. Lastly, in *Inland Revenue Commissioners* v. *Haddington (Earl)*[26] the converse case of a single deductible payment out of income was treated by the Court of Session as due to be " spread " over the two years to which it related. This too was a decision which turned primarily on the meaning of the word " payable " in the tax legislation relating to Scotland.

9. It is evident to me that in some cases the argument against spreading has been thought to rest upon or be supported by a supposed principle of income tax law that at the close of the year of charge the taxpayer is entitled to " know where he

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[20] 29 T.C. 69, 93.

[21] [1928] 1 K.B. 578; 13 T.C. 327.

[22] 16 T.C. 414.

[23] Ibid.

[24] [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590.

[25] [1928] 1 K.B. 73, 77; 11 T.C. 590, 595.

[26] 1924 S.C. 456; 8 T.C. 711.

"is" and to expect a final clearance of tax according to the ascertained results of the year—see *Johnson* v. *W. S. Try Ltd.*[27]; *Grey* v. *Tiley.*[28] I can make little of this general principle anyway under a system which allows additional assessments, and less of it in relation to the realities of current practice in dealing with the complexities of industrial, commercial, and personal incomes in the modern economy. But, however that may be, I imagine that this solicitude would readily be forgone by a taxpayer in favour of getting his true income fairly distributed over the appropriate tax years, and he would think his peace of mind bought at altogether too dear a price if the cost of it proved to be a quite fortuitous surcharge on his tax bill.

I am in favour of allowing the appeals.

LORD KEITH OF AVONHOLM. My Lords, I would place the payments here in question within Case III of Schedule D of the Income Tax Act, 1918, as coming under the description of "other "annual payment" in rule 1 (*a*) of that Case. The fact that they owe their origin to statutory enactment, which is not a source specifically recognised by the rule, does not, for the reasons stated by Harman J. and the Court of Appeal, exclude them from coming within the rule (*Smith* v. *Smith*[29]; *Inland Revenue Commissioners* v. *City of London* (*as Conservators of Epping Forest*[30])). The nature of the payments as prescribed by sections 19 and 22 of the Coal Industry Nationalisation Act, 1946, and section 1 of the Coal Industry (No. 2) Act, 1949, brings them, I think, easily under the rule. They are expressly described in section 19 of the 1946 Act as "interim income." Section 22 fixes the measure by which that interim income is to be quantified. It is clear that that income was going to be paid for at least two years. Its complete and final quantification and so its full satisfaction might have to be postponed, but there would at least be substantial payments to account. I can draw no distinction between the payments under subsection (2) and subsection (3) of section 22. They are complementary to one another and in certain events subsection (2) may not be invoked at all. Where both are invoked, each makes its respective contribution to the interim income provided for by section 19 of the Act. The "revenue payments" under section 22 (3) (*a*) of the 1946 Act may be regarded as an instalment to account of the money payment calculated under section 22 (2) (*a*), although for the years 1947 and 1948 there was to be no recoupment in the event of the "revenue payments" being found to have exceeded the sum calculated, under that subsection, as satisfying the right to interim income. It may be true to say, as the Court of Appeal have said, that it is difficult to discern the quality of recurrence in the payment made under subsection (2) (*a*), but as the subsection is part of the machinery for fixing the "interim "income" and filling any deficiences of amount resulting after payment of the "revenue payments" under subsection (3), I think the payment made under it should be regarded as part of an annual payment. The circumstances here seem to me to be every bit as potent to bring these payments under the words of rule 1 (*a*) of Case III as were the circumstances in *Moss' Empires Ltd.* v. *Inland Revenue Commissioners*[31] to make the payments under guarantee in that case so chargeable. With this qualification I would agree with the Court of Appeal that these payments have the characteristics required of "other annual "payments" under rule 1 of Case III. There is nothing, in my opinion, in the decision of this House in *Inland Revenue Commissioners* v. *Butterley & Co. Ltd.*[32] to preclude that conclusion.

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[27] 27 T.C. 167, 181.

[28] 16 T.C. 414, 422.

[29] [1923] P. 191.

[30] [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.

If, then, these payments came under rule 21 of the general rules of the Income Tax Act there would be a simple end to this case. Tax would be deducted from the payments at the rate of tax in force at the time of the payments as being annual payments charged with tax under Schedule D and not payable out of profits or gains brought into charge. By section 38 of the Finance Act, 1927, the tax deducted would be tax at the standard rate, and by section 39 (2) of the same Act the payments would be treated as income of the year in which the deduction was made, i.e., of the year in which the payments were received by the company. The appeal of the company would be dismissed and the order of Harman J. reversing the determination of the special commissioners would stand affirmed.

The contention, however, of the company is that rule 21 does not apply to the Crown and that accordingly the payments being payments by the Crown do not come under the rule. Rule 21 stems from section 40 of the Income Tax Act, 1853, which "entitled" and "authorised" the payer to deduct the tax at the time of payment. Had the rule continued in this form I can see no reason why the Crown equally with the subject should not have deducted tax from such payments. The section did not, however, compel the deduction of tax, and Lord Macnaghten in *London County Council* v. *Attorney General* [33] also thought that it did not compel the payer to account to the Crown for the tax if deducted, though Lord Davey in the same case [34] took, I think, a different view on this point. The rule, though not expressly repealed, was in effect replaced by section 24 (3) of the Customs and Inland Revenue Act, 1888, which directed that "the person "by or through whom such interests or annuities shall be paid, "shall deduct thereout the rate of income tax in force at the "time of such payment, and shall forthwith render an account to "the Commissioners of Inland Revenue of the amount so "deducted, . . . ; and such amount shall be a debt from such "person to Her Majesty, and recoverable as such accordingly;" The rule as so modified was carried into the Income Tax Act, 1918 (which also repealed the 1853 Act and section 24 of the 1888 Act). The Finance Act, 1927, made certain amendments for reinforcing the machinery for recovery of tax so deducted and in its amended form is the rule now under consideration. One, if not the main reason for the amendment, was to place a direct assessment on the payment and so secure priority of ranking in bankruptcy or liquidation which would not have been available to a mere debt due to the Crown. My Lords, it seems strange that a rule, which in its original form would, I think, have entitled the Crown to deduct tax, should, when strengthened for the protection of the Crown, by improving the machinery for the recovery of the tax, cease to apply to the Crown. Much, I think, might be said for the view that what was compulsory on the subject was permissive to the Crown and that, if the Crown deducted tax, the other directives of the rule became clearly inoperative, because the circumstances for their operation could never arise. But I find it unnecessary to pursue this line further as your Lordships take the view that rule 21 cannot be invoked by the Crown. I am content to proceed on this view.

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[31] [1937] A.C. 785; 53 T.L.R. 867; [1937] 3 All E.R. 381; 21 T.C. 295.

[32] [1957] A.C. 32.

It is then contended by the company, rule 21 being out of the way, that the payments fall to be attributed to the years in respect of which they were paid. As the commissioners made no direction in respect of the year 1947–48 no question in respect of that year now arises. The directions in issue are directions in respect of payments in the years 1948–49, 1949–50 and 1950–51, with reference to which the dispute is whether the year of receipt or the period of accrual is to count. By rule 2 of the rules applicable to Case III in its original form under the Act of 1918 and in its form as amended by the Finance Act, 1922, tax is to be computed on the amount of income " arising " in a particular year. The word " arising " is to be found in various contexts in the Income Tax Acts. By Schedule C to the Act of 1918 tax is charged " in respect of all profits arising from interest, " annuities, dividends and shares of annuities payable out of any " public revenue." It is difficult to see how this can mean anything other than that tax shall be charged on profits from the receipts of interest, etc. If interest is not received there can be no profits. Passing over for the moment the opening paragraph of Schedule D, we find in the rule applicable to Case II of that schedule that the tax shall extend, inter alia, to " all profits " and earnings of whatever value arising from employments." " Arising " here might reasonably be taken as referring to the source of the profits and earnings, as also in rule 2, the proviso to rule 4 (1) and rule 5 of the rules applicable to Cases I and II. Under Case III, which is the material Case here, rule 2 originally provided that the tax should be computed " on the full amount " arising " within a particular year. As amended in 1922 the rule provides that the tax shall be computed " on the full amount of " the profits or income arising within " certain specified years. As we are concerned here only with tax on item 1 (*a*) of the Case " any interest of money whether yearly or otherwise or any " annuity, or other annual payment," I think, that as in Schedule C, the natural reading of rule 2 is to apply it, in the case of income, to income received in the specified years. Rule 1 of Case IV, as amended by the Finance Act, 1926, yields, I think, a similar inference. It is suggested that the rule shows a clear differentiation between income arising and income received. I can see no such distinction. We are faced here again with a computation " on the full amount [of the income] arising in the year " preceding the year of assessment, whether the income has been " or will be received in the United Kingdom or not, subject in " the case of income not received in the United Kingdom " to certain deductions and allowances. Here, also, I think income arising means income received, which in this case means received abroad, and that income received in the United Kingdom is income remitted in some form to the United Kingdom, which could only be from income already received abroad. The same construction falls, in my opinion, to be given under Case V to "income arising from stocks, shares or rents" and "income "arising from possessions." More careful consideration, I think, must be given to the words in rule 2 of Case VI, which does not refer to "income arising" but to "the profits or gains arising in "the year of assessment." This is a sweeping-up Case charging tax "in respect of any annual profits or gains not falling under "any of [Cases I to V] and not charged by virtue of any other "Schedule." (Schedule D, para. 2.) It is frequently applied to what are called casual profits, or to isolated transactions, but is not necessarily so confined (see *Forth Conservancy Board* v. *Inland Revenue Commissioners* [35]). While it does not cover the profits of any concern "in the nature of trade" which come under Case I (see definition of "trade" in section 237) it can be invoked to cover the profits of transactions analogous to trade and other transactions which require the striking of a balance of profits and gains. In such cases the method of assessment may differ from that applied in the case of receipt of a pure income profit. Under Case VI the words "profits or gains arising in the year of "assessment" will be apt to cover both. Reference was made for the appellants to section 35 of the Finance Act, 1926. This section provides for apportionment of profits or gains chargeable under Case I, Case II, rule 4 of Case III or Case VI. The purpose of this section is, I think, clear. It is to provide for the apportionment of profit over a series of years when that has been earned not by activities conducted in one year, but by activities continued over a number of years. This may happen in the exercise of a trade, or profession, or business of cattle or milk dealers curiously brought under Case III by rule 4. By association it would seem reasonably clear that the profits and gains under Case VI covered by the section are similar profits and gains of analogous activities assessed under this Case.

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[33] [1901] A.C. 26, 39, 40; 17 T.L.R. 131; 4 T.C. 265.

[34] [1901] A.C. 26, 43.

The word "accruing" with reference to income or profits and gains is of infrequent use in the Act of 1918. Paragraph 1 (*a*) of Schedule D provides that tax shall be charged in respect of annual profits or gains arising or accruing to persons "from any "kind of property whatever" and "from any trade, profession, "employment, or vocation." Paragraph 1 (*b*) makes no reference to profits or gains arising or accruing. It charges tax directly on "all interest of money, annuities, and other annual profits or "gains not charged under Schedule A, B, C or E, and not

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[35] [1931] A.C. 540; 47 T.L.R. 429; 16 T.C. 103.

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"specially exempted from tax." In this respect it follows closely section 2, Schedule D, of the Income Tax Act, 1853. To take up at once the matter of taxation of the profits of a trade, or vocation, it is familiar law that under Cases I and II, with which I think may be classed some instances under Case VI, where profits and gains are ascertained on an earnings basis, a receipt can be related back, for purposes of assessment to tax, to a year prior to the year of receipt. In such case the receipt is itself not income subject to tax, but a payment to be brought into computation for the purpose of striking a balance of profits and gains of the earlier year. It may in effect result in a pure profit to the trader or professional or other earner, but that is only if all his expenses have already been allowed for in assessing the profits and gains brought into charge for tax. This practice is not, I think, based in any way on the use of the word "accruing" in paragraph 1 of Schedule D, which it may be noted is not used in Cases I and II of that schedule, but on a recognition of the method by which traders and others are accustomed to ascertain their profits for any year. This is no argument for applying such a rule to receipt of a pure income profit. The only other references in the 1918 Act to accrual of income are in section 5 (3) (*c*) dealing with super-tax and rule 19 of Schedule D. Section 5 (3) (*c*) may have been introduced to avoid any difficulties arising from the language of rule 19 in the matter of assessment to super-tax. It does not apply any principle of accrual, but rather supersedes it. It has been considered in some cases to which I refer later and for the moment I pass to rule 19. This rule in the Act of 1918 authorises deductions from payments of any yearly interest of money, annuity or other annual payment "at the rate or rates of "tax in force during the period through which the said payment "was accruing due." That does not help the appellants. The deduction is not an assessment to tax. The rule expressly says so. The rule has an ancient origin dating back to 1803 (43 Geo. 3, c. 122, s. 208) when there was only one rate of deduction. The deduction authorised by the Act of 1918 dates from the Customs and Inland Revenue Act, 1864, and remained until changed by section 39 (1) of the Finance Act, 1927, to the form which at present obtains authorising deduction "at the "standard rate for the year in which the amount payable becomes "due." In either form it is, in my opinion, of no assistance to the appellants and is in contrast with rule 21 which requires deduction of tax at the rate in force at the time of payment.

Mr. Bucher, for the appellants, submitted that the general

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principle (if any) of the Income Tax Acts is to charge income when received, in the period in which it was earned or arising. It is for that reason that I have examined in some detail any provisions of the 1918 Act that he thought relevant. I have been unable to extract from them any such principle. The inferences, indeed, I think point in the opposite direction. The appellants would seem to be in something of a dilemma. Either they must say that income arising " means income accruing," in which case it should be taxed during each year of accrual, whether received or not; or that it only arises when received and thereafter should be taxed for the years in which it has accrued. The first alternative might be productive in many cases of great hardship and injustice to the taxpayer. The second alternative ignores the twofold difficulty that if receipt fixes the date of the income arising the Act says it shall be charged with tax on the amount of that income in the following year, and that there is no statutory provision for spreading the income received over the years of accrual. Special provision was made by section 34 of the Finance Act, 1927, in a case of assessment to super-tax, now to surtax, for relief in such a case, but that does not touch the present issue and no reference was made to this section in the course of the argument.

Several cases were cited touching the meaning of " income " arising " under the Income Tax Acts. The one decision which is directly in point on the issue here is the decision of Rowlatt J. in *Grey* v. *Tiley*,[36] a case of commission earned in one year and partly paid in two instalments in subsequent years. The learned judge held in a case of assessment under Case VI that the instalments fell to be charged in the years of receipt as profits or gains arising in these years. In so holding he applied the reasoning expressed by him in the earlier case of *Leigh* v. *Inland Revenue Commissioners*.[37] The question there was a different one, being concerned with the measure of liability to super-tax under section 5 (3) (*c*) of the Act of 1918. The ratio of these judgments was followed in *Lambe* v. *Inland Revenue Commissioners* [38] by Finlay J. and in *Dewar* v. *Inland Revenue Commissioners*,[39] by the Court of Appeal. While these latter cases merely decided that interest which was accruing but had not been received could not be charged to tax, the necessary correlative follows that income assessable to tax only arose when it was received.

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[36] 16 T.C. 414.

[37] [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590.

[38] [1934] 1 K.B. 178; 18 T.C. 212.

[39] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 568.

Against this view some reliance was placed on the judgments in *Simpson* v. *Bonner Maurice's Executors* [40] and *Inland Revenue Commissioners* v. *Haddington (Earl)*.[41] The first of these cases creates, in my opinion, no difficulty. The assessments were there made under Cases IV and V on the income arising from securities and stocks and shares, belonging to a naturalised and domiciled British subject, which had been paid into certain German banks during the 1914–18 war. None of this income was received in England till 1923. It was held by the special commissioner, Rowlatt J. and the Court of Appeal that the income arose when it was received by the German banks on behalf of the stockholder or his representatives.

The *Earl of Haddington's* case [42] calls for rather more consideration. Rowlatt J. thought it was in conflict with his decision in *Leigh's* case,[43] as did Finlay J. in *Lambe's* case.[44] Some of the expressions of opinion by the judges in the case would lead to that conclusion. But the case was a very special case. The Earl had succeeded his grandfather as heir of entail in possession to the estate of Tynninghame. His father (Lord Binning) who would have succeeded to the estate had died some five months earlier, on January 12, 1917. On the occasion of his marriage Lord Binning had, by virtue of the Entail Acts, burdened the entailed estates with a life-rent annuity of £2,125 in favour of his widow and also with a provision in favour of the younger children of the marriage. On Lord Binning's death it was found that the estate was burdened by these provisions to a greater extent than was permissible under the Entail Acts, and after his succession to the entailed estate the Earl brought a petition to restrict the annuity of Lord Binning's widow to the sum of £1,627 14s. 1d. and the younger children's provisions to £7,234 5s. This application was granted by an interlocutor of the court dated November 27, 1918, and a bond and disposition in security to secure the children's provisions was granted by the Earl. The position thus was that there had been, since the death of Lord Binning on January 12, 1917, an effective life-rent annuity belonging to his widow and secured on the rents of the entailed estate and provisions to the children secured by bond and disposition in security as from the same date. There was no question of Lord Binning's widow or children having waived their rights or of the Earl being unable to satisfy them. The widow and children were

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[40] (1929) 45 T.L.R. 581; 14 T.C. 580.

[41] 1924 S.C. 456.

[42] Ibid.

[43] [1928] 1 K.B. 73.

[44] [1934] 1 K.B. 178.

H. L. (E.)
1959

WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION)
v.
INLAND REVENUE COMRS.

RAMSHAW COAL CO. LTD. (IN LIQUIDATION)
v.
SAME.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION)
v.
SAME.

Lord Keith of Avonholm.

in possession of their provisions from the death of Lord Binning with all the rights attached to them by statute. As Lord Ormidale put it, the right to the provisions had vested at the death of the heir-apparent. The widow and children might be said to be domini of the sums in question as they became due, to use an expression used by Lord Hanworth M.R. and Maugham L.J. in *Dewar's* case.[45] The question in the case was whether under section 66 (2) of the Finance (1909–10) Act, 1910 (the precursor of the original section 5 (3) (*c*) of the Income Tax Act, 1918), the sums in question were payable in each year as they accrued or in the year in which they were in fact paid. Owing to the proceedings for restriction which had been taken by the Earl, the first two years' payments were not made till the second fiscal year after Lord Binning's death. He sought to deduct the whole of these payments from his income of that year in order to reduce the super-tax exigible from him in that year. The court held that he could only deduct one-half of the payments, as the other half must be held to have been payable in the previous year. Rowlatt J.'s view in *Leigh's* case[46] was that "payable" was the correlative of "receivable" in the same section of the Act and that, as there was no receivability without receipt, there could be no payability without payment. The case is no direct authority on the meaning of "income arising" under any of the Cases, but in *Grey* v. *Tiley*[47] he clearly regarded the principle of that case as applicable to the meaning of "profits or gains "arising" under Case VI. For the reasons I have given it may be possible to reconcile the *Earl of Haddington's* case[48] with *Leigh's* case.[49] But in any event, looking to its specialties, I could not regard it as an apt precedent in support of the appellants' case. Reliance was also placed by counsel for the appellants on *Hawley* v. *Inland Revenue Commissioners*.[50] I find difficulty in discovering the ratio of the decision of Rowlatt J. in that case. But as the same learned judge in *Grey* v. *Tiley*[51] had his previous decision in *Hawley*[52] before him, which he found himself able to distinguish, I must assume there is no conflict between the two decisions. His reasoning and decision in *Grey* v. *Tiley*[53] are perfectly clear and, in my opinion, entirely applicable to the case now under appeal.

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[45] [1935] 2 K.B. 351, 362, 372.
[46] [1928] 1 K.B. 73, 77.
[47] 16 T.C. 414.
[48] 1924 S.C. 456.
[49] [1928] 1 K.B. 73.
[50] (1925) 9 T.C. 331.
[51] 16 T.C. 414.
[52] 9 T.C. 331.
[53] 16 T.C. 414.

Other cases were cited but, except for the decision of the Privy Council in *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia (Colonial Treasurer)*,[54] I find them of little help on the point at issue here. The *St. Lucia* case[54] was decided on the words "income arising or accruing" in a Colonial Ordinance. It was held that no income arose or accrued until receipt. This decision is in line with the reasoning of Rowlatt and Finlay JJ. and the Court of Appeal in the cases already cited.

In the result I have come to the opinion that the payments received by the company were income of the year in which they were received and as such were subject to direction and apportionment under section 21 of the Finance Act, 1922.

The Court of Appeal took the view that the payments fell within Case VI of Schedule D. That was mainly because they thought that the only annual payments to which Case III 1 (*a*) could apply were payments from which deduction of tax could be made under rules 19 or 21. They also pointed out that certain payments from public funds were separately provided for in Case III. I do not find these considerations compelling. If the payments are of the character that would bring them under rule 19 or rule 21 if made by any person or body other than the Crown, I do not see how they lose their character by the accident that the person liable to pay happens to be the Crown. The payments from public funds dealt with in Case III are small payments not exceeding fifty shillings and interest on Exchequer Bonds and other securities issued under the authority of the Treasury or under the War Loan Acts during the 1914–18 war, from which tax was not deducted at the source. Special considerations applying to such payments which have put them into Case III and not into Schedule C seem to me to have no bearing on the question of what is the appropriate Case for the payments here under the Coal Industry Nationalisation Act. But this difference of view is, in my opinion, immaterial. Treated as coming under Case VI they would still, in my opinion, for the reasons I have tried to express, be income arising in the year of payment.

It is said, however, that as the company has not received the

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[54] [1924] A.C. 508.

H. L. (E.)

1959

WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS.

RAMSHAW COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

tax deducted, the deductions cannot, on the view that income only arises when received, be held to be the income of the company. This submission is more ingenious than sound. Income for the purpose of the Income Tax Acts is gross income whether paid with or without deduction of tax. If rule 21 had applied to the tax deducted here, the income that arose would still have been the gross income. It is because it is the taxpayer's income that tax is deducted from it. The same, in my opinion, applies here. This contention was rejected and, I consider, rightly rejected, by the Court of Appeal.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *Tamplin, Joseph & Flux for Darling, Heslop & Forster, Darlington; Solicitor of Inland Revenue.*

J. A. G.

[PRIVY COUNCIL.]

J. C.*

1960
Oct. 11.

WILLIAM McCULLOCH GOLLAN AND ANOTHER APPELLANTS;

AND

RANDWICK MUNICIPAL COUNCIL . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Australia—New South Wales—Rating—Valuation of land—Unimproved value—Grant of Crown land—Restrictions and conditions—Whether to be taken into account in ascertaining unimproved value—"Fee "simple" in Act an absolute or "pure" title—Valuation of Land Act (No. 2), 1916–1951 *(N.S.W.), ss.* 5, 6*—Land Tax Assessment Act,* 1910–1950 *(Federal), s.* 3*—Local Government Act,* 1919–1954 *(N.S.W.)—Australian Jockey Club Act,* 1873 *(N.S.W.), s.* 3.

The Valuation of Land Act (No. 2), 1916–1951, of New South Wales provides by section 5 that "The improved value of land is the "capital sum which the fee simple of the land might be expected

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST.

"to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require," and by section 6: "The unimproved value of land is the capital sum which the fee "simple of the land might be expected to realise if offered for sale "on such reasonable terms and conditions as a bona-fide seller would "require, assuming that the improvements, if any, thereon or "appertaining thereto, and made or acquired by the owner or his "predecessor in title had not been made."

The appellants, the owners of land used as a racecourse near Sydney, New South Wales, were the trustees of the property which had been vested by the Crown in their predecessors in fee simple upon the trusts and subject to the conditions, reservations and powers contained in two deeds of grant, which included, inter alia, a general right to resume any part of the lands for public purposes, and to take stone, gravel and timber. Under a power conferred by the first deed of grant the land was leased to the Australian Jockey Club, the original power of leasing up to seven years having been extended to 21 years by the Australian Jockey Club Act, 1873. On a question as between the appellants and the respondent municipal council, whether in ascertaining for rating purposes the "unimproved value" of the land under the Valuation of Land Act, 1916–1951, the valuation should or should not take into account the existence of the restrictions in the Crown grants:—

Held, that in valuing the land under sections 5 and 6 of the Act the trusts, restrictions, conditions and provisos contained in the grants and in the Act of 1873 should not be taken into consideration (post, p. 102).

The considerations that led the High Court in *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation* (1955) 91 C.L.R. 610 to treat unimproved value under section 3 of the Land Tax Assessment Act, 1910–1950 (which was in substantially the same terms as section 6 of the Valuation of Land Act) as involving the hypothesis of "a fee simple unencumbered and subject to no "conditions" could be applied to unimproved value under section 6 of the Valuation of Land Act. "The fee simple of the land" as used in section 6 did not refer to the actual title vested in the owner at the relevant date with any restrictions by which it was affected, but to an absolute or "pure" title such as constituted full ownership in the eyes of the law. There was nothing in the rating scheme under the Valuation of Land Act and the Local Government Act, 1919–1954 (which provided for the charging of rates) which called for any different meaning to be given to those words (post, pp. 100, 101).

Stephen v. *Federal Commissioner of Land Tax* (1930) 45 C.L.R. 122 disapproved.

The Australian Jockey Club Act, 1873, did not create a restriction on alienation but merely recognised a restriction already created, so that the source of the restriction was not the Act but the original Crown grant, and, accordingly, the restriction was not part of the general statutory law of the State to be taken account of (as were the county planning restrictions in the *Royal Sydney*

Golf Club case (supra)) in assessing the unimproved value (post, p. 98).

The principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment (post, p. 96).

Decision of the Full Court of the Supreme Court of New South Wales affirmed.

APPEAL (No. 7 of 1960) from an order of the Full Court of the Supreme Court of New South Wales (Roper C.J. in Eq., Maguire and Hardie JJ.) (October 25, 1957) answering in a manner adverse to the interests of the appellants, certain questions of law submitted to that court by way of case stated by the Land and Valuation Court (Sugerman J.) (December 14, 1956) pursuant to section 17 of the Land and Valuation Court Act, 1921–1955.

The appellants in 1955 had vested in them as trustees certain land at Randwick near Sydney used as a racecourse and known as Randwick Racecourse. That land was held by them as to the major portion upon the trusts and subject to conditions set forth in a deed of grant of 1863 by the Crown to their predecessors. As to a small portion the land was held pursuant to a Crown deed of grant of 1935 upon the trusts and subject to the conditions set out in the deed of 1863.

By the Australian Jockey Club Act, 1873, of New South Wales, the trusts were recited and certain powers additional to those set forth in the deed of 1863 were conferred on the trustees, including a power to lease the land for 21 years.

The trusts and conditions were in substance that the land could only be used for various specifically named recreational purposes, with rights in the Crown to reserve portions for public roads and other public purposes, to take stone and other materials for public works, and if the land or any part was used for any purpose not so authorised the land should revert to the Crown. The trustees were given the power to lease the land or any part thereof to the Australian Jockey Club for any of the authorised purposes.

The land was for the purposes of local rates within the area of the respondent, the Randwick Municipal Council, and under the provisions of the Local Government Act, 1919–1954, such local rate was levied upon the unimproved value of the land as fixed under the Valuation of Land Act, 1916–1951, by the Valuer-General, who under that Act was required to assess the improved value, the unimproved value and the assessed annual value. [The provisions of sections 5 and 6 of the Valuation of Land Act are set out in the headnote.]

The appellants having objected to the unimproved valuation of the land assessed by the Valuer-General on the ground that it was excessive and should be reduced to nil or to a nominal figure, and the respondent council having also objected on the ground that it was too low, the objections came before the Land and Valuation Court (Sugerman J.), when the rival contentions in point of principle were on the part of the appellants that all the trusts, restrictions and conditions of the deeds and as recited in the Act of 1873 should be considered in applying section 6, with the result, it was submitted, that the land had only a nil or nominal value, while the respondent council claimed the title of the appellants should be assumed to be free of all such restrictions.

The Land and Valuation Court of its own motion, and without deciding such matter of principle, stated a case for the opinion of the Supreme Court upon four questions, of which only the first and fourth were in issue in this appeal. They were: (1) " Whether, in valuing the said lands under sections 5 " and 6 of the Valuation of Land Act, 1916–1951, the trusts, " restrictions, conditions and provisos contained in the said " grants and in the said Act of 1873, or any of them, should be " taken into consideration, and if so in what manner and to what " extent." (4) " Whether the Valuer-General was bound in law " to assign to the said lands only a nil or nominal value." The Supreme Court answered both those questions in the negative. The trustees appealed.

1960. July 12, 13, 14, 18. *R. O. Wilberforce Q.C.* and *B. J. F. Wright* (Australia) for the appellants. By the Local Government Act, 1919–1954, of New South Wales, rates are directed to be calculated on the unimproved capital value of all rateable lands, and the unimproved capital value is arrived at in accordance with the directions in the Valuation of Land Act, 1916. Apart from the grants, the land in question here was also at the relevant date subject to certain restrictions arising under the town planning legislation of New South Wales. The Valuer-General, in arriving at the unimproved value of this land, took into account the restrictions on the use of the land arising under the deeds of grant, and on that basis arrived at an unimproved value of about £A385,000. The respondent municipal council say that the Valuer-General should not have taken the restrictions in the grants into account, and that what he should have valued was not the actual fee simple estate but a hypothetical fee simple estate freed from all restrictions, and that if he had done so a substantially higher figure would have resulted. The Supreme Court of New South Wales, on the case stated, held that the unimproved value was to be arrived at on the basis of a fee simple estate freed from any restrictive conditions other than such as might flow from a public law affecting the enjoyment of the land.

The case depends on the construction of section 6 of the Land Valuation Act in the context of the Act, and on whether there is anything in the section which requires any hypothetical state of the land to be assumed. The submission is that the section only requires the actual fee simple in the hands of the owner to be valued. Up to the year 1930 there was some authority in New South Wales in the Land Valuation Court that a hypothetical fee simple has to be taken: *Armidale Racecourse Trustees* v. *Armidale Municipal Council* [1]; *Goulston* v. *Valuer-General.*[2] Then in 1930 *Stephen* v. *Federal Commissioner of Land Tax*,[3] relating to this actual racecourse, came before the High Court of Australia under the Land Tax Assessment Act, 1910–1950, section 3 of which is very much the same as section 6 of the Land Valuation Act of New South Wales, and the High Court in that case was equally divided—two to two; in that state of affairs the opinion of the Chief Justice (Isaacs C.J.) prevailed, his view being that the actual fee simple—the estate subject to the restrictions—is taken. That view was followed after 1930 in New South Wales in five cases under the Land Valuation Act, 1916, when it was decided that one takes the actual fee simple. In 1955 another case, *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation*,[4] came before the High Court of Australia, in which the court was concerned with a town planning restriction, and it was held that the restriction should be taken into account, so the actual point in the present case of restrictions arising under a deed of grant did not arise, but there are observations of importance in the judgment, which, dealing with section 3 of the Land Tax Assessment Act, said [4] that "in assessing the unimproved "value an estate in fee simple must be taken as the hypothesis "unencumbered and subject to no condition restricting the use "and enjoyment of the land." Then in 1956 *Sydney City Council* v. *Valuer-General*,[5] before the Land Valuation Court, followed the view as to section 3 expressed in the *Royal Sydney Golf Club* case [6] and applied it to a matter arising under the Land Valuation Act of 1916. The *Sydney City Council* case [7] has been followed by the Supreme Court in the present case.

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[1] (1923) 6 L.G.R. 151.

[2] (1924) 7 L.G.R. 17.

[3] (1930) 45 C.L.R. 122.

[4] (1955) 91 C.L.R. 610, 623.

[5] (1956) 1 L.G.R.(N.S.W.) 229.

The summary of the submissions for the appellants is: (1) The Valuation of Land Act, 1916, is dealing with the valuation of land generally, and not specifically with rating. It is wrong to consider it as a rating Act; the *Sydney City Council* case,[7] applying the High Court decision in the *Royal Sydney Golf Club* case,[8] falls into the error of construing it as a rating Act. (2) Prima facie, an Act of this character should be construed as requiring land to be valued at its market value in its existing state with all its advantages and disadvantages. That is a principle which has been established by numerous decisions—two of this Board. (3) There is nothing in the Act itself which requires any other view to be adopted. The only statutory hypothesis required to be made is that the land is sold. What is sold is the actual fee simple, or the actual owner's interest. (4) There is no valid distinction either in logic or based on the terms of the Act between restrictions on enjoyment imposed by public Acts and restrictions of the present type in a grant. (5) As regards the law, this is a New South Wales case depending on the terms of the New South Wales Land Valuation Act, 1916; the High Court's decision in the *Royal Sydney Golf Club* case [8] was not on the point the Board has to consider, because it was concerned with a town planning restriction. (6) If and so far as the High Court's judgment in that case has reasoning in it which supports a distinction between matters affecting enjoyment and matters affecting the fee simple, that distinction is not sound.

The use of the expression "fee simple" in both section 5 and section 6 of the Act of 1916 is quite non-committal—it does not carry any implication of some anterior estate. For the nature of a fee simple see Halsbury's Laws of England, 2nd ed., vol. 27, pp. 637, and note (e), 643 and 722, and *Tithe Redemption Commission* v. *Runcorn Urban District Council.*[9]

With regard to the authorities, in the *Armidale* case [10] the hypothetical basis was adopted without any reasons being given; and there are two other earlier decisions to the same effect; but the decision in *Stephen's* case [11] was that the fee simple to be valued was the estate subject to the restrictions and conditions imposed inter partes. The next two cases came before this Board: *Corrie* v. *MacDermott*,[12] a case of compensation on resumption of land, in which the terms of the grant are very close to those of the grant here, is relied on as having a very close application here; *Toohey's Ltd.* v. *Valuer-General*,[13] which is rather off the point here, does nevertheless state the principles of valuation on compulsory acquisition. *Trustees of Beecroft School of Arts* v. *Valuer-General* [14] helps the appellants here on the main point—the case followed *Stephen's* case [15] and applied it to New South Wales; the restrictions were taken into account on the assumption that the land could be sold, but it was land subject to a Crown grant. In *Metropolitan Golf Pty. Ltd.* v. *Valuer-General* [16] hypothetical restrictions were rejected; it would not have been fair to take them into account. *Trustees of Gunnedah School of Arts* v. *Valuer-General* [17] does not carry the matter any further. In *Sydney Exchange Co.* v. *Valuer-General* [18] it was held that restrictions must be taken into account; reliance is placed on the description in that case of the effect of *Stephen's* case.[19] And in *Board of Fire Commissioners* v. *Valuer-General* [20] it was held that the unimproved capital value should be determined "with due regard to the restrictions "and conditions in the Crown grant." On principle one cannot distinguish between any restriction, whether in a deed of grant, or imposed by statute or in a deed of conveyance. If the fee simple can be sold free from the trusts, then of course one disregards the trusts. In the case of the Crown grant, however, one cannot get rid of the trusts, even on a sale.

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[6] 91 C.L.R. 610.

[7] 1 L.G.R. 229.

[8] 91 C.L.R. 610.

[9] [1954] Ch. 383, 396, 398, 402; [1954] 2 W.L.R. 518; [1954] 1 All E.R. 653, C.A.

[10] 6 L.G.R. 151.

The second High Court case, the *Royal Sydney Golf Club* case,[21] was one of town planning restrictions only, which, it was held, should be taken into account. That case seems to be based on the assumption that the Crown itself cannot have a fee simple, and therefore one is required to make an hypothesis. That is not accepted; it is quite correct to speak of the Crown as having a fee simple: *Commonwealth of Australia* v. *New South Wales*.[22] So far as the *Royal Sydney Golf Club* case [23] seeks to go beyond town planning restrictions and extend the principle to Crown grant restrictions the reasoning should not be accepted. *Sydney City Council* v. *Valuer-General*,[24] the case in which the *Royal Sydney Golf Club* case[25] was applied in New South Wales, is really the effective judgment against which this appeal is brought, because the Supreme Court in the present case did little more than follow it. Sugerman J. in that case misplaced the emphasis; it is wrong, as that judge did in that case, to decide the matter on the footing that the sections are part of a rating scheme, since the values so fixed are used for other purposes as well, for example, assessment of death duties (section 65 of the Act of 1916) and resumption purposes (section 68). The *Sydney City Council* case[26] and the present case were wrongly decided, as was the *Royal Sydney Golf Club* case[27] in so far as it decided that not all restrictions were to be considered. [Reference was also made to *Randwick Municipal Council* v. *Rutledge*,[28] *In re Hutt Park and Racecourse Board*,[29] which was on a different and not comparable Act, and to *Disney* v. *Mayor, etc., of Williamstown*,[30] and, on restrictive covenants arising by contract, to *London Playing Fields Society* v. *Essex South-West Assessment Committee*.[31]]

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[11] 45 C.L.R. 122.
[12] [1914] A.C. 1056, P.C.
[13] [1925] A.C. 439, 443, P.C.
[14] (1940) 14 L.G.R. 199.
[15] 45 C.L.R. 122.
[16] (1950) 17 L.G.R. 223.
[17] (1952) 18 L.G.R. 134.
[18] (1953) 19 L.G.R. 111.
[19] 45 C.L.R. 122.
[20] (1953) 19 L.G.R. 115.
[21] 91 C.L.R. 610, 621, 623.
[22] (1923) 33 C.L.R. 1, 42.
[23] 91 C.L.R. 610.

The main submission, therefore, is that the restrictions have to be taken into account as the Valuer-General has done.

N. H. Bowen Q.C., *M. H. Byers* and *P. A. Twigg* (all of Australia) for the respondent. In the assessment of the unimproved value required by section 6 of the Act of 1916 the estate in fee simple is to be taken as the hypothesis, unencumbered and subject to no conditions restricting the use or enjoyment of the land. That interpretation flows from the words of the section, is supported by the history of the section and by the context of the Act in which it appears, and the weight of existing authority is in favour of it. Reliance is placed on the *Royal Sydney Golf Club* case[32] and the *Sydney City Council* case.[33] Once one takes restrictions into account all restrictions must be considered, whether they are in a Crown grant or imposed by statute or the result of transactions between the parties. Under the Act there has to be a hypothetical sale under hypothetical conditions, and in the case of unimproved value the hypothesis that, contrary to the fact, one has bare land. Originally under the system adopted in earlier Acts they took the land bare and assumed a sale of it for the imposition of the general rate. *Moran* v. *Commissioners of Taxation*[34] shows that one disregarded the trust. As far back as 1915 the valuation was always held to be on a hypothetical basis: see *Campbell* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)*,[35] referred to by Rich J. in *Stephen's* case.[36]

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[24] 1 L.G.R. 229.
[25] 91 C.L.R. 610.
[26] 1 L.G.R. 229.
[27] 91 C.L.R. 610.
[28] (1959) 33 A.L.J.R. 367.
[29] (1907) 27 N.Z.L.R. 246.
[30] (1889) 15 V.L.R. 59.
[31] (1930) 46 T.L.R. 631, D.C.
[32] 91 C.L.R. 610.
[33] 1 L.G.R. 229.

There was a practical reason for drawing the distinction between the town and country planning restrictions and the restrictions in the grant here, because the former would affect all land in the area—they would be of general application under the State law which affects every fee simple. It is a difficult question how far one can shrink the law so that it ceases to be a law of general application, and difficult to say what is on one side of the line or the other. The distinction is between the general law and something which only affects the particular title of the owner.

Before *Stephen's* case[36] it had been held in New South Wales that it was the hypothetical fee that had to be taken into account; and see *In re Hutt Park and Racecourse Board*.[37] In the *Armidale* case[38] the hypothetical fee was accepted as if it were the current view. In *Goulston* v. *Valuer-General*[39] the restriction was one imposed inter partes, and it was held that it was not to be taken into account in assessing the unimproved value.

A critical analysis of the Land Valuation Act shows that the context supports the view for which the respondent contends, and that on the ordinary meaning of the words that view ought to be adopted. The task to which the valuer is directed is to take the fee simple, that is, he has to assume that the seller will convey the land to the purchaser and his heirs on such reasonable terms and conditions as a bona fide seller would require. That is the statutory assumption he has to make, and it is perfectly easy to do so. It is difficult to see how one can bring into the estate—the fee simple—restrictions which are imposed on the owner of the estate. The idea of saying that the trusts which are imposed on the estate are the fee simple is a notion which is difficult to grasp. One sells an interest or estate in land, and here the draftsman took the largest estate known to the law—a fee simple. A number of different restrictions on user cannot be brought in and said to be of the nature of a fee simple. Once one starts to introduce restrictions it is very hard to stop. This uniform valuation for rating is perfectly consistent and sensible; it does not involve inquiry into restrictions in title or into title at all.

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[34] (1898) 19 N.S.W.L.R. 189, 191.

[35] (1915) 20 C.L.R. 49, 53.

[36] 45 C.L.R. 122, 135.

[37] 27 N.Z.L.R. 246.

[38] 6 L.G.R. 151.

[39] 7 L.G.R. 17.

There is some difficulty in visualising the Crown holding in fee; the nature of the Crown's fee simple in New South Wales is not a very simple concept; the Crown Lands Consolidation Act, 1913 (N.S.W.), provides a fairly close control of disposal of waste lands; the Crown holds subject to restrictions in many ways, and the idea of bringing in the Crown's fee simple is, it is submitted, misconceived—the appellants' view presents insuperable difficulties. The method of valuation for rating for which the respondent contends presents no difficulty under section 68 of the Act of 1916, which deals with valuations for resumptions. Secondly, in every Act mentioned in that section there is provision for the basis of assessment. There is ample scope for the application in section 68 (2) to take care of the problem arising on the basis of compensation. Section 68 does not impinge on sections 5 and 6, but, even if it does, it does not compel a construction contrary to what the respondent had submitted. [Reference was made to *Corrie* v. *MacDermott*,[40] *Toohey's Ltd.* v. *Valuer-General*[41] and *Minister for Public Works* v. *Thistlethwayte*.[42]]

The position on the authorities before 1930 has been dealt with. In *Stephen's* case[43] in 1930 Isaacs C.J. and Starke J. gave judgments contrary to the view for which the respondent here contends. It would not be inconsistent with *Corrie* v. *MacDermott*[44] to apply the respondent's interpretation in assessing the unimproved value. The reasoning of Dixon J. in *Stephen's* case[45] is adopted. The majority decision in *Stephen* was followed in the *Beecroft School* case.[46] See also *Metropolitan Golf Pty. Ltd.* v. *Valuer-General*,[47] *Sydney Exchange Co.* v. *Valuer-General*[48] and *Board of Fire Commissioners* v. *Valuer-General*.[49] The *Royal Sydney Golf Club* case[50] was rightly decided—it is not possible to distinguish it in principle and it is applicable to section 6 of the present Act. It was said for the appellants that that case is to be distinguished because it deals with the Land Tax Assessment Act which has provisions so

[40] [1914] A.C. 1056, P.C.

[41] [1925] A.C. 439, P.C.

[42] [1954] A.C. 475; [1954] 3 W.L.R. 305; [1954] 2 All E.R. 843, P.C.

[43] 45 C.L.R. 122.

[44] [1914] A.C. 1056.

[45] 45 C.L.R. 122, 139.

[46] 14 L.G.R. 199.

[47] 17 L.G.R. 223.

[48] 19 L.G.R. 111.

[49] 19 L.G.R. 115.

[50] 91 C.L.R. 610.

special and so different that the decision has no application to the operation of the Land Valuation Act; and, secondly, it was said that, even if it does apply to the latter Act, it was wrong. The respondent submits that the reasoning in that case is applicable to both types of legislation. The provisions are essentially part of the rating and taxing system. Reliance is also placed on the reasoning of Sugerman J. in the *Sydney City Council* case.[51] Two cases raising a claim for exemption from rates are *Borough of Randwick* v. *Dangar*[52] and *Randwick Municipal Council* v. *Rutledge*.[53]

The fee simple contemplated by section 6 of the Valuation of Land Act is a hypothetical fee simple unencumbered and subject to no condition arising out of the particular title restricting the use or enjoyment of the land. Further, whether or not the restrictions in the Crown grants and the Australian Jockey Club Act be considered in assessing the unimproved capital value of the land, the contention that such value is, as a matter of law, nominal only is incapable of justification.

Wilberforce Q.C. in reply. The question is as to the nature of a fee simple which has to be valued under section 6. *In re Hutt Park and Racecourse Board*[54] does not help in any way. In *Corrie* v. *MacDermott*[55] Lord Dunedin said that the principles of valuation in compensation cases must be taken to be well known to the parties. The crucial question is where the dividing line is to be drawn in this case; can one justify town planning restrictions on the one hand and the restrictions here on the other? The source of the restrictions does not make any difference. If anything attaches which cannot be got rid of by the seller when he is selling the land, it has to be taken into account; that is as far as the dividing line may be taken. What one has here is very close to a statutory restriction. The distinction drawn by the *Royal Sydney Golf Club* case,[56] followed by the *Sydney City Council* case,[57] cannot be justified in relation to its source or the area which is said to be affected by the restriction. It is impossible to maintain an interest such as the appellants have here if it has to be valued on the basis that they have a fee simple absolute or otherwise than on the basis of the actual interest which they possess.

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[51] 1 L.G.R. 229.
[52] (1898) 15 W.N.(N.S.W.) 37.
[53] 33 A.L.J.R. 367.
[54] 27 N.Z.L.R. 246.
[55] [1914] A.C. 1056.
[56] 91 C.L.R. 610.
[57] 1 L.G.R. 229.

October 11. The judgment of their Lordships was delivered by LORD RADCLIFFE. The appellants are the owners of some land at Randwick, near Sydney, New South Wales, which is used as a racecourse and known as Randwick Racecourse. They are trustees of this property, the major portion of which was the subject of a deed of grant of June 15, 1863, whereby the land was vested by the Crown in their predecessors in fee simple, subject to a pepper-corn quit rent, upon the trusts and subject to the conditions, reservations and provisos mentioned in the deed. The remaining portion was granted in the year 1935 by a supplementary deed, the terms of which were for all relevant purposes the same as those of the deed of 1863.

The effect of the 1863 deed can be summarised as follows:

(a) The trustees were to allow the land, in their discretion, to be used for a number of specified purposes, first as a racecourse for horse-racing, secondly as a training ground for training race-horses and for the erection of appropriate buildings, thirdly as a cricket ground, fourthly for rifle-shooting, fifthly for any other public amusement or purpose that the Governor of the State might declare.

(b) The trustees were empowered to grant to the Australian Jockey Club, or any other club or association formed for the above-mentioned recreational purposes, the exclusive use and occupation of the lands for any period up to seven years.

(c) There was a reservation to the Crown of the right to resume any part of the lands that might be required for public roads or ways and of the right to take stone, gravel and timber, as well as of a general right to resume any part of the land for public purposes.

(d) Finally, there was a proviso that if the land or any part of it should be used for any purpose other than such as was allowed by the foregoing trusts, the trusts should cease and the land should be forfeited and revert to the Crown.

The lands in question are now and always have been in lease to the Australian Jockey Club, the original power of leasing up to seven years having been extended to 21 years by the terms of an Act of 1873 entitled the "Australian Jockey Club Act."

The appellants, then, are the owners of this land in fee simple subject to a number of restrictive trusts, conditions and provisos which cannot but materially affect its value. They have no power of selling their land free from any of the restrictions which bind them, and it must therefore be taken that, if they did in some way manage to sell, a purchaser from them would take it subject to the same restrictions. These restrictions arise from a Crown grant which, although made in exercise of the Crown's public right or duty of granting unappropriated land, is treated as being on the same footing as a grant of land inter partes made by one citizen to another. The question at issue between the appellants and respondent is whether in ascertaining the "unimproved "value" of their land under the New South Wales Valuation of Land Act, 1916–1951, the valuation should or should not take account of the existence of these restrictions.

The Valuation Act itself prescribes the principle for arriving at "unimproved value." Having declared in section 5 (1) that "the improved value of land is the capital sum which the fee "simple of the land might be expected to realise if offered for "sale on such reasonable terms and conditions as a bona-fide "seller would require," it enacts in section 6: "The unimproved "value of land is the capital sum which the fee simple of the "land might be expected to realise if offered for sale on such "reasonable terms and conditions as a bona-fide seller would "require, assuming that the improvements, if any, thereon or "appertaining thereto, and made or acquired by the owner or his "predecessor in title had not been made."

It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly, it is irrelevant that the land may be so settled or encumbered that there is no single person or even combination of persons who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed. Again, the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all: see *Toohey's Ltd.* v. *Valuer-General.*[1]

These considerations do not, however, go far enough to supply the answer to the question upon which this appeal turns and which can be expressed as follows: Is the fee simple assumed to be sold a "pure" estate in the land without reference to the actual title under which it is held, or is it that actual title, with the consequence that there enters into the valuation, notice of any restrictions on user and enjoyment by which the title is affected?

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[1] [1925] A.C. 439, P.C.

Either construction would be consistent with the mere words "fee simple" in the statutory formula, for grantees holding title under a conditional grant subject to forfeiture or under restrictive covenants or conditions or, a fortiori, under trusts that limit their powers are nonetheless owners in fee simple. It does not follow from this that a sale of such a fee simple would be a sale of "the" fee simple of the land within the meaning of the formula: but even if the use of the definite article in this connection has any pregnant significance it is better to defer dealing with that until it has been possible to give a rather fuller account of the scope and purpose of the Valuation of Land Act.

In New South Wales unimproved value or unimproved capital value as a basis of assessment has been a conception associated primarily with rating. The valuable judgment of Sugerman J. in *Sydney City Council* v. *Valuer-General*[2] identifies the section 6 formula as first appearing in section 68 of the Land and Income Tax Assessment Act, 1895.[3] It reappeared in the Local Government Act, 1906, which[4] "first adopted the unimproved capital "value as the general basis of rating in both shires and muni- "cipalities." It is part of the somewhat confusing history of the matter that what is to all intents and purposes the same phrase was also used in the federal Land Tax Assessment Act, 1910–1950. In either case the formula was related to the imposition of an annual rate or tax charged on land and exacted, generally speaking, from the "owner" as representing all interests in the land.

As was to be expected, the relevance to the statutory valuation of restrictions on use and enjoyment affecting title was soon a matter of legal controversy in rating assessments. The course followed by decisions on the issue in the courts of New South Wales falls into three separate phases. At first a construction was adopted which accepted the idea of a "pure" fee simple and rejected any reference to constructions imposed inter partes—see *Armidale Racecourse Trustees* v. *Armidale Municipal Council*,[5] *Goulston* v. *Valuer-General*.[6]

In 1930, however, *Stephen* v. *Federal Commissioner of Land Tax*[7] reached the High Court of Australia, and it fell to the court to consider the meaning and effect of the corresponding words in section 3 of the Land Tax Assessment Act, 1910–1950. Its members were equally divided in opinion, Isaacs C.J. and Starke J. disagreeing with the line taken in the *Armidale* case,[8] while Rich and Dixon JJ. thought that the New South Wales decisions had taken the right approach. In the result the questions submitted to the court, being by way of appeal, were answered in the sense favoured by the Chief Justice's opinion. As the High Court has since, in a later case, unanimously preferred the view of Rich and Dixon JJ. to that which then prevailed, it is sufficient to notice with regard to the *Stephen* decision that the governing reason which moved the Chief Justice and Starke J. was that the idea of the "pure" fee simple would be in itself unjust to the owner of land subject to restrictions and would be contrary to the law as laid down in the Privy Council decision *Corrie* v. *MacDermott*,[9] a case of compensation upon the resumption of land. It will clear the ground if their Lordships say at this point that in their view the principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment; and that they see no general issue of justice or injustice at stake in the selection of the answer to be returned to the question now under review.

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[2] (1956) 1 L.G.R.(N.S.W.) 229.

[3] Ibid. 233.

[4] Ibid.

[5] (1923) 6 L.G.R. 151.

[6] (1924) 7 L.G.R. 17.

[7] (1930) 45 C.L.R. 122.

The *Stephen* decision, however, changed the current of authority in rating cases in New South Wales. In 1940 trustees holding land subject to user restrictions imposed by virtue of an original grant by the Crown objected to the unimproved value of their land being arrived at on the basis of a sale of an unrestricted estate in fee simple. This objection was upheld by Roper J. in the Land and Valuation Court (*Trustees of Beecroft School of Arts* v. *Valuer-General*[10]), the court treating the question as concluded by *Stephen* and the earlier decision in *Armidale* as no longer capable of application. Two cases in 1953 (*Sydney Exchange Co.* v. *Valuer-General*[11] and *Board of Fire Commissioners* v. *Valuer-General*[12]) proceeded on the same basis; and, though there are other reported cases in which a different result was arrived at (e.g., *Metropolitan Golf Proprietary Ltd.* v. *Valuer-General*,[13] *Trustees of Gunnedah School of Arts* v. *Valuer-General*,[14] the ground of distinction is not any departure from the principle of *Stephen* but the circumstance that in neither case did the restrictions relied upon bind the freehold title itself.

It was a second decision of the High Court that once more changed the current of authority in New South Wales. This was the case of *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation* [15] decided in 1955. The opinion of the court (Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.), was unanimous and is contained in a single judgment. The direct issue decided was not that involved in the present appeal: on the contrary, the golf club land being for all that appears held in unrestricted fee simple, the point (among others) that arose was whether the unimproved value for the purpose of land tax assessment should take account of certain restrictions on user imposed by a county planning scheme operating under the New South Wales Local Government (Amendment) Act of 1951. It was held that such restrictions must be taken account of in so far as their existence would be likely to affect the sale value of the land.

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[8] 6 L.G.R. 151.

[9] [1914] A.C. 1056, P.C.

[10] (1940) 14 L.G.R. 199.

[11] (1953) 19 L.G.R. 111.

[12] (1953) 19 L.G.R. 115.

[13] (1950) 17 L.G.R. 223.

[14] (1952) 18 L.G.R. 134.

On the other hand, the court found it necessary to their decision to review the opinions of Isaacs C.J. and Starke J. in the *Stephen* case,[16] the principle of which they found to be "gravely open to question." [17] The conclusion finally arrived at, so far as concerned section 3 of the Land Tax Assessment Act, was expressed in the following words [18]: "The interpretation of the Act "which seems best to accord with the policy appearing from its "provisions and also to flow from its language is that in assessing "the unimproved value an estate in fee simple must be taken as "the hypothesis unencumbered and subject to no condition "restricting the use or enjoyment of the land."

This conclusion is, as it says, based on two main considerations, of which one is the language, common to the Land Tax Assessment Act and the Valuation of Land Act, in which the definition of unimproved value is expressed. The other consideration arises from the structure or scheme of the Land Tax Assessment Act as a whole, from which the court deduced that [19] "the "general policy of the Act was to impose the tax on the owner of "the first estate of freehold in possession and to make him liable "independently of the rights of any reversioner, mortgagee or "holder of security in respect of the unimproved value of the "land." From this it was further deduced that the fee simple whose sale was to be assumed was an unincumbered fee simple: and the inference was drawn that, just as the fee simple must be taken as being free from encumbrances which operated to confer upon some other person or persons an estate or interest in the land, for the reason that the scheme did not allow for the taxing of the holders of those other estates or interests, so conditions or reservations which might affect the value of the estate, even if operating only in the interests of the public, must similarly be treated as irrelevant to the valuation required.

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[15] (1955) 91 C.L.R. 610.
[16] 45 C.L.R. 122.
[17] 91 C.L.R. 610, 622.
[18] Ibid. 623.
[19] Ibid. 622.

This decision was treated in New South Wales as restoring the interpretation of "unimproved value" under the Valuation of Land Act that prevailed before the *Stephen* case.[20] In 1956 Sugerman J., in the Land and Valuation Court, applied it to an area of land in Sydney held by the City Council under Crown dedication upon trust to secure its use as a public park; see *Sydney City Council* v. *Valuer-General*.[21] In the case now under appeal the Supreme Court approved his decision and accordingly returned the answer "No" to the first question in the case stated to them, "Whether, in valuing the said lands under "sections 5 and 6 of the Valuation of Land Act, 1916–"1951, the trusts, restrictions, conditions and provisos contained "in the said grants and in the said Act of 1873, or any of them, "should be taken into consideration."

The "said Act of 1873" is a reference to the Australian Jockey Club Act, 1873, previously mentioned. Its existence and terms played a part in the arguments because the contention was raised on behalf of the appellants that, since the Act recited in its preamble the provisions of the Crown grant of 1863, and in particular those imposing restrictions on use and alienation, the restrictions became thereby part of the general statutory law of the State and, as such, as much to be taken account of in the valuation as the planning restrictions accepted by the High Court in the *Royal Sydney Golf Club* case[22] as to be admitted on the ground that the planning scheme was[23] "a law operating over "an area of country within the State . . . chosen independently "of all questions of title or ownership."

The Supreme Court rejected this contention on two separate grounds. The Act of 1873, they said, did not create the restriction: all it did was to recognise the restriction already created. It would follow from this that the source of the obligation and conditions binding the trustee holders was not the Act of the legislature but the original Crown grant which constituted their title. Their Lordships have no doubt that this view is correct, and it is sufficient to dispose of the point. The Supreme Court also expressed the opinion that the 1873 Act, being a private Act of Parliament, could not amount to a "public law" capable of satisfying the High Court's distinction expressed by its words, "There is all the difference between a public law affecting the "enjoyment of land and a restriction of title" (see *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation*[24]). The appellants now say that it is a mistake to treat the Act as a private Act and that per incuriam the case was wrongly argued on this point by both parties in the Supreme Court. It is unnecessary to go into this, for it does not make any difference whether the Act in question ranks as public or private if the deed of grant and not the Act remains the true source of restrictions on user.

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[20] 45 C.L.R. 122.

[21] 1 L.G.R. 229.

[22] 91 C.L.R. 610.

[23] Ibid. 624.

The second question submitted to the court was "Whether, "in valuing the said lands as aforesaid, the restrictions arising "from the said notification by the Minister for Local Govern-"ment under section 342 (7) of the Local Government Act "should be taken into consideration." The restrictions referred to are planning restrictions operating under statutory authority. To this question the court returned the anwser "Yes," being of the opinion that such restrictions fell within the principle laid down by the High Court in the *Royal Sydney Golf Club* case.[25] The respondent has not preferred any cross-appeal on this answer, and their Lordships have not therefore to express any view as to the validity of the distinction that has been drawn between restrictions on user imposed on title by Crown grant and restrictions on user imposed on land by the operation of a local planning scheme.

The outcome of the appeal before the Board, therefore, is to be determined by nothing more than the answer to be given to the two interrelated questions, Is the view of the High Court in the *Royal Sydney Golf Club* case [25] to be preferred to the view of Isaacs C.J. and Starke J. in the *Stephen* case? [26] and, secondly, Does an interpretation placed on section 3 of the Land Tax Assessment Act, 1910–1950, hold good for the corresponding words in section 6 of the Valuation of Land Act, 1916–1951?

The Land Tax Assessment Act was designed to impose a single annual tax upon the unimproved value of all lands owned by taxpayers and not exempt from taxation. It was possible, therefore, to survey its scheme as a whole and to relate the conception of unimproved value to the general intent shown by the scheme. The Valuation of Land Act does not serve a purpose similar to this. It is, as its title declares, an Act "to make "provision for determining values in respect of certain lands and

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[24] 91 C.L.R. 610, 624.

[25] 91 C.L.R. 610.

[26] 45 C.L.R. 122.

"to provide that statutory rates, taxes, duties and contributions "based on land values shall be levied on values so determined." In fact the valuations made under it are required not only for the purposes of rates, but also of such diverse transactions as resumption and exchange of land, advances on mortgage and death and transfer duties. A basis of valuation that may seem reasonable and appropriate for one of these purposes is not necessarily suitable for another. It is not therefore to be assumed without further consideration that, though words that are effectively identical are used to define unimproved value in both these Acts, they are to have the same meaning in their respective contexts.

Yet, even with this caution taken, it would be unreal to ignore the fact that "unimproved value" as a basis of taxation is essentially a rating conception in New South Wales. The Local Government Act, 1919, which provides for the making of general, local, special and loan rates, bases them upon the improved or unimproved capital value of "all rateable land" in the area. In the case of the general rate unimproved capital value is the only permitted basis. Section 134 (1) then expressly provides that the unimproved capital value, the improved capital value and the assessed annual value of rateable land is to be the unimproved value, the improved value and the assessed annual value of the land as determined under the Valuation of Land Act, 1916. Sections 58 (1) and 59 (1) of the latter Act supply a cross reference to this, tying in the unimproved and improved values of land as arrived at by its procedure with the Local Government Act assessments. It is apparent, therefore, that the unimproved values to be ascertained under the Valuation Act are values to be employed primarily for a rating scheme. Indeed, the category of unimproved value is not required for any other of the various purposes served by the Valuation Act except for the somewhat analogous imposts under the Land and Income Tax Assessment Act (see section 58 (1) (*b*)) and the Fire Brigades Act, 1909 (see section 67).

In their Lordships' opinion the considerations that led the High Court in the *Royal Sydney Golf Club* case [27] to treat unimproved value under section 3 of the Land Tax Assessment Act as involving the hypothesis of "a fee simple unencumbered and "subject to no conditions" can be applied to unimproved value under section 6 of the Valuation of Land Act, and they agree with the conclusion to which those considerations led them. Prima facie, it appears to their Lordships, "the fee simple of the "land" as used in section 6 does not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law. There is nothing in the rating scheme under the Valuation of Land Act and the Local Government Act which calls for any different meaning to be given to these words and, as the High Court have shown, there is more than one reason for rejecting the alternative view. That which commends itself to their Lordships as being of particular significance is the fact that the latter Act, having provided for the charging of rates on "all rateable "land," contains a long and detailed section, section 132, which declares all land to be rateable except that comprised in a number of special categories embracing a variety of public purposes. If the conditions or restrictions affecting any particular area of land bring it within one of those categories, then it is expressly exempt by virtue of the statute, but it seems directly contrary to the intent of the Act that, though not within one of the categories, land can yet be effectively withdrawn from rateability or, at least, find its rateable assessment substantially reduced by the operation of some grant or other transaction inter partes imposing restrictions on user.

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[27] 91 C.L.R. 610.

It might still be necessary to ignore all these considerations if the Valuation of Land Act were so constructed as to provide a single basis of valuation of land, whether improved or unimproved, which was to do duty for such various purposes as death duties, resumption and mortgage valuations as well as for rating. For while burdens on individual titles may naturally enough be treated as irrelevant under a general rating scheme, it would hardly be possible to expect that similar treatment was intended to be given when it came to valuing a person's individual interest for any of these other purposes. It was the appellants' argument that the Act was constructed upon just this single basis, and certainly there are phrases and even sections in which it seems to be contemplated that what is provided for is a single scheme of valuation of "land." Their Lordships are satisfied, however, that a full reading of the Act does not admit of any such construction.

"Improved value" and "unimproved value" are special terms to which is allotted a particular statutory meaning. They will be resorted to only where the taxing or other Act in question requires a valuation to be made with reference to these concepts.

As has been pointed out, "unimproved value" is fundamentally a rating concept and, it seems, is resorted to for virtually no other purpose. "Improved value," which is capable of raising a similar question as to the relevance of restrictions on user, does, however, find a place in section 68, which deals with valuations for resumptions. Even that section, however, contemplates that not only will there be an "improved value" to be referred to but also separate valuations of "the respective estates and "interests referred to in such valuation."

It seems that throughout the Act it is intended that valuations of individual estates and interests, which will presumably allow for matters of title, will be determined and made available side by side with such special categories of valuation as the improved and unimproved value and assessed annual value of the land itself. Thus, in section 16, which lays down the requirements for the initial valuation roll, it is provided that, apart from stating improved and unimproved values, the roll may contain a statement of "the value of the estates and interests of all owners." The owner of any estate or interest is entitled to notice of, and to object to, any valuation of it, whether or not he is the owner of a freehold estate in possession (section 29). A similar duality runs through other sections of the Act—see sections 43, 65, 68, 70. The scheme of the Act, therefore, does not require that the highly artificial conception of unimproved value should be imported into valuations of estates and interests required for other purposes served by the Act.

For these reasons their Lordships are of opinion that the answer returned by the Supreme Court of New South Wales upon question 1 of the case stated is correct. Question 2 is not the subject of appeal. Question 3 was not argued there or here and no answer was returned to it. Question 4 was rightly answered in the negative, having regard to the answer given to question 1. The order of the Supreme Court dated October 25, 1957, must be affirmed and the appeal dismissed. Their Lordships will humbly advise Her Majesty accordingly. The appellants must pay the respondent's costs of the appeal.

Solicitors: *Bell, Brodrick & Gray; Ranken, Ford & Chester.*

C. C.

[HOUSE OF LORDS.]

WELHAM . . . . APPELLANT;

AND

DIRECTOR OF PUBLIC PROSECUTIONS . RESPONDENT.

H. L. (E.)*

1960
Feb. 22, 23, 24, 25;
Mar. 24.

Crime—Fraud—"Intent to defraud"—Forgery—Uttering forged documents with intent to defraud—Whether economic loss necessary—Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *ss.* 4 (1), 6.

Statute—Construction—Meaning of word—Contemporary usage—Established legal interpretation before passing of Act—"Intent to "defraud"—Forgery Act, 1913, *s.* 4 (1).

Judicial Precedent—Statute—Construction—Obiter dictum on meaning of words prior to enactment—"Intent to defraud"—Forgery Act, 1913, *s.* 4 (1) (post, p. 126).

By section 4 of the Forgery Act, 1913: "(1) Forgery of any document, which is not made felony under this or any other statute for "the time being in force, if committed with intent to defraud, shall "be a misdemeanour. . . ." By section 6: "(1) Every person who "utters any forged document . . . shall be guilty of an offence of "the like degree . . . and on conviction thereof shall be liable to the "same punishment as if he himself had forged the document. . . ."

The appellant was tried on an indictment which included two counts which charged him with uttering forged documents, contrary to section 6 of the Forgery Act, 1913.[1] The appellant, as sales manager of Motors (Brighton) Ltd., had witnessed forged hire-purchase agreements on the strength of which certain finance companies had advanced large sums of money to Motors (Brighton)

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* *Present*: LORD RADCLIFFE, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

[1] Forgery Act, 1913, s. 4: "(1) "Forgery of any document, which is "not made felony under this or any "other statute for the time being in "force, if committed with intent to "defraud, shall be a misdemeanour "and punishable with imprisonment "with or without hard labour for any "term not exceeding two years. "(2) Forgery of any public document "which is not made felony under "this or any other statute for the "time being in force, if committed "with intent to defraud or deceive, "shall be a misdemeanour and "punishable with imprisonment with "or without hard labour for any term "not exceeding two years."

S. 6: "(1) Every person who "utters any forged document . . . shall "be guilty of an offence of the like "degree . . . and on conviction there"of shall be liable to the same "punishment as if he himself had "forged the document. . . . (2) A "person utters a forged document . . . "who, knowing the same to be forged, "and with either of the intents neces"sary to constitute the offence of "forging the said document . . . uses, "offers, publishes, delivers, disposes "of, . . . or puts off the said forged "document. . . ."

Ltd. The appellant's defence was that he had believed that the agreements were brought into being to enable the finance companies to lend money which they could not ordinarily do because of credit restrictions, and because by their memorandum and articles of association they could not act as moneylenders. He claimed that the purpose of the hire-purchase agreements was to make it appear that the finance companies were advancing money in the way of their business as finance companies, and he accordingly contended that he had had no intention to defraud the finance companies but was merely uttering the documents to mislead the relevant authority who might inspect the records to see that the credit restrictions were being observed and whose duty it was to prevent their contravention. The jury were directed that this was a sufficient intention to defraud and the appellant was convicted. He appealed on the ground that his intention was merely an intention to deceive and not an intention to defraud, which involved causing some economic loss to the person deceived:—

Held, (1) that the words "intent to defraud" in section 4 (1) of the Act of 1913, must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act (post, pp. 123, 131), and that, on the authorities, there was no warrant for confining those words to the idea of depriving a person by deceit of some economic advantage or inflicting upon him some economic loss (post, pp. 124, 133).

Dictum of Buckley J. in *In re London and Globe Finance Corporation* [1903] 1 Ch. 728, 732; 19 T.L.R. 314 considered.

(2) That an intent to defraud existed when the false document was brought into existence for no other purpose than of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put forward such a document with knowledge of its falsity, and with a similar intent was to commit the crime of uttering it (post, pp. 125, 134). Accordingly, the appeal must be dismissed.

Reg. v. *Toshack* (1849) 4 Cox C.C. 38; 1 Den.C.C. 492, C.C.R. applied.

Decision of the Court of Criminal Appeal, sub nom. *Reg.* v. *Welham* [1960] 2 Q.B. 445; [1960] 2 W.L.R. 333; [1960] 1 All E.R. 260, C.C.A. affirmed.

APPEAL from the Court of Criminal Appeal (Lord Parker C.J., Hilbery, Cassels, Salmon and Edmund Davies JJ.).

This was an appeal by Robert John Welham from the decision of the Court of Criminal Appeal on December 16, 1959, affirming his conviction at the Central Criminal Court on December 19, 1958, on two counts of uttering forged documents contrary to section 6 of the Forgery Act, 1913.

The facts, stated by Lord Denning, were as follows: The appellant, Robert John Welham, and two other men were charged at the Central Criminal Court with conspiracy to defraud and

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with uttering forged documents. Welham was acquitted of the conspiracy but convicted of the uttering and sentenced to nine months' imprisonment. He appealed to the Court of Criminal Appeal. That court dismissed his appeal. The Attorney-General gave his fiat for a further appeal.

The counts for uttering charged Welham with uttering forged documents contrary to section 6 of the Forgery Act, 1913. It is sufficient for present purposes to take the second count which was put to him on his arraignment in these words: "On January 16, "1957, with intent to defraud, you uttered a forged hire-purchase "proposal form and hire-purchase agreement purporting to be "signed by J. Murray of 4, Meynell Crescent, E.9, knowing the "same to be forged."

To that charge he pleaded not guilty. Likewise to the third count relating to forged credit sale agreements he pleaded not guilty.

According to the evidence for the prosecution, Welham was the manager of a firm of motor dealers in Brighton called Motors (Brighton) Ltd. These dealers obtained money from finance companies in London called Consortium Finance Ltd. and Masterton Finance Ltd. They did this by submitting to the finance companies sets of documents which appeared to relate to the hire-purchase of lorries or the credit-sale of lorries. But the documents were fictitious. Take, for instance, the hire-purchase document which was the subject of count 2. The document named one "J. Murray" as the hirer of lorry No. XMT 756. But there was in fact no such lorry: and although there was such a person as Mr. Murray, he had not in fact signed the hire-purchase document nor had he authorised it to be signed in his name. His signature "J. Murray" had been forged. It purported to be witnessed by the accused "R. J. Welham," but Welham had never witnessed it. Welham had signed the document in the place for the witness. His own signature was genuine enough but he had attested a forgery. It was on that document and others like it that the motor dealers obtained money from the finance companies. That was cogent evidence of a conspiracy to defraud the finance companies. The two other men were convicted of it. But Welham was acquitted.

Welham's defence to the conspiracy charge which, no doubt, earned him his acquittal was this: He said that he did not intend to defraud the finance companies at all. He had been brought into the matter by one Prater, a director of the motor dealers.

Prater told him that they wished to borrow money from the Consortium Finance Co. The company were unable to lend money on straight loans owing to the restrictions on borrowing then in force, and also owing to the objects in their memorandum and articles: but they were ready to lend money under cover of hire-purchase documents so long as nobody outside the "immediate "circle" knew of it. The documents were bogus and were known by the finance company to be bogus, but they were necessary to cover up the loans. "The purpose was," he said, "to satisfy any "Board of Trade investigation." The jury must be taken to have accepted Welham's belief on this point: for they acquitted him on the charge of conspiracy to defraud the finance companies.

There remained, however, the counts for uttering forged documents with intent to defraud knowing them to be forged. To these counts Welham said in the first place that he did not know the documents were forged. At the time when he signed as a witness, the signature of the hirer was, he said, in blank. Take the hire-purchase document in count 2. "J. Murray" was, he said, not on it when he signed. He sent it to London to be completed: and when he got it back, the signature "J. Murray" was then filled in: and he accepted that signature as being genuine. He then sent the document forward to the finance company. He acknowledged that there was no such lorry as described in the document but he believed that the signature was genuine.

The next answer made by Welham to the charge of uttering was that he had no intent to defraud. There was, however, in this respect a significant difference between the count for conspiracy and the counts for uttering. The conspiracy was charged as being to defraud specified persons, namely, the finance companies: but the uttering was charged as uttering of forged documents "with intent to defraud" generally, without specifying any particular person or persons. On these counts for uttering Welham seems to have been prepared to admit that he had an intent to deceive but not that he had an intent to defraud. His position can be summed up in his answers to the last two questions addressed to him by the Common Serjeant:

"Q. I think you told Mr. Maxwell Turner . . . that you passed "these documents on to Consortium" [Finance Co.] "knowing "that they were fictitious, with the object of deceiving, among "other things, the Capital Issues Committee? A. I did say that. "At that time I knew there were credit restrictions, but the

"Capital Issues Committee did not mean anything to me; that "is to say, with the object of defeating the regulations.

"Q. And inducing that committee to do something which in "fact they were bound in law to prevent? A. Yes, my Lord."

The Common Serjeant appears to have taken the view, on those answers, that Welham had admitted an intent to defraud, for he told the jury: "It is not incumbent upon the prosecution in "these two counts, as it is in the case of the first count, to prove "an intent to defraud any particular person, and, therefore, if the "prosecution have succeeded in proving against Welham that "he was a party to putting forward documents which he knew "to be forged, and he put them forward with the dishonest intention, as he himself said, of defrauding the Capital Issues "Committee, well, then, he would be guilty upon these two "counts. . . . They have got to prove an intent to defraud, and "Welham's own case is that the intention here in respect of these "bogus documents was to defraud the Capital Issues Committee "by deceiving them in not preventing something which it was "their duty in law to prevent."

The jury retired and returned with the question: "Does "'with intent to defraud' mean that when Welham signed . . . "as a witness before hirer's signature, was he defrauding?"

The Common Serjeant directed them again on Welham's two defences. He told them that, in order to convict Welham, they must be satisfied that he knew Murray's signature was not genuine, and then went on to say: "I have ventured to direct you that upon "his own evidence, if that be so, these documents, like all the "others, were put forward for the purpose of pulling the wool "over the eyes of the Capital Issues Committee, as he understood "it, and to cover up the fact, if there should be an inquiry, that "these big loans had been made by the hire-purchase companies "to Motors (Brighton) Ltd. . . . on his own evidence . . . there "would not be an intention to defraud because the intention to "defraud would not be the intention to defraud the hire-purchase "companies, but to defraud the Capital Issues Committee by "deceiving them into taking a course of action which would lead "them into not preventing something happening which it was "their duty in law, if they knew of it, to prevent." Something appears to have gone wrong in the transcribing of the last passage, but the Common Serjeant was no doubt repeating again to the jury what he had already told them.

The jury retired again and found Welham guilty on counts 2 and 3 of uttering forged documents.

Gerald Gardiner Q.C. and *C. W. G. Ross-Munro* for the appellant. The question is as to the meaning of the words "intent "to defraud" in section 4 (1) of the Forgery Act, 1913. Throughout this Act a clear distinction is drawn between an intent to defraud and an intent to deceive: see sections 1, 2, 3, 4, 5 and 6. In the case of a public document it is sufficient to prove an intent to deceive, but in the case of a private document it is essential to prove an intent to defraud to establish the offence. Accordingly, it is essential in a case where the subject is charged with forgery of, or uttering, a forged *private* document to ascertain whether the accused's intention was to defraud or merely to deceive.

At the appellant's trial the Common Serjeant gave no clear direction to the jury as to the difference between the two intents. Further, there was no evidence of an intent to defraud. It is pertinent to point out that this appears to be the first case in which there has been a conviction for uttering a forged document with intent to defraud where the person alleged to be defrauded was not the person to whom the forged document was uttered.

In the context of the Forgery Act, 1913, "intent to defraud" means an intent to deprive a person of some valuable thing, namely, money or money's worth. If this definition is departed from it is impossible to keep separate the two different types of intent which the Act of 1913 plainly envisages.

At the date of the Forgery Act, 1830, and under that Act it was necessary for the prosecution to show an intent to defraud in order to establish the commission of the statutory offence. *Rex* v. *Crowther* [2] establishes that it is immaterial that the fraud was not, or, indeed, could not be, perpetrated. It is to be observed that (a) the intent was to deprive the person of a valuable thing; (b) it was to that person that the forged document was uttered; (c) it is a decision that the indictment was good, that is, that the jury might find the offence proved. *Rex* v. *Martin* [3] and *Reg.* v. *Wilson* [4] are plainly cases of an intent to defraud. In *Reg.* v. *Marcus* [5] the uttering was to the person alleged to be defrauded. In *Reg.* v. *Hoatson* [6] Rolfe B. dissented from some of the observations in *Reg.* v. *Marcus*,[7] but there is no comment as to whether there is a distinction between an intent to defraud and an intent to deceive. *Reg* v. *Heywood* [8] established that to constitute the offence of uttering a forged marriage certificate contrary to section 20 of the Forgery Act, 1830, it was necessary to prove that the document was uttered to the person it was intended to defraud.

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[2] (1832) 5 C. & P. 316.

[3] (1836) 1 Mood.C.C. 483, C.C.R.

[4] (1848) 1 Den. 284, C.C.R.

[5] (1846) 2 C. & K. 356.

[6] (1847) 2 C. & K. 777.

[7] 2 C. & K. 356.

[8] Ibid. 352.

The Crown strongly rely on *Reg.* v. *Toshack*,[9] which was a case of forgery at common law. It is to be observed, however, that the only question that the court was considering was whether the indictment was good and *not* whether the jury were entitled to find that there was an intent to defraud. The indictment contained both the words "defraud" and "deceive." The decision is of little assistance. The words defraud and deceive appear to be synonymous in the old cases. At common law all that was required was an intent to defraud. The Crown also rely on *Reg.* v. *Nash*,[10] but it is difficult to see its relevance here since the sole question was whether there was any evidence on which the jury could find an intent to defraud. In *Reg.* v. *Hodgson*[11] it was held that the mere display of a forged certificate was not evidence of an intent to defraud. The certificate was not produced when the accused applied for a post. If it had been, it could have been said that the accused was endeavouring to obtain something of value, and it would then have been akin to the facts in *Reg.* v. *Toshack*.[12] *Reg.* v. *Sharman*[13] and *Reg.* v. *Moah*[14] are both cases where there was plainly evidence of an intent to defraud.

The Forgery Act, 1861, extended the class of documents which could be forged, but there is no provision creating an offence of uttering forged documents with intent to deceive. The various provisions of the Act usually contain either the words "fraudulently" or "intent to defraud," see sections 1, 2, 4–8, 12, 20–33, 36 and 44. [Reference was also made to sections 83 and 84 of the Larceny Act, 1861, and to the Forgery Act, 1870.]

Great reliance has been placed in forgery cases on the following observations of Buckley J. in *In re London and Globe Finance Corporation Ltd.*[15]: "To deceive is . . . to induce a man to "believe that a thing is true which is false, and which the person "practising the deceit knows or believes to be false. To defraud "is to deprive by deceit: it is by deceit to induce a man to act to "his injury. More tersely it may be put, that to deceive is by "falsehood to induce a state of mind; to defraud is by deceit to "induce a course of action." That is not, however, a complete definition and, in any event, it is strictly obiter, for the question for decision was whether the costs and expenses of a prosecution under sections 83 and 84 of the Larceny Act, 1861, and section 166 of the Companies Act, 1862, should be paid out of the assets of a company. If A deceives B by asking him to drink a glass of water, which is in fact poison, and B drinks it, doubtless B has acted to his detriment, but no one could suggest that B had been defrauded. In other words, to defraud is *not* " by deceit to " induce a course of action." It is submitted that an intent to deceive is an intent to induce a person to believe that something is true which is untrue, or that something is untrue which is true, or to make a statement recklessly not caring whether it be true or false. In contrast, an intent to defraud is for present purposes an intent to obtain from the person to whom the forged document is uttered something of value.

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[9] (1849) 4 Cox C.C. 38; 1 Den.C.C. 492, C.C.R.

[10] (1852) 2 Den. 493, C.C.R.

[11] (1856) Dears. & B. 3, C.C.R.

[12] 4 Cox C.C. 38.

[13] (1854) 1 Dears.C.C. 285, C.C.R.

[14] (1858) 7 Cox C.C. 503, C.C.R.

[15] [1903] 1 Ch. 728, 732, 733.

The law relating to forgery before the passing of the Forgery Act, 1913, is set out in Russell on Crimes and Misdemeanours, 7th ed. (1909), pp. 1599 and 1642. The pre-1913 cases do not differentiate between an intent to defraud and intent to deceive. [Reference was made to *Rex* v. *Parker* [16] and *Rex* v. *Carpenter*.[17]] The Forgery Act, 1913, in terms, shows that Parliament intended that there should be a substantial distinction between an intent to defraud and intent to deceive. In *Rex* v. *Bennett and Newton* [18] the Court of Criminal Appeal expressly approved the dictum of Buckley J. in *In re London and Globe Finance Corporation Ltd.*,[19] but *Bennett's* case [20] is distinguishable from the present case for there the accused were uttering forged documents with intent to defraud, for they plainly intended their victim to act to his injury. It is a question of fact for the jury whether there was an intent to defraud: *Rex* v. *Secombe* [21]; *Rex* v. *Hunt* [22]; *Rex* v. *Pickup*.[23]

Rex v. *Bassey*,[24] on which the Crown rely, was wrongly decided in so far as it upheld the prisoner's conviction on the charge of forgery; the only authority cited by the Court of Criminal Appeal was Buckley J.'s dictum in *In re London and Globe Finance Corporation Ltd.*[25]—the court was not referred to the authorities relating to the meaning of " intent to defraud " in connection with forgery. They only held that there was evidence on which the jury could find that the prisoner had such intent. The grounds for so holding were that there exists an intent to defraud if the accused intended to prevent a person, who has a duty to perform, by deceit from discharging that duty, for thereby he acts to his injury. That is a wrong principle. Even if the duty there mentioned was intended to be confined to a public duty, that does not cover *Bassey's* case [26] for the benchers of an Inn of Court do not constitute a public body, nor does the Law Society, which is a statutory body, since a public body, inter alia, has to publish its accounts. Further, however widely the word " injury " be construed in the present context, to hold that any person who intends by deceit to impede a public authority from doing its duty therefore intends to defraud within the meaning of the Forgery Act, 1913, would be an act of judicial legislation for which there is no warrant, however desirable it might be to have such a statutory provision.

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[16] (1910) 74 J.P. 208.
[17] (1911) 22 Cox C.C. 618.
[18] (1913) 9 Cr.App.R. 146, C.C.A.
[19] [1903] 1 Ch. 728, 732.
[20] 9 Cr.App.R. 146.
[21] (1917) 12 Cr.App.R. 275, C.C.A.
[22] (1918) 13 Cr.App.R. 155, C.C.A.
[23] (1931) 22 Cr.App.R. 186, C.C.A.
[24] (1931) 22 Cr.App.R. 160, C.C.A.
[25] [1903] 1 Ch. 728, 732.

Buckley J.'s dictum [27] and the decision in *Rex* v. *Bassey* [28] and the interpretation therein given to Buckley J.'s statement, have been the subject of comment and criticism in the textbooks: it has been pointed out that the definition proper of " defraud " in this dictum ends with the expression " to defraud is to deprive " by deceit " and that the words which follow merely give the genus to which the defined species belong. It is further pointed out that the words " more tersely it may be put," etc., again merely indicate the genus in another way: see Russell on Crime, 10th ed. (Turner), pp. 1476 et seq., and in particular pp. 1485–1487; 11th ed. (Turner), pp. 1428–1430; Kenny's Outlines of Criminal Law, 16th ed. (Turner), pp. 300, 301; 17th ed. (Turner), pp. 347–350; Glanville Williams, Criminal Law, The General Part (1953), pp. 74–77. [Reference was also made to Kenny's Outlines of Criminal Law, 13th ed., p. 262; 15th ed. (Phillips), pp. 301, 302.]

In *Reg.* v. *Wines* [29] the prisoner's conviction for falsification of accounts was upheld on the ground that entries of non-existent profits in order to avoid dismissal amounted to an intent to defraud as defined by Buckley J. in the *London and Globe Finance Corporation* case.[30] But it is submitted that defrauding does not cover every kind of detriment. Thus the covering up or concealment of a fraud does not evince an intent to defraud but merely an intent to deceive. The observations of Lord Tucker in

[26] 22 Cr.App.R. 160.
[27] [1903] 1 Ch. 728, 732.
[28] 22 Cr.App.R. 160.
[29] [1954] 1 W.L.R. 64; [1953] 2 All E.R. 1497; 37 Cr.App.R. 197, C.C.A.
[30] [1903] 1 Ch. 728, 732.

Board of Trade v. *Owen*[31] as to the ambit of the phrase "intent "to defraud" are obiter in view of the decision of the House on the main issue in that appeal. [Reference was also made to *Reg.* v. *Newland*,[32] *Reg.* v. *Fowler*[33] and *Reg.* v. *Potter*.[34]]

The Forgery Act, 1913, plainly contemplates that the benefit obtained by the fraud should be the product of the deception. But on the jury's finding the appellant had no intention of deceiving the finance companies. Further, the appellant himself did not obtain the loan.

In summary, the decision of the court below abolishes the distinction between an intent to defraud and an intent to deceive, because there is now included in the former intent the intent to effect any injury or deprivation. Thus it includes an intent to prevent a person exercising a right which he possesses and also an intent to induce a person to do something contrary to his duty, and that is in no way limited to a duty laid upon a public authority or to a public duty. From this decision it would appear that *Reg.* v. *Hodgson*[35] was wrongly decided. It is submitted that such an extension of the meaning hitherto given to "intent to "defraud" can only be effected by legislation, for otherwise it would mean that the courts have power, like Humpty-Dumpty, to interpret words in any sense whatsoever.

Ross-Munro following. The presence or absence of an intent to defraud is a question of fact: *Kat* v. *Diment*.[36] Accordingly, if the Common Serjeant had explained to the jury the relevant distinction between an intent to defraud and an intent to deceive, and the jury on such direction had found that, on the evidence, there was no intent to defraud, it could not be said that the jury's verdict was perverse. The Common Serjeant was wrong in directing the jury that the appellant's own evidence amounted to an admission of an intent to defraud.

Sir Jocelyn Simon Q.C., S.-G., J. H. Buzzard and *M. D. L. Worsley* for the Crown. The crime of forgery arose as a development of the law relating to treason, it being considered a species of treason to fabricate the Great or Privy Seals. Subsequently the Star Chamber exercised its jurisdiction in relation to the falsification of seals and documents of a non-official character, but there was no judicial development of the law of forgery until it became a misdemeanour at common law early in the eighteenth century. There followed numerous statutes extending the class of instruments which could be forged and increasing the penalties which could be imposed. [Reference was made to a schedule listing so far as was known all the statutes relating to forgery from (1350) 25 Edw. 3, st. 5, c. 2, to (1910) 10 Edw. 7 & 1 Geo. 5, c. 24 (106 statutes in all), and to the statutes cited in Archbold's Criminal Pleading, Evidence and Practice, 34th ed., paras. 2144 et seq., and paras. 3701 et seq.]

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[31] [1957] A.C. 602, 622; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11, H.L.; sub nom. *Reg.* v. *Owen* [1957] 1 Q.B. 174; [1956] 3 W.L.R. 252, 739; [1956] 3 All E.R. 432, C.C.A.

[32] [1954] 1 Q.B. 158; [1953] 3 W.L.R. 826; [1953] 2 All E.R. 1067; 37 Cr.App.R. 154, C.C.A.

[33] [1956] Crim.L.R. 330.

[34] [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51; 42 Cr.App.R. 168.

[35] Dears. & B. 3.

[36] [1951] 1 K.B. 34, 39, 43; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657, D.C.

Before the enactment of section 1 of the Forgery Act, 1913, none of the relevant statutes contained any definition as to what constituted forgery. The first mention of "intent to defraud" is in 9 Ann. c. 21, s. 57; the first mention of "fraudulently" is in 8 Geo. 1, c. 12, s. 1, and the first mention of "intent to deceive "or defraud" is in 43 Geo. 3, c. 139, s. 1. In spite of the alleged distinction between public and private documents referred to in the textbooks and also in the Forgery Act, 1913, some enactments relating to the forging of public documents required an intent to defraud, whilst others relating to the forging of private documents required no intent as a prerequisite to the commission of the offence: contrast 12 Geo. 1, c. 32, s. 9, with 8 Geo. 1, c. 22, s. 1, and 31 Geo. 2, c. 22, s. 77.

The distinction between public and private documents may have arisen because at common law a distinction was drawn between the counterfeiting of records and "writing of an inferior "nature," the counterfeiting of which did not constitute the crime of forgery before the decision in *Rex* v. *Ward*.[37] The great lack of precision and the anomalies in the expressing of the relevant intent (if any) in the statutes makes it impossible to draw any general conclusions as to intent by reference to them. A comparison of 10 Geo. 4, c. 24, s. 41, with 3 & 4 Vict. c. 92, s. 8, demonstrates plainly the confusion which reigned in the pre-1913 statutes relating to forgery.

It is submitted, however, that the following proposition is a legitimate inference from the earlier statutes, namely, that where before 1913 a statute made it an offence to forge any document, and no reference was made to intent, it was implicit in the use of the word "forge" that the making of the false document should be with intent that it should be thought to be genuine, in other words, to deceive. Accordingly, the specific inclusion of an intent to deceive in the Forgery Act, 1913, is mere tautology. But the question may be asked: why does the expression "intent to defraud or deceive" occur in section 1 (1) of the Act of 1913, an Act "to consolidate, simplify and amend the law "relating to forgery and kindred offences"? It is suggested that the draftsman had in mind the well-known dictum of Buckley J. in *In re London and Globe Finance Corporation Ltd.*[38] which had been quoted in extenso in the 23rd edition of Archbold (1905) at p. 590, and in the 24th edition of Archbold (1910) at p. 675, and it was intended by the use of the words "intent to defraud or deceive" that they should bear the same meaning as determined by Buckley J., on the principle of re-enactment: see *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*[39]; *Robinson Brothers (Brewers) Ltd.* v. *Durham County Assessment Committee*[40]; *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell (Raymond)*[41]; *Lang* v. *Lang*[42]; *Galloway* v. *Galloway.*[43] [Reference was made to Halsbury's Laws of England, 2nd ed., vol. 31, para. 624; Maxwell on Interpretation of Statutes, 10th ed., p. 313; Craies on Statute Law, 5th ed., p. 158.]

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[37] (1727) 2 Ld.Raym. 1461; 3 Ld.Raym. 358; 2 Stra. 747.

As to forgery at common law, it is submitted: (1) An intent to defraud was a necessary element for the commission of the offence whether the document was of a public or a private nature. (2) In spite of a later distinction in the statutes between public and private documents, the common law does not appear to have drawn any such distinction although, as indicated above, a distinction was drawn to differentiate documents of an inferior nature, that is, inferior to deeds and wills, and they were not considered to be the subject of forgery until *Rex* v. *Ward.*[44] That case[45] decided that the counterfeiting in writing of any document whereby any person would be prejudiced was a forgery at common law. (3) The intent did not necessarily involve any economic detriment or the loss of anything of any pecuniary value. The test was the possible prejudice of another man's rights: see East's Pleas of the Crown (1803) vol. 2, pp. 852, 854. (4) The loss or prejudice need not be intended to be suffered by the person to whom the document was uttered. It was enough if some third person's rights were intended to be prejudiced. (5) There was no necessity to prove an intent to defraud any particular person provided there was a person or class of persons who could be defrauded. The fact that the forgery might be so palpable that no one would be taken in by it is irrelevant. It follows that it matters not in the present case that the appellant was mistaken as to the precise functions of the Capital Issues Committee. (6) Section 4 (1) of the Forgery Act, 1913, enacted the common law.

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[38] [1903] 1 Ch. 728, 732.

[39] [1933] A.C. 402, 411; 49 T.L.R. 391.

[40] [1938] A.C. 321, 339; 54 T.L.R. 568; [1938] 2 All E.R. 79.

[41] [1949] 2 K.B. 417; [1949] 1 All E.R. 749.

[42] [1955] A.C. 402, 431; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571.

[43] [1956] A.C. 299, 306, 317, 323–325; [1955] 3 W.L.R. 723; [1955] 3 All E.R. 429.

[44] 2 Ld.Raym. 1461; 3 Ld.Raym. 358; 2 Stra. 747.

[45] Ibid.

In Hawkins' Pleas of the Crown, 8th ed., vol. 1, p. 264, there is cited as an example of forgery the insertion into an indictment "the names of those against whom in truth it was not found." That is important, since it is a plain case of a person being prejudiced without suffering economic loss; it is also a case of a third person being prejudiced and not the person to whom the forgery was uttered, which would be either the grand jury or the court itself. In Blackstone's Commentaries on the Laws of England, 8th ed., vol. 4, p. 247, forgery is defined as "the "fraudulent making or alteration of a writing to the prejudice of "another man's right." It is to be observed that there is in that definition no reference to any economic loss. In *Rex* v. *Jones and Palmer*[46] and in *Rex* v. *Parkes and Brown*,[47] it was held that an intent to defraud is a necessary ingredient of forgery; and East's Pleas of the Crown (1803), vol. 2, at p. 853, which notes these two cases, makes the comment that "in the word *deceive* "must doubtless be intended to be included an intent to "*defraud*." *Rex* v. *Fawcett*[48] and *Rex* v. *Harris*,[49] neither of which was cited to the Court of Criminal Appeal, were both cases concerning the forging of papers to secure a prisoner's release from gaol. They are very material for present purposes since, although there was no intent that the person deceived, the sheriff or governor of the gaol, should be pecuniarily prejudiced thereby, nevertheless, it was held that there was an intent to defraud.

A servant who takes his employer's money and falsifies the books to cover up his defalcations is guilty of forgery: *Rex* v. *Martin*[50]; *Reg.* v. *Wines*.[51] Equally, it is submitted, if the servant de die in diem replaces the money he has previously taken; for although the employer has suffered no deprivation in the nature of economic loss, nevertheless, the deceit has deprived him of the opportunity of prosecuting the offender and, accordingly, the falsification of the accounts amounts to forgery with intent to defraud.

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[46] (1785) 1 Leach 366.

[47] (1797) 2 Leach 775.

[48] (1793) 2 East P.C. 862, C.C.R.

[49] (1833) 1 Mood.C.C. 393, C.C.R

[50] (1836) 1 Mood.C.C. 383.

[51] [1954] 1 W.L.R. 64.

Reg. v. *Toshack* [52] is of great importance. It would appear that the trial judge was reluctant to put the case of forgery with intent to defraud on such an artificial ground as the loss of a piece of paper of the value of a penny, and the case was reserved for the opinion of all the judges, who held on the seventh and ninth counts of the indictment that the forging of the certificate was with intent to deceive and defraud. It is to be observed that the only way in which the examiners acting on behalf of Trinity House could have been defrauded was in being deprived of exercising their duty to the public of conducting a proper examination. Russell on Crime, 11th ed. (Turner), pp. 1422 and 1423, treats that case as though it turned on the value of the piece of paper. That is quite wrong. *Reg.* v. *Hodgson* [53] is a clear case where there was merely an intent to deceive and not an intent to defraud. It supplies an answer to the appellant's argument that the Crown's construction of section 4 (1) of the Act of 1913 obliterates the distinction between an intent to defraud and an intent to deceive. The April fool cases, such as a forged invitation, are de minimis, for the facts are such that the courts would not take cognisance of them. But if by means of a forged letter a person was deprived of voting for his favoured candidate at an election by being, for example, induced to present himself at the wrong polling booth, that would, it is submitted, amount to forgery with intent to defraud. In *Reg.* v. *Moah* [54] the prisoner had obtained the situation of a police constable and had supported his application for the post by two testimonials which proved to have been forged. The prisoner was convicted of forgery and of uttering, and this conviction was upheld. Russell on Crime, 11th ed. (Turner), p. 1423, suggests that the decision might have turned on the fact that the prisoner intended to obtain the pay of a police constable, but it does not appear from the report that this was the ground of decision. It is submitted that the decision would have been the same if the prisoner's intention had been to obtain the honorary position of justice of the peace. In both cases it would be forgery with intent to defraud.

Buckley J.'s dictum in *In re London and Globe Finance Corporation* [55] has been queried in Russell on Crime, 11th ed.

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[52] 4 Cox C.C. 38; 1 Den.C.C. 492.

[53] Dears. & B. 3.

[54] Dears. & B. 550.

[55] [1903] 1 Ch. 728, 732.

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(Turner), pp. 1428, 1429, which attempts to explain it by saying that the definition proper of "defraud" there given ends with the expression "To defraud is to deprive by deceit." But that is to put a full stop in place of an inverted comma. The judge is dealing with two classes of definition, and there is no reason to exclude the second part at all. Indeed, Buckley J.'s use of language was so very exact that if he was proposing, as is suggested, to pass from a species to a genus in that passage he would have put it very differently from the way it is put. The only criticism that the Crown would venture to make of this definition is that it is not quite complete in that it fails to include an omission to act.

Rex v. *Bassey* [56] was rightly decided and is in line with the earlier authorities, in particular, *Reg.* v. *Toshack.*[57] The Crown relies on the observation of Lord Tucker in *Board of Trade* v. *Owen*,[58] concurred in by the other Law Lords, that a government department acts to its detriment "if it issues a licence which "enables something to be done which the department is charged "with the duty to prevent." That passage clearly conflicts with the observation of Lord Goddard C.J. in the Court of Criminal Appeal,[59] but it was delivered in the light of the arguments presented to the House [60] and overrules it. Lord Tucker's statement [61] which, it is conceded, is obiter, equally applies to an omission to act, namely, where by the deception a government department is prevented from taking action by discharging the duty laid upon it.

The Court of Criminal Appeal correctly state the law when they say [62]: "While, no doubt, in most cases of an intention to "defraud the intention is to cause an economic loss, there is no "reason to introduce any such limitation. Provided that the "intention is to cause the person deceived to act to his real "detriment, it matters not that he suffers no economic loss. It "is sufficient if the intention is to deprive him of a right or to "induce him to do something contrary to what it would have "been his duty to do, had he not been deceived." The only gloss which the Crown would put on this definition is that it is sufficient if the intention induces the person deceived to act to his own or some other person's detriment.

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[56] (1931) 47 T.L.R. 222; 22 Cr.App. R. 160.

[57] 4 Cox C.C. 38; 1 Den.C.C. 492.

[58] [1957] A.C. 602, 622.

[59] Sub nom. *Reg.* v. *Owen* [1957] 1 Q.B. 174, 187.

[60] [1957] A.C. 602, 609, 617.

[61] Ibid. 622.

[62] [1960] 2 Q.B. 445, 457.

The Crown concedes that the appellant did not understand the nature of the functions of the Capital Issues Committee, but it is submitted that he intended to deceive anyone who saw the relevant documents into thinking that they were hire-purchase agreements and not direct loans, and that that intention is sufficient to constitute an intention to defraud.

In conclusion, where the words " intent to defraud " occur in the Forgery Act, 1913, the legislature intended those words to be understood in the light of their common law meaning and interpretation. All the institutional writers and a considerable number of the reported decisions suggest that the test was detriment or injury to another person's rights and not economic or pecuniary loss. The statutory history of intent in forgery before 1913 is anomalous and confusing, and in no statute before the Act of 1913 is there a clear antithesis between an intent to defraud and an intent to deceive. Accordingly, the draftsman of the Act of 1913 must be presumed to have drafted the Act as he did in the light of previous decisions and, in particular, *In re London and Globe Finance Corporation*,[63] and, on the principle of *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*,[64] the words in question should bear the same meaning as in that decision. In those circumstances, the Common Serjeant's direction to the jury was correct and the conviction should be upheld.

[Reference was also made to Stephen's History of the Criminal Law of England (1883), vol. 3, pp. 178 and 180; Hudson's Treatise of the Court of Star Chamber, pp. 66, 67, 70, 71 (published in Hargreave's Collectanea Juridica (1792), vol. 2); Bacon's Abridgement, 7th ed. (1832), vol. 3, pp. 744–746; *Reg.* v. *Marcus*[65]; *Reg.* v. *Hoatson*[66]; *Reg.* v. *Nash*[67]; *Reg.* v. *Fowler*[68]; *Reg.* v. *Potter*.[69]]

Buzzard following. There is one element of Buckley J.'s definition[70] of " intent to defraud " which is wrong, and which could cause confusion in the criminal law if acted upon. Plainly, " to deceive is . . . to induce a man to believe that a thing is " true which is false . . . ,"[71] but deceit is not an essential element of fraud, for one can defraud without the use of deceit: see section 80 of the Larceny Act, 1861. Conversion of trust property with intent to defraud, which is the subject of that section, is quite inconsistent with Buckley J.'s definition,[72] because a person converting property to his own use and benefit does not intend by deceit to induce another to act or refrain from acting; he simply pockets, for example, the fund in question. Attention is drawn to that particular section because it contains the expression "intent to defraud," as do sections 83 and 84 of the same Act. In sections 83 and 84 deceit is implicit in the actus reus, whether or not deceit be necessary in the definition of "intent to defraud." Further, the word "fraudulently" is used in section 1 of the Larceny Act, 1916, and no one has ever suggested that deceit is a necessary element of larceny. The word "fraudulently" is of very ancient origin and is to be found in Roman law: East's Pleas of of the Crown (1803), vol. 2, p. 553, cites Justinian's Institutes, Book IV, Title I: "Fraudulently" and "intent to defraud" are synonymous in so far as the element of fraud is concerned, and in nine cases out of ten it is sufficient to tell the jury that they mean "dishonestly": *Rex* v. *Carpenter*.[73]

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[63] [1903] 1 Ch. 728.
[64] [1933] A.C. 402, 411.
[65] 2 C. & K. 356.
[66] 2 C. & K. 777.
[67] 2 Den. 493.
[68] [1956] Crim.L.R. 330.
[69] [1958] 1 W.L.R. 638.
[70] [1903] 1 Ch. 728, 732.
[71] Ibid.

Gardiner Q.C. in reply. There are three issues: (1) What is the true meaning of "intent to defraud" in the Forgery Act, 1913? (2) What was the intention of the appellant? (3) A comparison between questions (1) and (2). The second issue is a question of fact, and it is not now open to the Crown to suggest that the appellant's intention was to defraud the auditors or shareholders of the hire-purchase companies or the credit restriction authorities, for there is no evidence on which to found such a submission.

In the present case there is an element of remoteness which does not appear in any of the reported cases. It is the only case in which there has been a conviction where the person whom it was contemplated would put forward the forged document was not under the accused's control: contrast *Reg.* v. *Moah*[74]; *Reg.* v. *Fowler*[75]; *Rex* v. *Martin*[76]; *Reg.* v. *Hoatson*[77]; *Reg.* v. *Wilson*[78]; *Reg.* v. *Sharman*[79]; *Rex* v. *Parker*[80]; *Rex* v. *Bennet and Newton*[81]; *Reg.* v. *Wines*[82]; *Board of Trade* v. *Owen*.[83] It is to be observed that in *Reg.* v. *Toshack*[84] and *Reg* v. *Moah*,[85] on which the Crown greatly rely, it was the accused who presented the forged document. The present case is wholly exceptional in this respect. There may well be an element of public mischief in addition to conspiracy in the facts here, but these factors are quite irrelevant.

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[72] [1903] 1 Ch. 728, 732.
[73] 22 Cox C.C. 618.
[74] 7 Cox C.C. 503.
[75] [1956] Crim.L.R. 330.
[76] 1 Mood.C.C. 483.
[77] 2 C. & K. 777.
[78] 1 Den. 284.
[79] 1 Dears.C.C. 285.
[80] 74 J.P. 208.
[81] 9 Cr.App.R. 146.
[82] [1954] 1 W.L.R. 64.
[83] [1957] A.C. 602.
[84] 4 Cox C.C. 38.
[85] 7 Cox C.C. 503.

As to the history of the law of forgery, although the picture is very confused, it is at least plain that at common law there was at the outset a clear distinction between the forging of public documents and the forging of private documents: see Hawkins' Pleas of the Crown, 8th ed., vol. 1, p. 263. Further, it is plain that at common law it was necessary to mention in the indictment the person whom it was alleged the accused intended to defraud, not necessarily by name, but it was not sufficient merely to allege in the indictment a general intent to defraud. On the history of forgery generally: see Russell on Crime, 11th ed., pp. 1395 et seq. which is adopted.

As regards the history of the statutory offence of uttering forged private documents, the statutes over a period of 530 years are, with a few exceptions, remarkably consistent in that it was not an offence for a person knowingly to utter a forged private document unless it was uttered with intent to defraud. Accordingly, in construing the provisions of the Forgery Act, 1913, which it is to be remembered was a consolidating Act, it is the statutory history of forgery and not the history of forgery at common law which must be borne in mind.

There is no room for the application of the doctrine of re-enactment in relation to Buckley J.'s dictum [86] and the Forgery Act, 1913. [Reference was made to *Barras's* case.[87]] It was plainly obiter, the decision not being one concerning forgery, and whilst it is true that it is cited in the 23rd (1905) and 24th (1910) editions of Archbold it is significant that it is not referred to in the 7th (1909) edition of Russell, nor is it cited in any reported decision prior to the passing of the Act.

The Crown have contended that the test of whether there exists an intent to defraud is to be found by ascertaining whether another has suffered a loss to his rights. But, with the exception of *Reg.* v. *Toshack*,[88] there is no sign of such a principle to be found in the authorities. It is true that in Stephen's History of the Criminal Law, vol. 2, p. 122, vol. 3, pp. 186 and 187, there are references to " loss " or the " risk of loss " as a test of fraud or an intent to defraud, but it is submitted that in their context those passages refer to " financial loss." *Reg.* v. *Toshack* [89] is of little assistance, for all that the court was considering was whether the indictment was good. Further, *Rex* v. *Bassey*[90] can be supported in that it was rightly decided on the ground of public mischief, which it is submitted, was the main ground of decision. It was also suggested that Channell J.'s direction to the jury in *Rex* v. *Carpenter*,[91] namely, was the statement "dishonestly made"? could be applied as a test of forgery with intent to defraud: but see *Rex* v. *Hunt*[92] and *Rex* v. *Pickup*.[93]

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[86] [1903] 1 Ch. 728, 732.

[87] [1933] A.C. 402, 411.

[88] 4 Cox C.C. 38.

[89] Ibid.

The Crown's definition of "intent to defraud" is so wide that it would cover any interference with another's rights or duties. It would cover even the "April Fool" type of case, and it is no answer on the question of principle to suggest that the courts would treat such cases as de minimis. Further, it effaces the distinction between an intent to defraud and an intent to deceive for which there is no warrant in light of the long history of statutory forgery. The two "intents" are placed side by side for the first time in the Act of 1913, thus showing that the legislature intended that there should be a sharp distinction between the two intents. That this was the intention of Parliament is strongly reinforced by the subsequent enactment of section 112 (1) of the Road Traffic Act, 1930, relating to forged certificates of insurance, which, on the Crown's argument, would be a completely superfluous provision, namely, by insertion of "intent to "deceive" only. It is plain that in the context of the Forgery Act, 1913, an "intent to defraud" connotes an intent to deprive another of some valuable thing, namely, money or money's worth.

[Reference was also made to Glanville Williams, Criminal Law, The General Part, p. 77; 5 Eliz. 1, c. 14, s. 3; 37 Geo. 3, c. 122; 7 Geo. 4, c. 16, s. 38; 8 Edw. 7, c. 69, s. 38; *Rex* v. *Firling*[94]; *Reg.* v. *Syed Husain*[95]; *Jan Mahomed* v. *Reg.*[96]]

Their Lordships took time for consideration.

March 24. LORD RADCLIFFE. My Lords, I have had the opportunity of reading in advance the opinion that will be delivered by my noble and learned friend, Lord Denning. I agree with what he says and I share his view that this appeal must be dismissed. I propose, therefore, to confine what I say to expressing

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[90] 22 Cr.App.R. 160.
[91] 22 Cox C.C. 618.
[92] 13 Cr.App.R. 155.
[93] 22 Cr.App.R. 186.
[94] (1904) 18 E.D.C. 11 (S.A.).
[95] (1885) I.L.R. 7 All. 403.
[96] (1884) I.L.R. 10 Cal. 584.

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my opinion upon the central question of law involved, the question which has been the cause of the case reaching this House.

What is the meaning of the words "intent to defraud" which occur in section 1 and, more particularly, in section 4 (1) of the Forgery Act, 1913? In my opinion an answer cannot be supplied to that question which does not regard both the context of the Act in which they appear and the previous history of legal decisions as to the meaning of the word "defraud" when used as an element of the crime of forgery. There are, accordingly, two preliminary considerations which commend themselves as being material to this approach.

The first is that the Act itself recognises that there may be at least a significant difference between an intent to defraud and an intent to deceive. For whereas most of the offences for which punishment is prescribed are punishable whether done with intent to deceive or intent to defraud, some acts of forgery can be a crime only if done with intent to defraud (see section 2 (1) and (2) and section 4 (1)). Up till the date of this Act forgery statutes, of which there had been innumerable instances over the preceding 500 years, while often (though not by any means consistently) defining the offence explicitly in terms of "intent to defraud," had hardly ever used the phrase "intent to deceive" in connection with it. The first and only occasion on which this occurred, so far as the researches of the learned Solicitor-General have taken us, was in the Act of 1803 (43 Geo. 3, c. 139), which by section 1 dealt with the crime of forging bills of exchange, promissory notes, etc. "with intent to deceive or defraud" His Majesty or other persons. The combined phrase does not seem to have been employed again in a forgery Act, since neither of the consolidating statutes of 1830 (11 Geo. 4 & 1 Will. 4, c. 66) and 1861 (24 & 25 Vict. c. 98) reproduced the substance of section 1 of the Act of 1803 with anything more than the single phrase "intent to defraud." On the other hand, "intent to deceive or "defraud" did occur in other nineteenth century Acts relating to offences akin to forgery, e.g., in section 84 of the Larceny Act, 1861, and section 166 of the Companies Act, 1862. No instance, however, has been discovered of a statute defining forgery in terms of "intent to deceive" except as an alternative to the phrase "intent to defraud."

It seems fair to say, then, that the Act of 1913 established the first occasion upon which in legislation about forgery the two phrases "intent to defraud" and "intent to deceive" were brought into any regular combination with or dissociation from each other. While this compels us, I think, to treat them as not being synonymous with each other for the purposes of the Act, I do not conclude, on the other hand, that it requires us for the same purpose to give a more limited meaning to " defraud " than it would otherwise have had, unless not doing so would involve us in finding no independent meaning at all for the word " deceive."

The second consideration which weighs with me is that by 1913 the word " defraud," when used in connection with forgery, had been a frequent subject of judicial decision and institutional comment. On most occasions the exposition had related to forgery as a crime at common law: but forgery was also becoming increasingly a statutory crime by virtue of those various Acts which had either punished forgery without explicitly referring to intent to defraud, or had explicitly imported that intent into the offence proscribed. The Act of 1913, unlike its predecessors of 1830 and 1861, was not merely an Act consolidating a number of previous enactments on the subject of forgery. Its title declares it to be an Act " to consolidate, simplify, and amend the Law relating to Forgery." In my opinion it superseded forgery as a crime at common law in the cases to which it applied, though there still remained such a crime (see section 14), just as much as it superseded the statutory offences whose constituent Acts it amended or repealed. While it did essay a definition of the act of forgery: " the making of a false document in order that it may be " used as genuine, and . . . the counterfeiting of " certain " seals " or dies " (see section 1 (1)), it did not introduce any definition of " intent to defraud " or, for that matter, of " intent to deceive." In that state of affairs I cannot doubt that the words " intent to " defraud " in the Act must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act.

Now, I think that there are one or two things that can be said with confidence about the meaning of this word " defraud." It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning. This is none the less true because since the middle of the last century the law has not required an indictment to specify the person intended to be defrauded or to prove intent to defraud a particular person.

Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by "to defraud." It may mean to cheat someone. It may mean to practise a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray's New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our "angry and "defrauded young." There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.

Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (Commentaries, 18th ed., vol. 4, at p. 247) called "to the prejudice of another man's right." East, Pleas of the Crown (1803), vol. 2, at pp. 852, 854, makes the same point in the chapter on Forgery: "in all cases of forgery, properly so called, "it is immaterial whether any person be actually injured or not, "provided any may be prejudiced by it."

Of course, as I have said, in ninety-nine cases out of a hundred the intent to deceive one person to his prejudice merely connotes the deceiver's intention of obtaining an advantage for himself by inflicting a corresponding loss upon the person deceived. In all such cases the economic explanation is sufficient. But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated.

I think that it is sufficient if I mention three authorities without analysing them. First, *Rex* v. *Harris*,[1] in which a forged order purporting to be a direction from a magistrate to the keeper of a county gaol to discharge a prisoner was held by all the judges on the case reserved to be capable of sustaining a conviction for forgery at common law. Secondly, in *Reg.* v. *Sharman*,[2] a forged certificate giving false references as to employment, put forward in order to obtain appointment as a schoolmaster, was held to support a similar conviction. The indictment in that case charged "intent to obtain the emoluments and to deceive." Thirdly, there is *Reg.* v. *Moah*,[3] in which the Court of Criminal Appeal upheld a conviction for forgery at common law where a forged letter of recommendation had been delivered to a chief constable by a forger for the purpose of obtaining the situation of a police constable.

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[1] (1833) 1 Mood.C.C. 393.

Reg. v. *Toshack*[4] seems to me to be the most explicit authority on the subject prior to 1913. Toshack had forged a testimonial over the purported signature of a master of a sailing ship in order to deceive Trinity House examiners and so obtain his master's certificate. He was tried on an indictment containing a number of counts, including one of unjustly obtaining a piece of paper, value one penny (the master's certificate), but the case as reported only dealt with the seventh and ninth counts, charging respectively that he forged the testimonial with intent to injure, deceive, prejudice and defraud the examiners, and that he did the same thing for the purpose of deceiving Trinity House. He was convicted of the offence of forgery at common law; and the conviction on these two counts being reserved for the opinion of the judges (Pollock C.B., Patteson, Wightman JJ., Platt B. and Talfourd J.), their unanimous opinion delivered by Alderson B. was that the offence had been committed.

In my opinion it is clear that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it. That seems to me to be the essential point of the present appeal.

Inevitably, the argument in this House concentrated much attention upon what was said by Buckley J. in the course of his judgment in *In re London and Globe Finance Corporation Ltd.*,[5] when he took occasion to point out the distinction as he saw it between an intention to deceive and an intention to defraud. The passage was criticised by the appellant's counsel as being either incomplete or inaccurate as an exhaustive statement of the law on the point: on the other hand, it was put forward on behalf of the Crown as being an authoritative exposition of the meaning of "intent to deceive" and "intent to defraud" in the crime of forgery, which must be taken as adopted and read into those phrases when they occur in the Act of 1913. I think that the criticism is misconceived and I think, on the other hand, that the argument for the Crown goes too far: but before I say more it is convenient to set out the familiar passage in full. "To "deceive," he said, "is, I apprehend, to induce a man to believe "that a thing is true which is false, and which the person prac-"tising the deceit knows or believes to be false. To defraud is to "deprive by deceit: it is by deceit to induce a man to act to his "injury. More tersely it may be put, that to deceive is by false-"hood to induce a state of mind; to defraud is by deceit to induce "a course of action."

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[2] (1854) 1 Dears.C.C. 285.

[3] (1858) 7 Cox C.C. 503.

[4] (1849) 4 Cox C.C. 38; 1 Den.C.C. 492.

[5] [1903] 1 Ch. 728, 732.

There is no doubt that what was said was obiter. What the learned judge was deciding in the case was whether to sanction a prosecution of Mr. Whittaker Wright under the Larceny Act, 1861, ss. 83 and 84, and the Companies Act, 1862, s. 166, at the expense of the company's funds. It was not necessary to that decision to offer a definition of either one or both of the "intents" that would be involved or to express himself in the terms of a judge directing a jury. There is no reason to suppose that he intended to do more than give a general indication of the nature of the offences that were in question and of the distinction between them. I cannot accept that a judicial utterance of this kind could ever qualify as an authoritative exposition of words employed in a subsequent statute within the doctrine laid down by this House in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*,[6] where the meaning of the single word "wreck" was in question.

On the other hand, I do not think that what he said is any the less valuable because it does not contain an exhaustive account of the legal significance of deceit and fraud. Certainly, so far as civil liability is concerned, deceit can involve a reckless indifference to truth or falsity as well as the deliberate making of false statements; and in all cases it may involve the inducing of a man to believe a thing to be false which is true as well as to believe to be true what is false. But the learned judge was speaking of the nature of criminal intent in the limited field of activities such as wilful destruction or falsification of books and publication of false statements or accounts, and, apart from that, there would be no difficulty in enlarging upon his text if it were necessary to do so in the context of any particular case. Again, it is said and, I think, justly, that to defraud must involve something more than the mere inducing of a course of action by deceit. But these words, which are found in the last sentence of the whole passage, must be understood in the light of what had gone before. They do not qualify the description of " defraud " as " by deceit to induce a " man to act to his injury ": what they do is to point the contrast between deceiving, the essence of which is to bring about a state of mind, and defrauding, the essence of which is to bring about a course of action, whether doing something or refraining from something.

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[6] [1933] A.C. 402; 49 T.L.R. 391.

It is this last point which constitutes the most important element in the whole passage. It is obvious that it was at once appreciated that it expressed briefly and with felicity the significant distinction between the two kinds of intent when they were referred to together or apart in statutes dealing with criminal offences. The 1905 (23rd) edition of Archbold's Criminal Pleading and Practice incorporated Buckley J.'s words in full, and they have regularly appeared in subsequent editions. By 1913 they had been cited with approval in a criminal appeal as illustrating or defining " intent to defraud " (see *Rex* v. *Bennett and Newton* [7]). They were treated as containing an authoritative distinction between " defraud " and " deceive " in *Rex* v. *Bassey*,[8] and by 1953 they had become so much the established text as to be referred to by the Lord Chief Justice, Lord Goddard, as the " locus classicus, which has been cited with approval over " and over again " (*Reg*. v. *Wines* [9]). I think that it would be perverse not to recognise that ever since they were reported they have been accepted and used in the criminal courts as providing a satisfactory account of the essentials of " defrauding " on the one hand and " deceiving " on the other. I imagine that a clear phrasing of the distinction was the more welcome because in the past judges dealing with forgery as a crime at common law had not always thought it necessary to distinguish between an intent to deceive and an intent to defraud, and had sometimes spoken of the latter under the title of the former. Thus East, Pleas of the Crown, at p. 853, quotes Buller J. and Eyre B. as each having described forgery as "the making a false instrument with "intent to deceive" in different trials, and adds the comment: "In the word *deceive* must doubtless be intended to be included "an intent *to defraud*: and so it was defined . . ."

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[7] (1913) 9 Cr.App.R. 146.

[8] (1931) 47 T.L.R. 222; 22 Cr.App.R. 160.

[9] [1954] 1 W.L.R. 64; 37 Cr.App.R. 197.

It was objected that, if defrauding was treated as meaning something so wide as any deceiving of another to his injury, his detriment or his prejudice, it provided a dangerously wide definition of a crime. It was said, for example, that by such a definition the writing of a faked letter to another giving him a fictitious appointment would constitute the crime of forgery. I do not know that I should regard this as so startling a result as to lead me to reconsider what seems to be the long-accepted definition of defrauding: after all, the crime in question only exists if there is the making of a false document in order that it may be used as genuine, which is itself dishonest and a cheat. Words, not being capable of infinite division for purposes of precise measurement, can only convey ideas that are to some extent general, and I think it may be that the imposition suggested does technically constitute the crime of forgery, unless the rule that lex non curat de minimis puts it out of court, or a jury concludes that there was no real intent to prejudice or injure. I suppose that, in any event, these theoretical arguments have to be tried by a certain standard of common sense, and I cannot say that in practice I should expect to see a crop of criminal prosecutions based on tricks or deceptions of this kind.

There is, I think, more weight in the criticism that if, in interpreting the Act of 1913, "intent to defraud" is given as wide an ambit as to include all deceptions to another's prejudice there is virtually no ambit left to be covered by the other statutory intent, "intent to deceive," since it is difficult to imagine an instance of a man forging a document in order that it should be used as genuine without having at the same time an intention of affecting another's conduct to his prejudice. It is difficult, but it is not impossible. There can be cases, I think, in which there is an intent to deceive and no more. *Reg.* v. *Hodgson*[10] may illustrate the kind of thing that can occur. There a diploma of the College of Surgeons had been altered by substituting Hodgson's for the genuine name: on the other hand, Hodgson had made no use of the document, so altered, except to hang it on the wall of his room and show it to two friends who inquired as to his qualifications. It was held by the court that this did not constitute forging or uttering at common law, because there was no criminal intent in what he did. It is not clear that the court had in mind any precise distinction between defrauding and deceiving and, as I have said, the distinction was not always made with regard to the crime at common law. But if a question arose under the Act of 1913 upon a similar alteration of some document falling within, say, section 3 or section 4 (2), I think that it would be hard to say that there had not been an "intent to deceive" within the meaning of the Act.

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[10] (1856) Dears. & B. 3.

I am therefore of opinion that the judgment of the Court of Criminal Appeal, the subject of the present appeal, was clearly right. The view there taken is in accordance with what was said by my noble and learned friend, Lord Tucker, in *Board of Trade* v. *Owen*,[11] and the fuller argument in this case has not led me to think that it needs any qualification.

LORD TUCKER. My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack. I have also had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, Lord Denning, and I desire to express my agreement therewith.

LORD KEITH OF AVONHOLM. My Lords, I agree.

LORD DENNING stated the facts and the direction of the Common Serjeant on the appellant's two defences (as stated above), and continued: My Lords, such being the direction of the Common Serjeant, these complaints were made of it:

(1) That the Common Serjeant failed to give the jury a clear direction as to the distinction between an intent to defraud and an intent to deceive.

(2) That the Common Serjeant incorrectly told the jury that on Welham's own case he had an intention to defraud.

(3) That there was no evidence that Welham had an intention to defraud.

(4) That in any case it should have been left to the jury to say whether Welham had an intention to defraud.

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[11] [1957] A.C. 602, 622; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11.

My Lords, I think that all these complaints depend on whether, on Welham's own evidence in the witness-box, he had an intent to defraud: for if he had, then the Common Serjeant was entitled to direct the jury as he did. There was no need for him to embark on a discussion of the difference between an intent to defraud and an intent to deceive, if the evidence did not give rise to it. And there was no need for him to leave it to them as an open question when Welham's own evidence permitted only of one answer. He said to them, in effect, what many judges have said before: "Why, even if you accept his own evidence on this "point, you may well think he had an intent to defraud."

The crucial question is, therefore, what is the meaning of the words "intent to defraud" in the Forgery Act, 1913, which were contained in the indictment. To determine this question I must set out the material sections of the Act:

"1.—(1) For the purposes of this Act, forgery is the making "of a false document in order that it may be used as genuine . . . "and forgery with intent to defraud or deceive, as the case may "be, is punishable as in this Act provided. . . .

"4.—(1) Forgery of any document, which is not made felony "under this or any other statute for the time being in force, if "committed with intent to defraud, shall be a misdemeanour . . .

"(2) Forgery of any public document which is not made felony "under this or any other statute for the time being in force, if "committed with intent to defraud or deceive, shall be a misdemeanour . . .

"6.—(1) Every person who utters any forged document . . . "shall be guilty of an offence of the like degree . . . and on "conviction thereof shall be liable to the same punishment as if "he himself had forged the document . . .

"(2) A person utters a forged document . . . who, knowing the "same to be forged, and with either of the intents necessary to "constitute the offence of forging the said document . . . uses, "offers, publishes, delivers, disposes of, . . . or puts off the said "forged document."

My Lords, the declared object of the Forgery Act, 1913, is "to "consolidate, simplify, and amend the Law relating to Forgery and "kindred Offences": and if its language were clear and unambiguous, it would not be right to embark upon a close consideration of previous authorities in order to ascertain its meaning: see *Bank of England* v. *Vagliano Brothers* [12] by Lord Herschell. But the more I consider the phrase "with intent to defraud" in this statute, the more doubtful do I find its import. It appears to be used in contrast to the phrase "with intent to deceive," but whilst I can see there may on occasion be a distinction between these two intents, I find it extremely difficult to say where the one intent ends and the other begins. Much valuable guidance is to be obtained from the dictum of Buckley J. in the *Whittaker Wright* case, *In re London and Globe Finance Corporation*,[13] but this has been criticised by modern scholars. It has even been hinted that it conceals within it the fallacy of the illegitimate antistrophe, which sounds, I must say, extremely serious. These scholars seem to think they have found the solution. "To defraud," they say, involves the idea of economic loss. I cannot agree with them on this. If a drug addict forges a doctor's prescription so as to enable him to get drugs from a chemist, he has, I should have thought, an intent to defraud, even though he intends to pay the chemist the full price and no one is a penny the worse off.

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[12] [1891] A.C. 107, 144, 145; 7 T.L.R. 333.

Seeing, therefore, that the words of the statute are of doubtful import, it is, I think, legitimate to turn for guidance to the previous state of the law before the Act. And here I would say at once that the phrase "with intent to defraud" has been the standard usage of lawyers in defining forgery for over 160 years. In 1796 all the judges of England laid down the definition of forgery as "the false making of a note or other instrument *with "intent to defraud*" (see *Rex* v. *Parkes and Brown*[14]); and ever since that time it has been held that the very essence of forgery is an *intent to defraud*, and it must be laid in the indictment (see East, Pleas of the Crown (1803), vol. 2, p. 988; Chitty, Criminal Law (1826), vol. 3, pp. 1039, 1042). I cannot help thinking that when Parliament in section 4 (1) of the Act of 1913 used a phrase so hallowed by usage, it used it in the sense in which it had been used by generations of lawyers. It was never by them confined to the causing of economic loss. Let me prove this by taking some examples: Take the case where a man forges a reference as to character, intending to get employment by means of it. It is clear forgery: see *Reg.* v. *Sharman*[15]; *Reg.* v. *Moah.*[16] But there may well be no economic loss intended. The man may intend, if he gets the job, to render full service in return for his wages. Or the post which he seeks may be unpaid, such as a justice of the peace. But he has the intent to defraud all the same.

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[13] [1903] 1 Ch. 728, 732.

[14] (1797) 2 Leach 775, 785.

[15] (1854) 1 Dears.C.C. 285.

[16] (1858) 7 Cox C.C. 503.

Take next the case where a servant steals his master's money and afterwards forges a receipt or other document so as to cover up his defalcations. This, too, is forgery: see *Rex* v. *Martin.*[17] He does not intend to deprive his master of anything: for he has already done that. He may not even do it so as to keep his job, because he may be under notice. What he really intends to do is to cover up his tracks so that he should not be found out. But he has the intent to defraud none the less.

Then there are the cases concerned with the release of prisoners. If a man forges an order or letter to the sheriff or to the governor of a prison, intending thereby to secure the release of a prisoner, he is guilty of forgery at common law: see *Fawcett's* case [18] and *Rex* v. *Harris.*[19] There is no idea of economic loss here. He has no intent to deprive the gaoler of any money or valuable thing. But at common law he is held to have an intent to defraud. Mr. Gardiner rather suggested that the reason for those decisions was that the documents were documents of a public nature. But I do not so read them. Even if they were public documents it was still essential that there should be an intent to defraud. Ever since *Ward's* case [20] in 1726 public and private documents were at common law on the same footing in this respect: see East's Pleas of the Crown, pp. 859–861. The forgery of any of them was a misdemeanour if done with intent to defraud, but not otherwise: see *Reg.* v. *Hodgson* [21] by Jervis C.J.

There remains the case of *Reg.* v. *Toshack,*[22] which is to my mind decisive. Toshack, a seaman, forged a certificate of good conduct so as to be admitted to sit for an examination for his master's certificate. He had no intention to deprive the examiners or Trinity House of any money or valuable thing. The piece of paper, value one penny, was not mentioned in the counts on which he was convicted. But he was held guilty of forgery. Alderson B. said: "It does amount to a very serious offence if "persons do forge certificates of this sort and are found to utter "them for the purpose of deceiving the Trinity House."

What is the common element in all these cases? It is, I think, best expressed in the definition given by East in his Pleas of the Crown, vol. 2, p. 852. He treats the subject, I think, better than any writer before or since: "To *forge*, (a metaphorical "expression borrowed from the occupation of the smith), means,

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[17] (1836) 1 Mood.C.C. 483.
[18] (1793) 2 East P.C. 862.
[19] 1 Mood.C.C. 393.
[20] 2 Ld.Raym. 1461; 3 Ld.Raym. 358; 2 Stra. 747.
[21] Dears. & B. 3, 8.
[22] 4 Cox C.C. 38, 41.

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"properly speaking, no more than to *make* or *form*: but in our "law it is always taken in an evil sense; and therefore Forgery "at common law denotes a *false* making (which includes every "alteration of or addition to a true instrument), a making malo "animo, of any written instrument for the purpose of fraud and "deceit. This definition results from all the authorities ancient "and modern taken together."

That was written in 1803, but it has been always accepted as authoritative. It seems to me to provide the key to the cases decided since it was written, as well as those before. The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to *the purpose of fraud and deceit.* Put shortly, "with intent to defraud" means "with "intent to practise a fraud" on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

At this point it becomes possible to point the contrast in the statute between an "intent to deceive" and an "intent to "defraud." "To deceive" here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction. Take the case of a private document. For instance, where a man fabricates a letter so as to puff himself up in the opinion of others. Bramwell B. put the instance: "If I were to produce a letter purporting to "be from the Duke of Wellington inviting me to dine, and say, "'See what a respectable person I am'": *Reg.* v. *Moah.*[23] There would then be an intent to deceive but it would not be punishable at common law or under the statute, because then it would not be done with intent to defraud. Take next the case of a public document. For instance, a parish register. If a man should falsify it so as to make himself appear to be descended of noble family, for the sake of his own glorification, he would not be guilty of an intent to defraud and would therefore not be punishable at common law (see *Reg.* v. *Hodgson*[24]), but he would have an intent to deceive and he would be punishable under the present statute, as indeed he was under its predecessors, such as the Forgery Act, 1861, s. 36.

So much for the principal point under discussion. Mr. Gerald Gardiner did make a further point. He said that the intent must be to defraud the particular person to whom the document is first

[23] 7 Cox C.C. 503, 504.

[24] Dears. & B. 3, 8.

presented or his agent, and that it was insufficient if he intended to defraud somebody else. This is not correct. It has long been ruled that it is no answer to a charge of forgery to say that there was no intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime. So also it is no answer to say that there was no intent to defraud the recipient, if there was intent to defraud somebody else: see *Rex* v. *Taylor.*[25]

In my judgment, section 4 (1) of the Forgery Act, 1913, only restates the requirements of the common law of forgery. The "intent to defraud" there mentioned is the same intent as was required by the common law. It is satisfactory to find that in the cases subsequent to the Act the courts have been giving it the same meaning as they did before (*Rex* v. *Bassey*[26] is particularly in point), and I am glad to find this confirmed by what my noble and learned friend, Lord Tucker, said in *Board of Trade* v. *Owen.*[27]

Applying this meaning to the present case, it appears that Welham on his own evidence had an intent to defraud, because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practise a fraud on whomsoever might be called upon to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud. I think the Common Serjeant was entitled to direct the jury as he did.

I find myself in entire agreement with the Court of Criminal Appeal, and I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, I agree that this appeal should be dismissed for the reasons which have been given by my noble and learned friends.

Appeal dismissed.

Solicitors: *Bellamy, Bestford & Co.; Director of Public Prosecutions.*

J. A. G.

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[25] (1779) 1 Leach 214.

[26] 47 T.L.R. 222.

[27] [1957] A.C. 602, 622.

[HOUSE OF LORDS.]

H. L. (E.)*

1960

Feb. 29; March 1, 2, 3, 7, 8, 9, 10; June 2.

SOCIEDAD FINANCIERA DE BIENES RAICES S.A. . . . . . . APPELLANTS;

AND

AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS, et è contra . . . . . RESPONDENTS.

[APPEAL IN THE AELLO.]

Shipping—Charterparty—Arrived ship—Ship awaiting cargo of maize compelled to wait in Buenos Aires roads—Ships excluded from the dock area unless cargo immediately available—Commercial area of port — Relevance of type of cargo — Roads not place where ships waiting delivery of grain usually lay—Whether roads within commercial area of port.

Shipping—Charterparty—Cargo, obligation of charterers to provide—Ship unable to become an arrived ship unless cargo immediately available—Liability of charterers for breach of contract—Whether charterers' breach matter of counterclaim or of defence.

By a port charterparty dated August 27, 1954, the steamship *Aello* was chartered to proceed as ordered by charterers to receive from them a cargo of wheat and/or maize and/or rye "at one or "two safe loading ports or places in the River Parana . . . and the "balance of the cargo in the port of Buenos Aires." The charterers had contracted with a Swiss firm to buy maize f.o.b. Argentine ports at sellers' option in accordance with an allocation received from a body called the Grain Board, and the Swiss firm in turn contracted to buy the maize from an Argentine state concern which controlled the sale and export of maize.

At the date of the charterparty the system of traffic control operated in the port of Buenos Aires did not permit vessels arriving to load maize to proceed beyond a point in the roads called the Free Anchorage—some 22 miles (three hours' steaming time) from the dock area—until they had obtained a "giro" or permit, which was issued by the customs authority on the ship's application only when the shipper had obtained from the Grain Board a certificate to the effect that cargo had been allocated. Once the giro had been obtained, the ship could proceed to the dock area, where vessels due to load grain usually lay, and wait there until a loading berth became available. At the relevant time supplies of maize were coming down to the port so slowly that by August, 1954, there was a congestion of vessels arriving to load maize. On September 1,

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* *Present*: LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

1954, to meet the temporary emergency, the port authority changed the previous system of traffic control by passing a resolution that, before a giro could be issued, not only must the Grain Board's certificate be obtained, but also a cargo ready to be loaded must be available.

The *Aello* arrived at the Free Anchorage on October 12, ready to proceed into the dock area; the shippers obtained the Grain Board's certificate on October 13; there was then no congestion in the dock area, but the charterers did not have a cargo of maize ready to be loaded until October 29. Accordingly, as a giro could not, under the terms of the resolution of September 1, be issued, the ship was compelled to wait at the Free Anchorage until October 29.

Though various operations were carried on in the roads, no loading or unloading of grain ever took place at the Free Anchorage.

The charterers, contending that the *Aello* was not an arrived ship until October 29, claimed, inter alia, the return of demurrage paid by them to the shipowners under protest. The shipowners by way of defence, or alternatively by way of counterclaim for damages for breach of contract, contended that, if the *Aello* was not an arrived ship on October 12, that was due to the charterers' breach of their absolute obligation to provide a cargo in time:—

Held, (1) (Lord Radcliffe and Lord Cohen dissenting) that the *Aello* was not an arrived ship until October 29, for when she was anchored in the roads she was not within the commercial area of the port, namely, that part of the port where a ship could be loaded when a berth was available; nor did the resolution of September 1 have the effect of extending the commercial area to embrace the Free Anchorage (post, pp. 188, 208, 209, 216).

Leonis Steamship Co. Ltd. v. *Rank Ltd.* [1908] 1 K.B. 499; 24 T.L.R. 128, C.A. applied.

(2) (Lord Keith of Avonholm dissenting) that where the provision of a cargo was necessary to enable the ship to perform its obligation of becoming an arrived ship, the charterers were under an absolute obligation to provide a cargo, or a reasonable part of it, in time to enable the ship to perform its obligation under the contract; and the charterers were not relieved of that obligation by showing that they had before October 29 taken all reasonable steps to provide a cargo (post, pp. 175, 182, 184, 209, 222).

Ardan Steamship Co. Ltd. v. *Andrew Weir & Co.* [1905] A.C. 501; 21 T.L.R. 723, H.L. applied.

(3) That the charterers' breach was a matter for counterclaim only (post, pp. 186, 209, 223).

Mackay v. *Dick* (1881) 6 App.Cas. 251 distinguished.

Decision of the Court of Appeal sub nom. *The Aello* [1958] 2 Q.B. 385; [1958] 3 W.L.R. 152; [1958] 2 All E.R. 695, C.A. affirmed.

APPEAL AND CROSS-APPEAL from the Court of Appeal (Lord Goddard C.J., Parker L.J. and Lloyd-Jacob J.).

This was an appeal and cross-appeal from an order of the Court of Appeal dated June 27, 1958, affirming a judgment of

Ashworth J. in the Queen's Bench Division (Commercial List) whereby it was adjudged that the respondents (plaintiffs in the action) should recover against the appellants (defendants in the action) the sum of £2,751 14s. 8d. on their claim, and that the appellants should recover against the respondents the sum of £2,726 14s. 8d. on their counterclaim, and that there should be no order as to the costs of the action.

On June 23, 1954, the respondents, who were an Hungarian state trading organisation responsible for the purchase of cereals required by the Hungarian Government, contracted with Bunge A.G. of Zurich for the purchase by the respondents of a quantity of Plate maize f.o.b. Argentine port or ports " at sellers' option " and in accordance with the allocation as received " from a body known as the Direccion Nacional De Granos y Elevadores Buenos Aires (" the Grain Board "). The respondents under the contract were to supply tonnage. Bunge y Born Limitada of Buenos Aires were named in that contract as shippers.

On August 5, 1954, Bunge A.G. through Bunge y Born Ltda. contracted to buy the maize from the Instituto Argentino De Promocion Del Intercambio, an Argentine state organisation having the monopoly of purchase from Argentine farmers and of sale for export (" I.A.P.I. "). The purchase was f.o.b. ports of the rivers not above San Lorenzo, completing in the port of Buenos Aires.

On August 27, 1954, the respondents, as charterers, entered into a charterparty in the " Centrocon " form with the appellants as shipowners for the charter of the appellants' vessel, *The Aello*, to carry the maize so purchased to Hamburg. So far as is material the charterparty provided as follows:

By clauses 2 and 3, that the vessel was to proceed as ordered by the respondents to one or two safe loading ports or places in the River Parana and there load part of a full and complete cargo of wheat and/or maize and/or rye in bulk, thereafter loading the balance of the cargo at Buenos Aires, Eva Peron (" La Plata ") or Montevideo.

By clause 13, that the vessel should be loaded at the rate of 500 tons per running day subject to certain exceptions, or demurrage to be paid at the rate of £200 per running day.

By clause 16, that dispatch money at the rate of £100 per day or pro rata should be paid by the appellants to the respondents for all time saved in loading.

By clause 33, that the master was to apply at loading ports to charterers or their agents for cargo, and steamer to be cleared at Custom House by Messrs. Agencia Maritima Sudocean S.R.L.

Pursuant to the respondents' orders the vessel loaded a part cargo at Rosario, loading being completed at that port at 6 p.m. on October 11, 1954. She was then ordered by or on behalf of the respondents to proceed to Buenos Aires and continue loading there. She accordingly proceeded to Buenos Aires and anchored in what is called the Free Anchorage in Buenos Aires roads at 1.30 p.m. on October 12, 1954, some 22 miles (three hours' steaming time) from the dock area of the port of Buenos Aires. Though various operations were carried on in the roads, no loading or unloading of grain ever took place at the anchorage. There she remained until October 29, 1954, on which day she proceeded to a berth in the inner harbour and was, by 2 p.m., ready to start loading there. Loading in fact started at 3.15 p.m. on that day, and was completed at 11.30 a.m. on November 6, 1954.

The respondents took the view that in the above circumstances they were entitled to the sum of £1,064 4s. 8d. (later reduced to £864 4s. 8d.) by way of dispatch money, whilst the appellants, on the other hand, contended that not only was nothing due from them to the respondents in respect of dispatch money, but that the respondents were liable to them in the sum of £1,887 10s. for demurrage in respect of the detention of the vessel beyond the permitted lay days. The appellants secured payment under protest from the respondents of the latter sum for demurrage shortly after the vessel sailed from Buenos Aires. Thereafter, the respondents brought the present action to recover the latter sum and also their claim for dispatch money, making a total claim of £2,751 14s. 8d. The appellants denied all liability to the respondents, but, in the alternative, counterclaimed £2,726 14s. 8d. The action was a test action, since a considerable number of other vessels were similarly delayed in loading at Buenos Aires in 1954, and the charterers and shipowners concerned wished the legal problems arising to be authoritatively settled.

At the hearing Ashworth J. gave judgment for the respondents on their claim, and for the appellants on their counterclaim. From this judgment both parties appealed to the Court of Appeal. The Court of Appeal affirmed the judgment of Ashworth J., but, as regards the claim, based their conclusion on different reasoning from that of the trial judge.

The major questions arising on the appeal and the cross-appeal were: (i) whether the vessel was, so far as her position was concerned, an "arrived" ship when she anchored in Buenos Aires roads; (ii) if she were, whether lay time nevertheless did not then begin to run because the vessel was not at that time ready to load in that she did not then have (a) a police permit, (b) a "giro" or berthing permit; (iii) whether on October 12, 1954, the vessel must be deemed an "arrived ship" and ready to load because she could go no further, and could not obtain a giro by reason of the respondents' failure to have any cargo available to load on board her on her arrival in Buenos Aires roads; (iv) whether the respondents were in breach of contract in not having any cargo available to load as aforesaid, there then being ample berth space empty in which the vessel could have loaded.

At the hearing before Ashworth J. the parties made certain written admissions of fact. At the hearing before the Court of Appeal the parties made further or amended admissions of fact. The following is a summary of the matters giving rise to the present dispute.

The respondents desired to employ the vessel for the purpose of carrying maize. The sale and export of maize from the Argentine was at all material times controlled by official bodies. That concerned with the sale of maize was I.A.P.I.; that concerned with its export was the Grain Board. When the vessel arrived in Buenos Aires roads supplies of maize were coming forward too slowly or in insufficient quantities to enable all vessels waiting to load maize to do so without delay. The sales of maize which had been made by I.A.P.I. were such that the requirements of vessels waiting to load such maize exceeded the supplies available at any given time. The loading of maize was carried out in the inner harbour of Buenos Aires at elevator berths or from lighters. By September 1, 1954, the number of vessels in the inner harbour waiting to proceed to a loading spot for the purpose of loading maize had become such that by a resolution of that date the port authorities ordered that thenceforth all vessels for which a cargo of maize was not available should wait in the roads, taking their turn, or order of precedence, for loading at a maize berth in the inner harbour from the time of their arrival in the roads. No such vessel would be allowed to proceed to a berth until she was given a "giro" or berthing permit. No giro could be obtained until (a) the proposed shippers of the maize had obtained a certificate from the Grain Board certifying that this body had allotted a parcel of grain for loading on the vessel (this was obtained in respect of the *Aello* on October 13, 1954), and (b) (at all material times after September 1, 1954) a cargo was available for her. Bunge y Born Ltda. (the proposed shippers of maize on board the vessel) and Agencia Maritima Sudocean S.R.L. at all material times knew these facts. The respondents did not have available at Buenos Aires any completion cargo for the vessel before October 29, 1954. It was admitted that the respondents had done everything they possibly could to procure a cargo. As soon as such completion cargo was available a giro was obtained and the vessel moved from the roads to a berth in the inner harbour. At all material times there were empty loading berths available in the inner harbour.

A. A. Mocatta Q.C. and *R. A. MacCrindle* for the appellants, the shipowners. This appeal raises two major questions of principle: (a) when is a ship an " arrived " ship? (b) Is a charterer under an absolute liability to have a cargo available? The following points fall to be determined: (i) Had the *Aello* when she anchored in the roads " arrived " within the legal, administrative and fiscal limits of the port of Buenos Aires? (ii) Was she then in so far as her position was concerned an " arrived " ship? (iii) Was she then ready in the absence of a police permit? (iv) Was she then ready in the absence of a giro? (v) Were the charterers in breach of contract in not having sufficient cargo available on the ship's arrival at the Free Anchorage to enable her to get a berth? (vi) If the answer to question (v) is in the affirmative, can the owners rely on it by way of defence and say that the *Aello* must be deemed to be an arrived ship?

The appellants rely on the following propositions: (1) Under a port charter (as here) when no notice of readiness has to be given (as here), the vessel is an arrived ship so far as her position is concerned (and the lay days commence) if (a) the ship satisfies these four tests: (i) she is somewhere within the legal, administrative and fiscal limits of the port; (ii) where the master can effectively dispose her to the charterer; (iii) as near as circumstances permit to the actual loading spot: (iv) at a place where ships waiting for access to that spot usually lie: *per* Kennedy L.J. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[1]; (b) she is in fact so far as she is concerned ready to load. (2) There are two corollaries to (1) (a): the spot at which the ship is lying need not be a spot or place at which it is possible or usual to load or discharge, and, further, the distance from the actual loading spot is immaterial. (3) The phrase " loading or " discharging area " or the phrase " part of the port where load- " ing takes place " is insufficiently precise to be useful as a test and it blurs the distinction between a port charter, on the one hand, and a dock or berth charter, on the other. (4) On the facts here, the *Aello* was, as found by Ashworth J., at anchor within the legal, administrative and fiscal limits of the port of Buenos Aires. (5) On the facts, she satisfied the tests in (1) (a) (i) to (iv). (6) As regards (1) (b), that is, the readiness of the ship, a ship is ready notwithstanding that she may still have to do something before loading can begin, provided that that something, on the facts, is a mere formality, for example, the obtaining of a police permit. (7) The absence of a giro does not affect the readiness of a ship and cannot prevent the *Aello* from being arrived, because its absence meant that no berth was available for her, and non-availability of a berth is not relevant in relation to a port charterparty in considering when lay days start. (8) In the alternative, it is submitted, as was held by the trial judge and the Court of Appeal, that the charterers were in breach of the absolute duty to have sufficient cargo available to enable the ship to get a berth or giro and, therefore, the appellants are entitled to say that the ship must be deemed to be an arrived ship. (9) Alternatively, the trial judge and the Court of Appeal were right in applying *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[2] and the appellants are entitled to succeed on their counterclaim.

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[1] [1908] 1 K.B. 499, 521; 24 T.L.R. 128, C.A.

In *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[3] both Buckley and Kennedy L.JJ. were agreed on the distinction between port and berth charters, and that distinction is not challenged in the present case, indeed, it is important not to blur the distinction between them as was done in the Court of Appeal here. That decision has been the subject of much comment in subsequent cases, only one of which was a decision of the House of Lords. It is open to this House to give a definition of "arrived ship," and any such definition should be of a practical nature and take notice of the fact that the tendency is for ships to increase in size and, consequently, that it is becoming more and more difficult for them to reach a waiting area in the same vicinity as the actual loading spot.

If a ship is unable to get within the legal limits of the port it is conceded that it is not an arrived ship. The commercial area of a port is an area within the legal limits of the port although it may not be coincident. But where, as here, the ship is within the legal limits of the port, and within the administrative limits as regards control, and she waits her turn for a berth pursuant to such control, she is an "arrived ship" within Kennedy L.J.'s test.[4]

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[2] [1905] A.C. 501; 21 T.L.R. 723, H.L.

[3] [1908] 1 K.B. 499.

The Court of Appeal's definition of the commercial area as "that part of the port where a ship can be loaded when a berth is "available, albeit she cannot be loaded until a berth is available" is not consonant with the earlier authorities and is indefinite in its application: see, in particular, *Pyman Bros.* v. *Dreyfus Bros. & Co.*,[5] which illustrates the difficulties to which the Court of Appeal's decision would lead, and *Sailing-ship "Garston"* v. *Hickie & Co.*,[6] which, unless it be held wrongly decided, covers the present case. The *Garston* case[7] which was an action to recover freight, is of importance for three reasons: (a) it arose under a charterparty; (b) the Court of Appeal purported to construe the word "port" in a commercial sense; (c) it cannot be distinguished merely on the ground of the use of the word "last" port in the charter. It is to be observed that in defining the extent of a "port" in the business sense great stress was laid on the element of safety to protect both ship and goods and, in regard to the place of loading and unloading, the degree of control exercised by the port authorities: see also *Hunter* v. *Northern Marine Insurance Co.*[8] *Hudson's Bay Company* v. *Domingo Mumbru Societa Anonyma*[9] is distinguishable from the present case for the reasons given by Ashworth J.[10] Further, the Court of Appeal's view that the vessel must be in a loading area is contrary to the views expressed in *Van Nievelt Goudrian & Co. Stoomvaart Maatschappij* v. *C. H. Forslind & Son Ltd.*[11] [Reference was also made to *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[12]; *Kokusai Kisen Kabushiki Kaisha* v. *Flack & Son*[13]; *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[14]; *Nelson* v. *Dahl.*[15]] Compare the changing statements on "commercial area" in Scrutton on Charterparties, 11th ed., pp. 135, 136; 12th ed., p. 137; 16th ed., p. 141, on what constitutes an "arrived" ship; see also Carver's Carriage of Goods by Sea, 10th ed., p. 864.

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[4] [1908] 1 K.B. 499, 521.

[5] (1889) 24 Q.B.D. 152.

[6] (1885) 15 Q.B.D. 580, C.A.

[7] Ibid.

[8] (1888) 13 App.Cas. 717, 724, 726, 729, 731, 733, 738, 739.

[9] (1922) 10 Ll.L.Rep. 476, C.A.

[10] [1957] 1 W.L.R. 1228, 1237, 1238.

[11] (1925) 30 Com.Cas. 263; 41 T.L.R. 481; 22 Ll.L.Rep. 49, C.A.

[12] [1917] 2 K.B. 204, C.A.

[13] (1922) 10 Ll.L.Rep. 635.

[14] (1924) 30 Com.Cas. 210; 21 Ll.L.Rep. 173, C.A.; affirmed [1926] A.C. 545; 42 T.L.R. 556, H.L.

[15] (1879) 12 Ch.D. 568, C.A.; affirmed sub nom. *Dahl* v. *Nelson Donkin & Co.* (1881) 6 App.Cas. 38, H.L.

Kennedy L.J.'s judgment in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[16] has always been considered the leading judgment, and the present appellants come within it. They are also within Buckley L.J.'s "true proposition,"[17] but his subsequent propinquity test differs substantially from Kennedy L.J.'s definition of the commercial area and is not supported by the authorities, in particular, *Nelson* v. *Dahl.*[18] This latter test was, in effect, adopted by the Court of Appeal in the present case, but, as stated above, it leads to considerable difficulties in practice and blurs the distinction between port and berth charters.

In the alternative, the "commercial area" of a port has no fixed limits but is to be ascertained at the date when the ship gets to port. It is very artificial to say that on August 27, 1954, the date of the signing of the charterparty, the parties had in mind as the commercial area the then limits of the half-a-dozen ports to which this ship could be ordered by the charterers. The Free Anchorage was always part of the commercial area. If this contention be rejected then it is submitted that it became part of it after the resolution of September 1, 1954, so far as regards maize-carrying ships, for then such ships, on reaching it, became arrived ships, since they were "at that anchorage in the area "within which, according to the evidence, steamers usually lie "awaiting their turn at the pier": *per* Kennedy L.J.[19] The only possible ground in law which could be brought against this contention is in relation to the word "usually" in the above definition. This must mean "usually at the time the ship gets "there." In construing a charterparty regard must be paid to the conditions existing when the vessel reaches port, and not at the time when the contract was entered into.

As regards the readiness of the ship to load, the *Aello* was not, for the reasons stated in propositions (6) and (7) above, prevented from being an arrived ship by the absence of (a) a giro, and (b) a police permit. As to the absence of a giro, Ashworth J.'s decision is in the teeth of *Pyman* v. *Dreyfus*,[20] where a vessel was held to have arrived though she was refused permission to berth by the harbourmaster. Once a ship is in a proper position the absence of a berthing permit or any certificate of any kind which does not relate to the ship's physical condition cannot have any relevance to the question of the ship's readiness to load.

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[16] [1908] 1 K.B. 499.

[17] Ibid. 512.

[18] 12 Ch.D. 568.

[19] [1908] 1 K.B. 499, 527.

[20] 24 Q.B.D. 152.

As regards proposition (8), reliance is placed on *Mackay* v. *Dick.*[21] Proposition (9) does not call for elaboration at this stage.

Eustace Roskill Q.C. and *John Donaldson* for the respondents, the charterers. In 1908 shipowners won a great victory over charterers by the decision in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[22] that where the place named in a charterparty as the place of loading is a port or other wide district, lay time begins when the ship arrives in the commercial area of the port. That decision[23] settled a conflicting welter of authorities and for the next 50 years no attempt was made to carry it a step farther. Now it is attempted to throw upon charterers the risk of delay arising from the action of a port authority in excluding a ship from the loading area of the port. No authority has been cited to support so broad a proposition and the appellants have been constrained to stretch the language of Kennedy L.J. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[24] beyond its due limits.

It is submitted that the roads of Buenos Aires never formed part of the port of Buenos Aires at any time, whether before or after September 1, 1954. The respondents further submit that if they are right as regards the position before September, 1954, then, the resolution of September 1, 1954, so far from extending the commercial area of the port, in fact operated to prevent vessels waiting to load maize from entering the commercial area of the port. If the appellants' contention were correct it would have been sufficient for the Court of Appeal in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[25] to have defined the commercial area as the waiting area of the port as determined from time to time. But that conception is quite contrary to Buckley L.J.'s judgment. It is plain from the earlier editions of Scrutton on Charterparties, that is, those editions by the author himself, that he had no doubt what the Court of Appeal meant by the phrase "commercial area of the port": see 11th ed., p. 136, where he cites from the judgment of Kennedy L.J. and not from that of Buckley L.J., but there is no suggestion that the two Lords Justices differed in their interpretation on this question. The concept of a fluctuating commercial area varying from day to day at the whim of the port authority is inconsistent with the true ratio decidendi of *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[26] and the subsequent decisions founded on it. This point is separate from any question which arises in relation to the decision in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[27] and it is also completely separate from the question whether the roads are within the legal, administrative and fiscal limits of the port of Buenos Aires.

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[21] (1881) 6 App.Cas. 251.
[22] [1908] 1 K.B. 499.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

On the assumption that the roads were at all times within the legal, administrative and fiscal limits of the port of Buenos Aires, what was the commercial area of the port? In the words of Parker L.J.[28] it "was intended to be that part of the port where "a ship can be loaded when a berth is available, albeit she cannot "be loaded until a berth is available." The appellants contend that that definition is not supported by any of the authorities, but it is to be observed that it is very similar to a passage in Scrutton on Charterparties, 11th ed., p. 136. Further, as Parker L.J. said,[29] "If the argument on behalf of the shipowners is "correct, it would have been sufficient in the *Leonis* case[29] to "define the commercial area as that area within the fiscal, legal "and administrative limits of the port which embraced any place "beyond which ships could not proceed without some steps being "taken by the shipper." It would also have been sufficient to define the commercial area as any area where ships have to wait provided that it is within the legal limits of the port, but Buckley L.J.[30] was at pains to define the commercial area as the "loading "place," and he uses that phrase as a term of art; any conception of the commercial area as a waiting place is quite inconsistent with a reference to the "loading place," assuming that that is different from the "actual spot" of loading.

Under a port charter, before a ship can qualify as an arrived ship, she must be waiting at that part of the port where the loading or discharging of the class of cargo in question takes place, though she need not be in the precise spot where she can load or discharge. That definition is supported by the judgment of Buckley L.J. and, inferentially, by that of Kennedy L.J. in the *Leonis* case,[31] and it follows therefrom that the requirement of arrival in such a place can never be satisfied by the vessel being in an anchorage some 20 miles away from the point of discharge or the area of discharge, even though (a) that anchorage is within the legal, fiscal and administrative limits of the port; and (b) at the time of anchoring ships of the class in question may be using it as a waiting place on the direction of the port authorities.

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[27] [1905] A.C. 501.

[28] [1958] 2 Q.B. 385, 401.

[29] Ibid. 402.

[30] [1908] 1 K.B. 499, 513.

[31] [1908] 1 K.B. 499.

Further, in ascertaining whether a particular area is the place of discharge or the commercial area, it is irrelevant whether or not other operations, albeit of a commercial character, take place in the anchorage in question. The undoubted fact that Buenos Aires roads are used for lighterage by vessels proceeding to the up-river ports and for the discharge of cargoes of explosives is irrelevant in considering whether the roads are within the commercial area for ships proceeding to Buenos Aires to load maize or, indeed, any other class of goods. It is, therefore, the respondents' submission that at all times before and after September 1, 1954, the commercial area of the port of Buenos Aires was the dock area. The effect of the resolution of September 1, 1954, was not to extend the commercial area but to exclude the appellants' ship from the dock area.

The basis of the *Leonis* case [31] is delimitation, not extension. The law is correctly stated in Scrutton on Charterparties, 11th ed., p. 136, that for a ship to be " arrived " " she must have got " to that port, or some part of the port, in which the loading of " vessels does take place." The alterations in that passage made in the 16th edition of Scrutton, p. 141, are wrong. It is accepted that the judgment of Kennedy L.J. is the leading judgment, but the differences between it and Buckley L.J.'s judgment are merely matters of phraseology and not of substance: see *per* Parker L.J.[32] The above definition is consonant with a number of authorities: *Hudson's Bay Co.* v. *Domingo Mumbru Sociedad Anonima* [33]; *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[34]; *Kokusai Kisen Kabushiki Kaisha* v. *Flack & Son* [35]; *Van Nievelt Goudrian & Co. Stoomvaart Maatschappij* v. *C. H. Forslind & Son Ltd.*[36]; *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[37]; *Lewis* v. *Louis Dreyfus & Co.*[38]

The " *K. K. K. K.*" case [39] is a classic example of the application of the true principle to be deduced from the *Leonis* case,[40] namely, to ascertain if the ship has " arrived " first discover the commercial area of the port, and if the ship is in the right part of it lay time begins to run. There the charter provided that the vessel should sail to Delagoa Bay. The Court of Appeal struck out references to " dock " in the charter as there were no docks in

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[31] [1908] 1 K.B. 499.

[32] [1958] 2 Q.B. 385, 401.

[33] (1921) 9 Ll.L.Rep. 196; affirmed (1922) 10 Ll.L.Rep. 476, C.A.

[34] [1917] 2 K.B. 204.

[35] (1922) 10 Ll.L.Rep. 635.

[36] 30 Com.Cas. 263; 41 T.L.R. 481; 22 Ll.L.Rep. 49.

[37] [1926] A.C. 545.

[38] (1926) 31 Com.Cas. 239, C.A.

[39] 10 Ll.L.Rep. 635.

[40] [1908] 1 K.B. 499.

Delagoa Bay, and treated the charter simply as one for the ship to go to Delagoa Bay. The Court of Appeal, applying the *Leonis* case,[41] held that lay time commenced when the ship began to wait in Delagoa Bay. But it is not an authority that ipso facto lay time begins to run from the moment the ship starts to wait. The use of the words "waiting place" adds nothing to the rule in the *Leonis* case.[42] Similarly, the use of the phrase "waiting "to load" in the *Van Nievelt* case,[43] which is in line with the "*K. K. K. K.*" case,[44] adds nothing to the principle, and that decision[45] is not authority for the proposition that if the ship cannot get inside the port to load the commercial area extends to any area where the ship is obliged to wait. The authorities draw no distinction between cases where the ship cannot get into port because of congestion or obstruction; such factors cannot extend the commercial area of the port. If, however, the port authorities create by regulation a new waiting area where ships may load or discharge, then the commercial area would have been validly extended in law. In *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.*[46] Sellers J. rejected the alternative argument of the shipowners that the ship had "arrived" because she had got as far as she could.

As to the old cases, *Brereton* v. *Chapman*,[47] *Brown* v. *Johnson*[48] and *Kell* v. *Anderson*,[49] were all expressly approved in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[50] Kennedy L.J.[51] plainly regarded *Brown* v. *Johnson*[52] and *Kell* v. *Anderson*[53] as limiting the breadth of Lord Esher's observations in *Sailing-Ship Garston Co.* v. *Hickie, Borman & Co.*[54] If Kennedy L.J. had meant "waiting" simpliciter to be the sole criterion of an "arrived" ship he would not have approved of *Kell* v. *Anderson*[55] in the terms in which he did. The appellants cannot get more out of the *Garston* case[56] than the way in which it was interpreted in the *Leonis* case.[57] The question was: had the *Garston* at the moment of the collision "sailed" from Cardiff? In the present case, if the *Aello* on leaving Buenos Aires had suffered a collision in the roads, it could not possibly be said that she had not left the port of Buenos Aires. *Hunter* v. *Northern Marine Insurance* Co.[58] is plainly distinguishable for there the question at issue arose under a policy of marine insurance. As to *Nelson* v. *Dahl*,[59] the respondents adopt Buckley L.J.'s observations thereon.[60]

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[41] [1908] 1 K.B. 499.
[42] Ibid.
[43] 30 Com.Cas. 263.
[44] 10 Ll.L.Rep. 635.
[45] 30 Com.Cas. 263.
[46] [1957] 1 Q.B. 109, 113, 114, 120; [1956] 3 W.L.R. 620; [1956] 3 All E.R. 383.
[47] (1831) 7 Bing. 559.
[48] (1842) 10 M. & W. 331.
[49] Ibid. 498.
[50] [1908] 1 K.B. 499.
[51] Ibid. 519–521.
[52] 10 M. & W. 331.
[53] Ibid. 498.
[54] 15 Q.B.D. 580, 587.
[55] 10 M. & W. 498.
[56] 15 Q.B.D. 580.
[57] [1908] 1 K.B. 499.

To summarise the "arrived ship" argument: to accept the appellants' argument is tantamount to holding that Buckley L.J. was wrong, and that Kennedy L.J. meant something different than what appears on the face of his judgment, and it also involves holding that *Kell* v. *Anderson*[61] was wrongly decided. Parker L.J.'s judgment[62] correctly states the law on this issue.

On the question of the absence of a giro and a police permit, in both cases it is not the ship's physical readiness to load which is material, but whether she was ready for "legal loading": see Scrutton on Charterparties, 16th ed., art. 41, p. 147; *The Austin Friars*[63]; *White* v. *Winchester S.S. Co.*[64] *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[65] is distinguishable. Until she had obtained a giro and a police permit the *Aello* was legally disqualified from loading and, therefore, she was not an "arrived ship." It appears from the evidence that ships using South American ports are not accepted as entering the harbour and are not free to communicate with the shore until a police permit has been obtained. In these circumstances, a ship is not ready to load until a police permit has been obtained. Similarly, a ship cannot be said to have arrived and to be ready for loading until a berthing permit has been obtained, for such a permit is the key which unlocks the legal door of entry into the port: Ashworth J.'s judgment[66] is adopted on this point.

On the question of the legal limits of the port of Buenos Aires, the appellants concede that the commercial area is within the legal, fiscal and administrative limits of the port. But it is the respondents' submission that the legal, fiscal and administrative limits of the port do not extend beyond the dock area, which is co-extensive with the commercial area of the port. The roads form part of a much larger unit than the port of Buenos Aires, namely, part of the joint port of Buenos Aires and La Plata, and the anchorages form part of that joint port. Accordingly, a ship anchored in the roads is not within the legal, fiscal and administrative limits of the port of Buenos Aires.

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[58] 13 App.Cas. 717.
[59] 12 Ch.D. 568.
[60] [1908] 1 K.B. 499, 511.
[61] 10 M. & W. 498.
[62] [1958] 2 Q.B. 385, 400–402.
[63] (1894) 10 T.L.R. 633.
[64] (1886) 13 R. 524; 23 Sc.L.R. 342.
[65] [1917] 2 K.B. 204.
[66] [1957] 1 W.L.R. 1228, 1241, 1242.

The cross-appeal.

Both Ashworth J. and the Court of Appeal felt themselves bound by the decision of this House in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[67] to hold that the respondents were in breach of charter in that they failed to have a cargo available not later than October 12, 1954, by reason whereof a giro was not then available and the vessel was delayed in Buenos Aires Roads. It was admitted that the respondents and their agents did everything reasonable to procure a completion cargo, a cargo certificate and a giro, and left nothing undone to attain these objectives. If, therefore, the respondents' duty was to act reasonably, that duty was admittedly discharged. It is submitted that that is the extent of the duty laid upon the respondents in the circumstances for the reasons given by Greer J. in *Vergottis* v. *William Cory & Son Ltd.*,[68] which is right in law, and that *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[69] is not a decision to the contrary, and that the view which Ashworth J. and the Court of Appeal felt reluctantly constrained to adopt is not the law of either England or Scotland.

The following nine propositions are put forward in an endeavour to reconcile the decisions given in six cases between 1895 and 1905 (when the decision in *Ardan* v. *Weir* [70] was given) which have caused great difficulty:

(1) Unless protected by exception a charterer is under an absolute duty to provide cargo: *Postlethwaite* v. *Freeland*,[71] *per* Lord Blackburn.

(2) Where the charterparty calls for loading in fixed lay time the charterer, unless protected by exception, is under an absolute and unconditional obligation to load in that lay time: *Postlethwaite* v. *Freeland*,[72] *per* Lord Selborne L.C.

(3) Where the charterparty does not call for loading in a fixed lay time a charterer is under an obligation to load in a reasonable time: *Postlethwaite* v. *Freeland*,[73] *per* Lord Selborne L.C.

(4) As a corollary to (1), (2), (3), above, a charterer, unless protected by exception, must provide the cargo so that it can be loaded in the lay time. Where, therefore, the arrival of the ship

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[67] [1905] A.C. 501; 21 T.L.R. 723, H.L.

[68] [1926] 2 K.B. 344, 354, 355.

[69] [1905] A.C. 501.

[70] Ibid.

[71] (1880) 5 App.Cas. 599, 619.

[72] Ibid. 608.

[73] Ibid.

and the commencement of lay time does not depend on any antecedent act of the charterer, the ship is not concerned with whether cargo is available on or before arrival. The charterer's only duty being to provide cargo so that it can be loaded in the lay time: *Vergottis* v. *William Cory & Son Ltd.*[74]

(5) If, however, the arrival of the ship or the commencement of lay time is dependent upon some antecedent act of the charterer, the charterer is under a duty to co-operate with the owner so far as it lies in the charterer's power to enable the ship to arrive and lay time to commence. For the basic rule: see *Mackay* v. *Dick*[75]; *Little* v. *Stevenson & Co.*,[76] *per* Lord Herschell; *Vergottis* v. *William Cory & Son Ltd.*[77]; *Hogarth* v. *Cory Brothers & Co. Ltd.*[78]

(6) The only cases in which a charterer can be held to be under a higher duty than to do what is reasonable are where special circumstances existed at the date of the charterparty, which have led the court to construe the charterparty as imposing upon the charterer an absolute duty to provide the cargo at such time as will enable the ship to obtain a berth either (a) in the ordinary turn of the port (see *Lilly & Co.* v. *D. M. Stevenson & Co.*[79]), or (b) out of the ordinary turn of the port where the possibility of loading out of turn was foreseeable at the date of the charterparty (see *Krog & Co.* v. *Burns & Lindemann*[80]). In each of those two cases the charterer's duty was held to be to provide cargo in sufficient time to load, in the first case, in turn, and in the second case, out of turn.

(7) A charterer's duty to have cargo available at such time as will enable the ship to berth in ordinary turn of the port is qualified where both parties have contracted upon the footing that cargo will be provided from a particular source, in which case the duty of the charterer is to provide cargo in such time as will enable the ship to berth in ordinary turn for cargo from that source. In other words, "colliery turn" is superimposed on the ordinary turn of the port: *Jones Ltd.* v. *Green & Co.*[81]

(8) A charterer is never obliged to have cargo available to enable a ship to berth in the event of a chance or unforeseen vacancy occurring at the berth unless that chance vacancy is foreseeable: *Little* v. *Stevenson & Co.*[82]

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[74] [1926] 2 K.B. 344.
[75] (1881) 6 App.Cas. 251.
[76] [1896] A.C. 108, 118, 119, H.L.
[77] [1926] 2 K.B. 344.
[78] (1926) 32 Com.Cas. 174.
[79] (1895) 22 R. 278.
[80] (1903) 5 F. 1189.
[81] [1904] 2 K.B. 275, C.A.
[82] [1896] A.C. 108.

(9) *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[83] properly analysed, is an illustration of a charterer's absolute duty to provide the cargo within such time as will enable the cargo to be loaded in the lay time, which in that case was a "reasonable "time." In other words, it is an illustration of proposition (3) above.

It is emphasised that the claim in *Ardan* v. *Weir*[84] was one for damages for detention under a charterparty calling for loading in a reasonable time, and the striking fact is that the period of detention for which damages were recovered only began on the expiration of the reasonable time. It was not a claim, either as pleaded or as argued, for wrongfully preventing lay time from beginning. It appears to have been accepted that the ship had arrived and was in the right place for lay time to have begun. It is to be remembered that that case[85] was decided before the "arrived ship" cases were crystallised in *Leonis* v. *Rank*.[86] It is to be observed that *Ardan* v. *Weir*[87] concerned a berth charterparty, and damages were awarded not for the detention of the ship for the first 31 days before she could become arrived, but for the last 31 days after the expiry of the "reasonable time" (10 days) allowed for loading. The decision is therefore not an authority for the proposition that a charterer is under an absolute obligation to provide cargo immediately the ship reaches port. Gloag on the Law of Contract, 2nd ed., p. 346, treats *Ardan* v. *Weir*[88] as a decision on a ship which had already arrived.

As to the propositions stated above, the first four are common ground. Proposition (5) states the basic rule. The present case comes within *Mackay* v. *Dick*,[89] since in the circumstances the respondents did all that it was in their power to do. Reliance is also placed on *Little* v. *Stevenson & Co.*,[90] in which, it is to be noted, *Lilly & Co.* v. *D. M. Stevenson & Co.*,[91] although cited in argument by both parties, was not referred to in the judgments. It is submitted that Greer J. decided *Vergottis* v. *William Cory & Son Ltd.*[92] in accordance with the basic rule, but that he declined to decide it on the *Ardan* v. *Weir*[93] ground. [Reference was made to *Hogarth* v. *Cory Brothers & Co. Ltd.*[94] and *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel Bros. & Co.*[95]]

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[83] [1905] A.C. 501.
[84] Ibid.
[85] Ibid.
[86] [1908] 1 K.B. 499.
[87] [1905] A.C. 501.
[88] Ibid.
[89] 6 App.Cas. 251, 263, 270.
[90] [1896] A.C. 108, 112, 113, 116, 118, 119.
[91] 22 R. 278.
[92] [1926] 2 K.B. 344.
[93] [1905] A.C. 501.
[94] 32 Com.Cas. 174.
[95] [1891] 2 Q.B. 647, C.A.

As to proposition (6), *Krog & Co.* v. *Burns & Lindemann*[96] is exceedingly difficult to reconcile with *Jones Ltd.* v. *Green & Co.*[97] unless treated as above as fitting into a general pattern. *Lilly & Co.* v. *D. M. Stevenson & Co.*[98] was based on the construction of the particular charter in question, for otherwise it is a very far-reaching decision; the ambit of the decision is correctly stated in Carver's Carriage of Goods by Sea, 10th ed., p. 431. [Reference was also made to Scrutton on Charterparties, 12th ed., p. 146; 16th ed., p. 152.]

As to proposition (7), *Jones Ltd.* v. *Green & Co.*[99] is very difficult to reconcile with *Lilly & Co.* v. *D. M. Stevenson & Co.*,[100] but those decisions can be reconciled on the basis that *Lilly* v. *Stevenson*[101] was decided against a background of common knowledge and *Jones* v. *Green*[102] against a background of custom.

Proposition (8) requires no elaboration.

As to (9), it is submitted: (i) *Ardan* v. *Weir*[103] does not state in terms that a charterer must always have the cargo available before the ship arrives outside the port, and there is no case which goes so far as to so hold. (ii) It goes no further than to say that a charterer's duty, when it arises, is to have the cargo available so as to enable the ship to load in the ordinary course. The *Ardandearg* did not load in the ordinary course. The *Aello*, however, did so load at Buenos Aires. (iii) A consideration of *Mackay* v. *Dick*[104] and *Little* v. *Stevenson & Co.*[105] on the one hand, and *Ardan* v. *Weir*[106] on the other, shows that *Ardan* v. *Weir*[107] cannot be held to be an authority for requiring the charterer to do more than that which is reasonable so as to enable the ship to arrive.

Ardan v. *Weir*[108] is distinguishable, and it is not a decision which obliges the House to decide the cross-appeal against the respondents. As Parker L.J. observed[109]: " There is no case in " which it has been held that a cargo must be ready to enable a " ship to get into the commercial area." Scrutton L.J.'s observations in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[110] and

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[96] 5 F. 1189.
[97] [1904] 2 K.B. 275.
[98] 22 R. 278.
[99] [1904] 2 K.B. 275.
[100] 22 R. 278.
[101] Ibid.
[102] [1904] 2 K.B. 275.
[103] [1905] A.C. 501.
[104] 6 App.Cas. 251.
[105] [1896] A.C. 108.
[106] [1905] A.C. 501.
[107] Ibid.
[108] Ibid.
[109] [1958] 2 Q.B. 385, 404.
[110] [1917] 2 K.B. 193, 202, C.A.

Einar Bugge A/S v. *W. H. Bowater Ltd.*[111] support the proposition that *Ardan* v. *Weir*[112] should be treated as a case decided on its own special facts. Taking it at its worst against the respondents, it is no more than a decision that a charterer must have his cargo ready to load in turn, and in the present case the *Aello did* load in turn as a maize ship.

Finally, if it be held that the authorities cannot be reconciled as outlined above, then the House is invited to hold that *Lilly & Co.* v. *D. M. Stevenson*[113] and *Krog & Co.* v. *Burns & Lindemann*[114] were wrongly decided. *Krog*[115] is exceedingly difficult to reconcile with *Little* v. *Stevenson & Co.*[116] The basic rule is that outlined in proposition (5). *Ardan* v. *Weir*[117] is *not* a case where to meet an emergency a measure of traffic control was suddenly introduced by the local port authority. If necessary, the House is invited to hold, applying the principle in *Jones Ltd.* v. *Green & Co.*,[118] that if shipowners and charterers agree that the ship should go to a particular port, then the parties must take that port as they find it when the ship gets there. The giro system was in force in its original form at the date of this charter. The system *as such* was not altered after the date of the charter, but only its application, and that circumstance is not covered by *Ardan* v. *Weir.*[119]

Mocatta Q.C. in reply. There are four questions for consideration: (1) Was the *Aello* within the legal, fiscal and administrative limits of the port of Buenos Aires when she was in the anchorage in the roads? (2) Was she then " arrived " so far as her position was concerned? (3) Was she " ready," apart from the question of her position? This involves consideration of the effect of the absence of (a) a police permit, (b) a giro. (4) The cross-appeal.

(1) This depends primarily on Argentine law. It may be that where the *Aello* anchored was within the legal, fiscal and administrative limits of both the ports of Buenos Aires and La Plata, but, if so, that does not affect the submission that the ship was within the legal, fiscal and administrative limits of the port of Buenos Aires. All the evidence treats the roads as part of the port of Buenos Aires. *Hunter* v. *Northern Marine Insurance Co. Ltd.*[120] is plainly distinguishable on its facts. *Hudson's Bay Co.*

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[111] (1925) 31 Com.Cas. 1, 8, 9, C.A.
[112] [1905] A.C. 501.
[113] 22 R. 278.
[114] 5 F. 1189.
[115] Ibid.
[116] [1896] A.C. 108.
[117] [1905] A.C. 501.
[118] [1904] 2 K.B. 275.
[119] [1905] A.C. 501.
[120] 13 App.Cas. 717.

v. *Domingo Mumbru Sociedad Anonima*[121] is distinguishable for the reasons given by Ashworth J.[122]

(2) The peculiar feature of the present case is that the ship was kept out of port although there was ample room for ships inside the port. It is submitted: (i) That under a port charter the vessel must reach the port but not the dock or berth before the lay days commence to run. (ii) The ship must be within the legal, fiscal and administrative limits of the port. (iii) It is not necessary for the vessel to reach a spot where loading can take place. (iv) It *may* be sufficient for the ship to reach merely the legal limits of the port. It is on this issue that the difference between the parties arises. The appellants contend that a ship which cannot get into the loading area of a port has nevertheless " arrived " when it reaches that spot where ship usually lie waiting for a berth.

The appellants' submission on the question of principle is more consonant with the authorities than that of the respondents, which would lead to the most extraordinary anomalies. Thus, if there was only one berth where a ship could load or discharge it would be extraordinary to hold that on a *port* charter the only ship which could be said to be " arrived " was the vessel actually at this single berth. It cannot be the sole test that a ship is " arrived " if it gets to a part of the port where loading and unloading takes place.

The present case is similar to *Pyman Bros.* v. *Dreyfus Bros.*[123] *Brereton* v. *Chapman*[124] has always been treated as turning on custom and it cannot be isolated from the finding thereon: see Scrutton on Charterparties, 11th ed., p. 136, and subsequent editions; the same view is taken in Carver's Carriage of Goods by Sea, 5th ed. (Wright), p. 822. In *Brown* v. *Johnson*[125] the point that the ship had " arrived " when she was outside the dock was never argued. In *Kell* v. *Anderson*[126] the court placed great stress on the place of discharge according to the usage of the port: see Scrutton on Charterparties, 11th ed., p. 136, n. (*c*). That case[127] was not cited by Buckley L.J. in *Leonis* v. *Rank*,[128] but it was cited by Kennedy L.J. to show that usage can limit the ordinary meaning of " port." The *Garston* case[129] is important since (i) it concerned the meaning of the word " port "

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[121] 10 Ll.L.Rep. 476.

[122] [1957] 1 W.L.R. 1228, 1237, 1238.

[123] 24 Q.B.D. 152.

[124] 7 Bing. 559.

[125] 10 M. & W. 331.

[126] Ibid. 498.

[127] Ibid.

[128] [1908] 1 K.B. 499.

[129] 15 Q.B.D. 580.

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under a charterparty; (ii) it held that "port" must be given a commercial meaning; (iii) it supplied the test as to the ascertainment of that meaning; (iv) it shows that the test of mere propinquity is not sufficient. The true import of *Nelson* v. *Dahl*[130] is correctly stated in Halsbury's Laws of England, 2nd ed., vol. 30, p. 522, and is in the appellants' favour. *Hunter* v. *Northern Marine Insurance Co. Ltd.*,[131] although distinguishable on its facts, is of importance, since it was the first case in which the House of Lords had to consider the meaning of the word "port," and it is to be noted that the House adopted the reasoning of the Court of Appeal in the *Garston* case.[132]

It is significant and helpful to see how Carver's Carriage of Goods by Sea states the law before and after the decision in *Leonis* v. *Rank*[133]: see 4th ed., pp. 748 and 760, and 5th ed., pp. 820, 821. The relevant passage in section 625A of the 5th edition has remained unaltered: see 10th ed., pp. 868, 869; see also Scrutton on Charterparties, 12th ed., p. 137.

The appellants are not seeking to overrule *Leonis* v. *Rank*,[134] but are merely inviting the House to resolve a point which did not arise for decision there, and, in so doing, to apply the judgment of Kennedy L.J. It is important to note that Kennedy L.J.[135] uses the concept of ships lying at the usual place for ships waiting for a berth. There is nothing which prevents notice of readiness being given in a place where loading is impossible: see, for example, *Pyman Bros.* v. *Dreyfus Bros. & Co.*[136] As to Buckley L.J.'s judgment,[137] the present case comes within his "true proposition." The true principle is that a ship must first be within the legal region of the port. Then, if the vessel can go to a loading spot she must go to it; if the vessel cannot go to it, it is sufficient if she goes to a spot where ships waiting for that particular class of cargo go nearest to the loading spot. In the present case, *after* September 1, 1954, the Free Anchorage was such a waiting place for ships loading maize. *Before* September 1, 1954, a ship was only an arrived ship when at the "Intersection," in those relatively rare circumstances when the whole of the inner harbour was full.

Most of the cases subsequent to the decision in *Leonis* v. *Rank*[138] are in the appellants' favour: see, for example, the

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[130] 12 Ch.D. 568, 582, 583.
[131] 13 App.Cas. 717.
[132] 15 Q.B.D. 580.
[133] [1908] 1 K.B. 499.
[134] Ibid.
[135] [1908] 1 K.B. 499, 523, 524, 527.
[136] 24 Q.B.D. 152.
[137] [1908] 1 K.B. 499, 512.
[138] [1908] 1 K.B. 499.

"*K. K. K. K.*" case.[139] It was said by Lord Sumner in *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[140] that Scrutton L.J., in the Court of Appeal in that case,[141] correctly summarised the effect of *Leonis* v. *Rank.*[142] Although purely obiter, such statements are of great authority. *Roland-Linie Schiffarht G.m.b.H.* v. *Spillers Ltd.*[143] is distinguishable since: (i) it concerned a dock or wharf charterparty and *not* a port charterparty; (ii) it was decided on a special clause which protected the shipowners.

The appellants should succeed on this issue, and the House is invited to give a clear common sense definition of what constitutes an "arrived" ship which can be easily applied in practice.

[Reference was also made to *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[144] and *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[145]]

(3) (a)—The absence of a police permit. The uncontradicted evidence is conclusive in favour of the appellants, for it is to be observed that (i) the obtaining of a permit takes only a few minutes; (ii) it is a general permit and was in the present case obtained without any delay to loading; (iii) if a ship does not obtain a permit the only consequence is a fine and the ship is not prevented from loading; (iv) even if the permit is obtained at the "Intersection" there is still another police visit when the ship is at berth. In the above circumstances it is impossible to hold that the ship was not ready to load because of the absence of a police permit.

(b)—The absence of a giro. The respondents' argument is confused and fallacious. It destroys the distinction between a port and a berth charter. A giro is a *berthing* permit and the present case involves a *port* charter, therefore the presence or absence of a giro is irrelevant on this question. Strong reliance is placed on *Pyman Bros.* v. *Dreyfus Bros. & Co.*,[146] which is conclusive on this point.

(4) *The cross-appeal.*

The Court of Appeal were right in holding that they were bound by *Ardan* v. *Weir.*[147] Their decision is consonant with justice and common sense and is supported by the authorities.

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[139] 10 Ll.L.Rep. 635.

[140] [1926] A.C. 545, 579.

[141] 21 Ll.L.Rep. 173.

[142] [1908 1 K.B. 499.

[143] [1957] 1 Q.B. 109.

[144] [1917] 2 K.B. 204, 211, 212.

[145] [1959] 1 Q.B. 131, 145.

[146] 24 Q.B.D. 152.

[147] [1905] A.C. 501.

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In the absence (as here) of any relevant exception clause there is an absolute duty on the charterer to provide such an amount of cargo as is necessary for the ship to perform her obligation and reach the position where she becomes "arrived," whether it be under a berth, dock or port charter. The only exception is where a vacancy occurs in the relevant place, that is, dock or berth, owing to fortuitous circumstances. The general principle was applied in *Lilly & Co.* v. *D. M. Stevenson & Co.*,[148] and in *Krog & Co.* v. *Burns & Lindemann*,[149] and it was established in the House of Lords in *Ardan* v. *Weir.*[150] It was also enunciated, possibly obiter, in *Hogarth* v. *Cory Bros & Co. Ltd.*[151] The exception was established by *Little* v. *Stevenson & Co.*,[152] and it was recognised as an exception to the general principle in *Krog* v. *Burns* [153] and *Ardan* v. *Weir.*[154]

If it is a lesser obligation, as contended by the respondents, then the charterers cannot shield behind I.A.P.I., for in effect I.A.P.I. and the other Argentine organisations were acting as agents for the charterers.

It is to be noted that an absolute obligation by way of an implied term is not a rarity in a charterparty. Thus, there is an absolute duty upon the charterer to provide a cargo and to load within the fixed laytime. There is also an absolute warranty by the shipowner that the ship is seaworthy.

On the facts it is to be observed: (a) it is now established that there was plenty of room in the inner harbour both at berth and at mooring. (b) It was not the case that maize could only be loaded at one berth. It was absence of maize which was the difficulty and which caused the *Aello* to be kept out of the harbour. (c) I.A.P.I. had hopelessly miscalculated and over-sold, and this fact must have been known to the charterers at the time of the signing of the charterparty. The resolution of September 1, 1954, did not work to the charterer's detriment. The ship did not arrive unexpectedly; she arrived at the anchorage in due course.

The phrase "turn of the port" is a misnomer and is misleading. "Turn" is only relevant in law in relation to space. If space is available over a long period (as here), there must be enough cargo provided for the ship to go in and load: see *Lilly & Co.* v. *D. M. Stevenson & Co.*[155] *Jones Ltd.* v. *Green & Co.*[156]

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[148] 22 R. 278.

[149] 5 F. 1189.

[150] [1905] A.C. 501.

[151] (1926) 32 Com.Cas. 174, P.C.

[152] [1896] A.C. 108.

[153] 5 F. 1189.

[154] [1905] A.C. 501.

[155] 22 R. 278.

[156] [1904] 2 K.B. 275.

is to be regarded as overruled or as decided on its special facts: see Scrutton on Charterparties, 16th ed., p. 152 n.(*i*), p. 154 n.(*d*), p. 366 n.(*a*). It is emphasised that in *Lilly & Co.* v. *D. M. Stevenson & Co.*[157] it was a berth charter; the respondents are unable to distinguish this case and place it in their proposition (6), which forms a "dustbin" of inconvenient cases. The respondents are forced to submit that it was wrongly decided. The appellants contend that it was rightly decided; it has not been doubted in subsequent cases.

Little v. *Stevenson & Co.*[158] also concerned a berth charterparty; it has always been treated as a case where the charterers were held not liable because of the unexpected contingency of a berth becoming available, and not as laying down any general principle. The appellants accept the respondents' proposition (8), but submit that *Little* v. *Stevenson & Co.*[159] does not support their proposition (5).

Ardan v. *Weir*[160] is indistinguishable in principle from the present case, and indeed, if maize be substituted for coal it is entirely comparable on its facts. It cannot be distinguished on the ground that it involved a berth charterparty. The *Ardandearg* was not "arrived" until she got into a berth; the *Aello* did not arrive until she got into port. The principle must be the same: see *per* Parker L.J.[161] Nor can it be distinguished on the ground that the resolution of September 1, 1954, was comparable to the unexpected vacancy of a berth in *Little* v. *Stevenson & Co.*,[162] for the charterers were fully aware of this resolution when they ordered the *Aello* to Buenos Aires. Further, the respondents' contention as to the provision of cargo in the "ordinary turn of the port" is not supported by the authorities. There is no such limitation on the charterer's obligation to provide cargo except where there is a special provision in the charter. "Turn" is only relevant to the charterer's obligation where it relates to space in the relevant area, that is, berth, dock or commercial area. If the whole of the relevant area is occupied the charterer is under no obligation to provide cargo until space is available for the vessel. The respondents' contention would be right here if at all material times there was only one spot at Buenos Aires where it was possible to load maize. That inevitably follows from *Ardan* v. *Weir*[163] because on the facts in that case there was *space*. [Reference was made to Carver's Carriage of Goods by Sea, 5th ed., pp. 338, 339; 10th ed., p. 431; Gloag on the Law of Contract, 2nd ed., p. 346.]

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[157] 22 R. 278.
[158] [1896] A.C. 108.
[159] Ibid.
[160] [1905] A.C. 501.
[161] [1958] 2 Q.B. 385, 404, 405.
[162] [1896] A.C. 108.
[163] [1905] A.C. 501.

As to the later authorities, *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[164] is of no assistance. *Einar Bugge A/S* v. *W. H. Bowater Ltd.*[165] is irrelevant, for it was not a charterparty case; further, it was decided in favour of the sellers on an exception clause. In so far as *Vergottis* v. *William Cory & Son Ltd.*[166] differs from *Ardan* v. *Weir*[167] it is wrong, especially if it is held to be authority for the proposition that the charterer's duty is to do only that which is reasonable. The statement of principle in *Hogarth* v. *Cory Bros. & Co. Ltd.*[168] is correct and in accordance with *Ardan* v. *Weir*.[169]

The House should accede to the appellants' contention irrespective of *Ardan* v. *Weir*,[170] for the failure to provide cargo is on the charterers' "side of the line" and the loss should fall on them in these circumstances. If the obligation be less than an absolute obligation, then it is submitted that if charterers place that obligation (as here) in the hands of a chain of agents any break in that chain is the responsibility of the charterers.

Roskill Q.C. in reply on the cross-appeal. The respondents' primary contention is that a charterer's obligation is to do no more than that which is reasonable to enable the ship to arrive. If that primary contention be wrong then the question arises, what is that earlier point of time at which that absolute obligation arises? That is the ultimate point in the case. It was said that that point of time arose when the *Aello* arrived in the roads. That is wrong, and *Ardan* v. *Weir*[171] and that line of authority does not decide what the point of time is. It depends simply and solely on implication, and it is going very far to imply such an obligation into the terms of this charterparty on the assumption that the respondents are wrong on their proposition (5).

The charterer's obligation is only to have the cargo available so as to enable the ship to become an arrived ship in turn of her arrival off the port or the berth, as the case may be. If that is the obligation the respondents have fulfilled it. [Reference was made to *Little* v. *Stevenson & Co.*[172]] Questions of turn only arise where there is an obstacle ahead. This is usually other

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[164] [1917] 2 K.B. 193.
[165] 31 Com.Cas. 1.
[166] [1926] 2 K.B. 344.
[167] [1905] A.C. 501.
[168] 32 Com.Cas. 174, 181.
[169] [1905] A.C. 501.
[170] Ibid.
[171] Ibid.
[172] [1896] A.C. 108.

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ships waiting to load. "Turn" is a procedure to overcome that obstacle. The respondents emphatically contest the appellants' submission that "turn" is relevant only in relation to space. It is submitted that it arises whenever the local port authorities find it necessary to regulate the movement of ships into port.

A charterer is only liable to pay damages if the ship has lost her place in the queue, in turn of the port, because cargo was not available. In *Ardan* v. *Weir*[173] the *Ardandearg* had lost her place in the queue. In the present case, the *Aello* never lost her place in the queue for ships loading grain. That is the real distinction between the present case and *Ardan* v. *Weir*.[174] The observations of Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[175] are adopted. The true view is that the charterer is entitled to wait until the ship gets into her place in the ordinary turn of the port when she becomes an arrived ship. [Reference was also made to Halsbury's Laws of England, 1st ed., vol. 26, p. 182; 2nd ed., vol. 30, pp. 422, 423; Carver's Carriage of Goods by Sea, 5th ed., pp. 338, 339; *Lilly & Co.* v. *D. M. Stevenson & Co.*[176]]

Their Lordships took time for consideration.

June 2, 1960. LORD RADCLIFFE. My Lords, the appeal and cross-appeal in this case relate to small sums of money in themselves, but the issues they raise are of considerable general importance and are not at all easy of solution. The main point to be decided on the appeal is at what date the appellants' ship, the *Aello*, became an "arrived ship" in the Port of Buenos Aires on a voyage to River Plate ports during the months of September/November, 1954, that date determining the start of her lay days for loading cargo in the port. The cross-appeal, on the other hand, turns on the issue whether, if she did not become an arrived ship on the date claimed by the appellants, October 12, 1954, the respondents incurred liability as charterers for the voyage to pay damages in respect of the detention of the ship in the circumstances which I will later narrate.

Both these questions involve consideration of certain earlier decisions either of this House or of the Court of Appeal. Those decisions are well known and of long standing. It is not my intention in anything that I shall say to depart from the principles there established: nor, I am sure, is that the intention of any of your Lordships. But I am bound to say that after listening to the careful and sustained argument that we heard from counsel on both sides, I have been left with the conviction that it is not as easy as I could wish to say what those principles are when they have to be applied to the incidents of the present case; and, moreover, I have found very considerable difficulties in reconciling all that has been said in their formulation, either in different judgments on the same case or in different decisions in different cases. The unfortunate situation that I describe is not altogether a novelty in this tangled branch of commercial law.

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[173] [1905] A.C. 501.
[174] Ibid.
[175] [1926] 2 K.B. 344, 355.
[176] 22 R. 278.

I will set out the relevant facts as shortly as I can. By a charterparty dated August 27, 1954, the *Aello* was chartered by the respondents from the appellants to load grain " at one or two " safe loading ports or places in the River Parana not higher than " San Lorenzo . . . quantity at charterers' option, but not more " than the steamer . . . can safely carry over Martin Garcia " Bar . . . the balance of the cargo in the Port of Buenos Aires or " Eva Peron (La Plata) or Montevideo." The charterparty was in the " Centrocon " form, subject to considerable variations. There was a stipulated rate of loading at so many tons per day, with exceptions, and a fixed rate of demurrage at £200 per running day. Dispatch rebate for all time saved in loading was at the rate of £100 per day.

The first port to which the *Aello* was ordered was Rosario on the River Parana. This river and the River Uruguay are the two main contributaries whose confluence forms the River Plate. Rosario therefore lies inland, to the north-west of Buenos Aires itself. The *Aello* took on a part cargo of maize at Rosario, having obtained there free pratique in respect of health and quarantine and also police and customs clearance. This she was bound to do before any loading operations could be begun. On October 11 she left Rosario for Buenos Aires to complete there the loading of her maize cargo, as the charterparty required. At 1.30 p.m. on the next day, October 12, she dropped anchor in the " Free " Anchorage " of the Buenos Aires roads, and there remained until October 29 waiting for the permission of the port authority to proceed nearer to her eventual destination, a loading berth in the inner harbour. The clue to this case lies in an appreciation of the reasons why the *Aello* had to wait for this period at this anchorage, and of the relationship of the anchorage to the Port of Buenos Aires as a whole. I must therefore deal with this matter in some detail.

The River Plate is the estuary of the two rivers, Parana and Uruguay, which meet a few miles north of Buenos Aires. It thus forms a very large expanse of fresh water of no great depth. On its south shore lies the Argentine port of La Plata: opposite to that, on the north shore, is the Uruguayan port of Colonia, and on the same shore, near the mouth, Montevideo. At the western or inner end of the River Plate, some 200 kilometers up from the mouth, is the city and port of Buenos Aires, which itself grew up round the spot where the River Riachuelo runs into the River Plate.

The inner harbour of Buenos Aires consists of a long frontage of basins and docks, equipped with very large installations for warehousing and loading and unloading goods. The Nuevo Porte, at the north end of this harbour, has an outer wall or mole built in the river. Access from the River Plate is provided by two dredged channels, the North and South channels, which themselves join to form a single channel at a point 9 kilometers outwards from the inner harbour. This channel continues seaward and at a point in it between Kilometer 29 and Kilometer 37 there is stationed a hulk for the use of pilots in the open waters of the estuary. This is the point known as "Intersection," because it is in effect a cross-roads for the various channels in the River Plate. Along this strip of water between Kilometer 29 and Kilometer 37 are formed two anchorages where vessels lie upon entering Argentine territorial jurisdiction, one to the north being known as the "Zone for steamers awaiting orders" or the Free Anchorage, the other, to the south, "Zone for steamers awaiting "sanitary visit." It is in the Free Anchorage, as I have said, that the *Aello* lay from October 12 to 29, 1954. This part of the estuary is known generally as the roads or the outer roads of Buenos Aires, and has a long-established connection with the port as a place of maritime commerce.

The purposes served by these two anchorages are various. The quarantine zone speaks for itself: a vessel whose first Argentine port is Buenos Aires or La Plata lies there until she obtains health clearance by receiving her free pratique. The Free Anchorage is primarily a waiting place serving these two ports on occasions when waiting is necessary. Vessels lying there are subject to customs and police clearance, are under the control of the pilotage authority and the maritime police, and cannot proceed further into the port of destination until the berthing office of the harbour authority has designated a berth or place in the inner harbour

(I speak of Buenos Aires), the designation constituting the necessary permit of entry to load or discharge. Apart from its use as a waiting place, the Free Anchorage is also used by vessels who wish to lighten by off-loading there part of their cargoes of oil or coal; vessels bunker and take in stores there; and dangerous cargo, which is not allowed to be taken into the inner harbour, must be discharged into lighters at this point. On the other hand, grain itself is not loaded in the anchorage.

A ship lying in the anchorage at the roads pays anchorage dues to the harbour authority of the port to which she is bound: if merchandise is discharged there for the port or loaded from the port, additional harbour dues are payable on the same tariff as would be applicable if the ship had entered and berthed in second tier. By articles 1702 and 1703 of the Maritime and River Digest there is constituted a joint port of the capital and La Plata, of which the channels and anchorages (including the Free Anchorage) form the Exterior Part or 4th Section. Probably the fairest practical statement of the status of the Buenos Aires roads in relation to the port of Buenos Aires (not the joint port) as a whole is that given at p. 289 of the Mar Year Book for 1954, in which, under the legend " Description of the Port," the roads are listed with the explanatory note: " Considered an extension of the Port."

In normal circumstances, a ship that has her orders has no occasion to wait at the anchorage. The berthing permit or " giro," which constitutes the permission to enter the inner harbour, is forthcoming without delay, tugs and pilots are sent down, and the vessel proceeds to take station in the inner harbour as directed by the berthing office of the port authority, which is in this port the Board of Customs. On her way in she passes one or other of the Vanguardias or hailing stations at the inner end of the North or South Channel, and it is at that moment that she is " entered " at the Customs and becomes liable to pay entrance dues, permanency dues and wharfage dues in addition to any anchorage dues already paid in respect of use of the roads. The receipt of the giro does not mean that the berth or loading spot allocated is immediately available. The vessel may enter the inner harbour and still find that she is there only as a waiting vessel.

The circumstances with regard to the Argentine maize trade during the autumn of 1954 were, however, not at all normal. What had happened was that the Government Board responsible for the sale of all maize for export had much over-estimated the quantities that would be coming forward at the times for which it had contracted. The result was that, at any rate by the month of August, ships waiting for maize cargoes began to pile up in the inner harbour. The congestion which these ships, lying in second and third tier off the quays, in basins and in the waters of the harbour, caused to each other and to other vessels was accentuated by the fact that, though the New Port and the South Dock between them contained several grain elevators and ample loading space and lighterage facilities, only one elevator, that in Darsena D in the New Port, was in fact being used, its capacity being more than sufficient to deal with all the maize that was available for loading. The shortage that was the cause of all the trouble was not a shortage of berths or of loading facilities: it was simply a shortage of maize cargoes.

By the end of August the congestion of shipping in the vicinity of the loading elevator had got so bad that the Port Authority and the Grain Board, the agency that owned and handled all loading facilities for grain, decided to put into force a new scheme for vessels arriving to load maize. On September 1, the authority adopted a resolution that no vessel was to be allowed to berth in third tier at the elevator or to be sent to a waiting berth in the North Basin or the New Port, as hitherto: all maize vessels were to anchor and wait at the Free Anchorage in the roads until a berth was available either in first or second tier at the elevator. The scheme became effective by the middle of September. To quote from the evidence of one of the witnesses from Buenos Aires (Affidavit of W. H. Fowler), "This resolution of the Berth-"ing office was made for practical reasons, in order to avoid "useless waste of time and money in continual shiftings of the "maize-vessels which were cluttering up the approaches of the "elevator. It was a measure of traffic-control. . . ."

It is necessary to add only two facts to complete the account of the régime that was in operation when the *Aello* anchored in the roads on October 12. First, it was the standing practice of the berthing office not to grant a giro for a vessel loading grain unless she had first received from the shippers a certificate of the Grain Board allocating the parcel of grain required for the cargo. Secondly, the special régime instituted for maize vessels by the resolution of September 1, was terminated some time in December, 1954, by which time the disproportion between ships and available cargoes had been adjusted.

Now, these being the facts, did the *Aello* become an arrived ship at the port of Buenos Aires on October 12, as the appellants claim, or did she not become arrived until October 29 when, having obtained her giro, she entered the inner harbour and berthed in second tier beside the grain elevator in the New Port? The latter is the view which has hitherto prevailed in the courts below, both before Ashworth J., who tried the case, and in the Court of Appeal. It has throughout been assumed that the governing test for the determination of this issue is to be found in the judgments of Buckley and Kennedy L.JJ. in the case of *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[1] and with that I agree. The decision was something of a landmark in the judicial development of the doctrine of the " arrived ship " and it has stood for so long in its field that, in my view, all later decisions must be built upon it. The real difficulty of the present case is to be sure how the test propounded there ought to be applied to the somewhat special circumstances that are now before us.

There are one or two things that can be said without raising any controversy. The *Aello* was sailing under a port charter, as distinguished from a dock charter or a berth charter. Therefore it was not incumbent on her to reach a loading berth before she became an arrived ship and so set the lay days in motion: it was sufficient if she reached the named destination, the port itself. On the other hand, it is not enough for that purpose merely to be within the confines of the port in the sense of being at any point within its legal or administrative limits or, I think, at any point within the area of the port as understood by maritime or commercial men. They might understand by the port different things for different purposes. The thing to remember is that, at whatever moment of time before actually berthing she might become an arrived ship, her ultimate duty under the charterparty remained the same: to reach with all due dispatch the loading berth to which the charterers might order her. However, therefore, the exact definition of her destination for " arrival " is to be phrased, it must be some part of the whole area, the port, which marks for the time being the proper limit of her effort to reach her ultimate berth. If she can go straight in, cadit quaestio. Disputes about arrived ships under a port charter are essentially disputes about what is a proper waiting place, lay days being, as Lord Sumner once said, " the contractual adjustment of the " incidence of risks of delay."

It has been said that, to become an arrived ship under a port charter, a vessel must reach the " commercial area " of the port.[2] With this, too, I agree, so long as there is no misunderstanding as to what is implied by the use of that phrase. If in the law we speak of the "commercial area" of a port, we are not employing a phrase that has been adopted and used in charterparties themselves, so far as I know, or a phrase that is in use in the speech of maritime or commercial persons. It is, I think, impossible to hope to identify it in any particular port by inquiring in what part of the port "commercial operations" are carried on. Commercial operations embrace a great variety of different activities, many of which are properly carried on in different parts of the port, and the parts that may be resorted to in connection with one class of cargo may be, and often are, different from the parts resorted to for dealing with another. In fact, the phrase "commercial operations" does not occur at any point in the judgments in *Leonis* v. *Rank*.[3] Nor do I find it any more acceptable to try to define it, as has been done by the judgment of the Court of Appeal in the present case, as "that part of the "port where a ship can be loaded when a berth is available, albeit "she cannot be loaded until a berth is available." It is not only that such a description is, if I may say so with all respect, altogether too imprecise as a general guide for identifying the relevant area: it is also, in my opinion, a misunderstanding of the true significance of the *Leonis* v. *Rank* decision[4] to seek to treat the "commercial area" for the purposes of any particular charterparty as if it were a fixed area of defined geographical limits which the ship must be treated as reaching or failing to reach without regard to the actual circumstances that prevailed at the time when the obligations of the particular voyage matured. "Commercial area" as applied to ships waiting for cargo is more accurately understood as defining a set of circumstances relevant to the voyage and the port than as delimiting a "part of the port "where a ship can be loaded."

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[1] [1908] 1 K.B. 499; 24 T.L.R. 128.

[2] Ibid.

I think that this is clearly the meaning and effect of the judgment of Kennedy L.J. in *Leonis* v. *Rank*.[5] I regard this, as others have (see, for instance, Atkin L.J. in *Hudson's Bay Co.* v. *Domingo Mumbru S.A.*[6]), as the leading judgment in that case, both because it provides a fuller and more authoritative treatment of the earlier decisions and because it is free from certain internal inconsistencies which mar the other judgment, that of Buckley L.J. If the two judgments do not in all respects make the same approach to the conception of the "commercial

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[3] [1908] 1 K.B. 499.

[4] Ibid.

[5] Ibid.

[6] (1922) 10 Ll.L.Rep. 476, 479.

"area," I do not hesitate to prefer that of Kennedy L.J. and to treat it as the more accurate exposition of the law. It is perhaps right at this stage to recall that the issue before the court in *Leonis*[7] was whether a ship's lay days even under a port charter could not begin until she had actually reached her loading berth—the view contended for by Mr. Scrutton, of counsel; that the port was Bahia Blanca, at which no loading could take place until a ship was alongside a single jetty which ran out into the harbour; and that the "commercial area" in which the *Leonis* anchored waiting her turn was simply her waiting place in the waters of the harbour, as near as she was allowed to go to the jetty.

My Lords, I may have some doubts as to what proposition Buckley L.J. intended to establish. I do not feel the same doubts about the judgment of Kennedy L.J. I can state the essence of it by marshalling a few extracts from it with a minimum of commentary of my own.

(1) For the purpose of deciding whether a ship is an arrived ship, it is "immaterial whether . . . the physical act of loading "was possible or impossible" at the spot where she lay.[8]

(2) *Nelson* v. *Dahl*[9] and *Pyman Bros.* v. *Dreyfus Bros. & Co.*[10] were the most directly relevant of the earlier authorities. The key words in *Nelson* v. *Dahl*[11] for the purpose of describing the agreed destination are the words of Brett L.J., "the area "in the port within which vessels whose obligation and purpose "is to receive a cargo lie."[12] Or again, the "usual place in it "at which loading vessels lie."[13] The context of that passage shows that "loading vessels" must mean "vessels whose purpose "it is to load."

(3) "Port" in a port charter is to be "construed in a "commercial sense in relation to the objects of the particular "transaction."[14] "Commercial area" means "the port in its "commercial sense, that is to say, as it would be understood by "persons engaged in shipping business, and in regard to the "arrival of a ship there for the purposes of the charterparty."[15]

(4) "The commercial area of a port, arrival within which "makes the ship an arrived ship . . . ought . . . to be that area "of the named port of destination on arrival within which the "master can effectively place his ship at the disposal of the

[7] [1908] 1 K.B. 499.

[8] Ibid. 527.

[9] (1879) 12 Ch.D. 568.

[10] (1889) 24 Q.B.D. 152.

[11] 12 Ch.D. 568.

[12] [1908] 1 K.B. 499, 523.

[13] Ibid. 522.

[14] Ibid. 519.

[15] Ibid. 520.

"charterer, the vessel herself being then . . . as near as circumstances permit to the actual loading 'spot' . . . and in a place where ships waiting for access to that spot usually lie. . . ."[16]

(5) The *Leonis*, therefore, was an arrived ship "when she was at that anchorage in the area within which, according to the evidence, steamers usually lie awaiting their turn at the pier."[17]

(6) Accordingly, the rule on the point was correctly expressed in section 627 of the then current [4th] edition of Carver, Carriage of Goods by Sea: "though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go."

I do not feel sure that Buckley L.J. intended to adopt any principle for determining a ship's arrival that differs from these. Evidently Lord Alverstone C.J. detected no divergence, since he agreed with both of his colleagues' judgments.[18] The general position of Buckley L.J. seems to be stated in his words[19]: "The true proposition, I think, is that where the charter is to discharge in a named place which is a larger area in some part or in several parts of which the ship can discharge, the lay days commence so soon as the shipowner has placed the ship at the disposal of the charterer in that named place as a ship ready, so far as she is concerned, to discharge . . ." The test there is whether the ship is truly at the disposal of the charterer, waiting for him to name his berth or for it to become available. But, as the judgment proceeds, it does introduce some difficulties of expression, arising, I think, from the learned Lord Justice's wish to establish an analogy closer than circumstances allow between obligations under a dock charter and obligations under a port charter. A dock is a defined geographical space, and under a dock charter any part of it, if reached, will do: the area of a port is not necessarily a defined space (for example, Bahia Blanca itself), and under a port charter not every part of it will do. The judgment does not keep in mind this unavoidable distinction between the two cases. In consequence, words used by Bovill C.J. in *Tapscott* v. *Balfour*[20] (a dock charter case in which a ship at its waiting place in a dock was in fact held to be an arrived ship) are adapted or misquoted—it is difficult to know what the Lord Justice's exact meaning is—to suggest that under a port charter a vessel can never be an arrived ship unless she has reached the usual "place of loading."[21] I allude to this rather unfortunate passage only because it leads directly to the statement that the "commercial ambit" of the port as distinguished from the port in a geographical or maritime sense must be understood as "the "usual place of loading" or "the proper place for discharging, "whether the vessel has reached a berth or not."[22] It is this attempt to define the commercial area in terms that ignore the proper or usual place of waiting for those whose purpose it is to load, and instead concentrate upon the proper place of loading even for those who are not yet able to do it, that, in my view, has confused the issue and has directly led to the Court of Appeal in the present case laying down the rule that a ship cannot be arrived unless she has reached "that part of the port where a "ship can be loaded."[23] Yet, if it is common ground that a ship can nevertheless be arrived under a port charter though she is anchored in a place where no loading is possible, what significance can there be in her having to reach "the usual place of "loading" when for the time being her only purpose and her only duty are to keep herself in readiness to enter a berth?

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[16] [1908] 1 K.B. 499, 521.

[17] Ibid. 527.

[18] Ibid. 510.

[19] Ibid. 512.

[20] (1872) L.R. 8 C.P. 46.

It seems to me to do no good to ignore that there is this difficulty in relating what was said by Buckley L.J. to the more authoritative statement of the law contained in Kennedy L.J.'s judgment. On the other hand, it is important to remember that both judges concurred in explicitly approving the decision of *Pyman Bros.* v. *Dreyfus Bros. & Co.*[24] as good law. Now *Pyman Bros.* v. *Dreyfus Bros. & Co.*[25] was a case in which the charter-party destination was simply "Odessa" and the vessel lay waiting in the outer harbour, under instructions of the port authority, until she could move into a berth in the inner harbour. It seems that there were berths in the outer harbour but not one that suited the charterers' purpose. She was held to be an arrived ship, not in the least because she was at a place where ships usually load—no one spoke of that—but because she had got herself to the point where she was at the disposition of the charterers. "They had only to indicate the place to which she "was to go for her cargo, and she would have been there imme-"diately."[26] Both the judges who decided the case (Mathew J. and Huddleston B.) regarded it as an application of the rule laid

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[21] [1908] 1 K.B. 499, 513.
[22] Ibid.
[23] [1958] 2 Q.B. 385, 401.
[24] 24 Q.B.D. 152.
[25] Ibid.
[26] Ibid. 157.

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down in *Nelson* v. *Dahl*[27]: " . . . the notice may be given, though " the ship is not then in the particular part of the port or dock " in which the particular cargo is to be loaded." The objection that I entertain to the Court of Appeal's judgment is that it exactly reverses this rule and declares that lay days cannot begin until the ship is in that particular part of the port where loading is to take place. Indeed, their judgment is in conflict with *Pyman Bros.* v. *Dreyfus Bros. & Co.*,[28] unless " immediately " excludes two to three hours' steaming under tugs. I do not think that it does.

Leonis v. *Rank*[29] has always been treated as having settled for good whatever it is that it did decide. I think it important to refer your Lordships to some interpretations of the decision that have commended themselves to judges profoundly versed in commercial law. I will make only three citations: none of them seems to afford any support for the Court of Appeal's view that a ship cannot " arrive " until it has reached a part of the port where a ship can be loaded, whereas two explicitly identify the commercial area with the place of waiting.

The first citation is *Kokusai Kisen Kabushiki Kaisha* v. *Flack & Son.*[30] The *Leonis* decision,[31] said Scrutton L.J., decided that under a port charter " the time for loading . . . begins when the " vessel is at that place in the port where vessels awaiting for a " berth usually lie."[32] Atkin L.J. took, apparently, the same view.[33] And it is evident that Lord Sumner, in his massive and exhaustive marshalling of the authorities in *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*,[34] approved of what they had said.

Next is the case of *Van Nievelt Goudriaan Stoomvaart Maatschappij* v. *C. A. Forslind & Son Ltd.*[35] All three members of the Court of Appeal, Bankes, Scrutton and Atkin L.JJ., referred to the *Leonis* decision[36] and its effect. " [It] decides . . . that this " vessel was an arrived vessel when she arrived within the limits of " the port " (Bankes L.J.).[37] " She is to proceed to the port, and " when she has got to the port the lay days begin " (Scrutton L.J.).[38] " She is an arrived ship when she gets into the port " (Atkin L.J.).[39] The simplicity of their account may seem a little

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[27] 12 Ch.D. 568, 581.

[28] 24 Q.B.D. 152.

[29] [1908] 1 K.B. 499.

[30] (1922) 10 Ll.L.Rep. 635, C.A.

[31] [1908] 1 K.B. 499.

[32] 10 Ll.L.Rep. 635, 638.

[33] Ibid. 639.

[34] [1926] A.C. 545, 573, 574.

[35] (1924) 30 Com.Cas. 263.

[36] [1908] 1 K.B. 499.

[37] 30 Com.Cas. 263, 265.

[38] Ibid. 268.

[39] Ibid. 270.

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old-fashioned nowadays, but it certainly gives no hint of the crucial importance of any "loading area."

Thirdly, there is *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[40] itself. *Leonis*,[41] said Scrutton L.J., decided that "the time began . . . when the ship was in a part of the "port where ships waiting for loading would lie, although she "had not got [to] the berth where she could load."[42] These words were quoted by Lord Sumner when the case reached the House of Lords,[43] and he accepted them as correct.

My Lords, applying the principle of the *Leonis* case[44] as I have tried to explain it, I am of the opinion that the *Aello* arrived in the port of Buenos Aires on October 12. My reason for thinking so is based on the combination of the following facts. She was under the control of the port authority at Buenos Aires in the anchorage. She was lying in what was by the prevailing régime of the port the proper waiting place for vessels under orders to load maize. She could go no further into the port without the giro which would allocate her a berth. She was at the disposition of the charterers, ready to take up the berth selected by them, as soon as they provided the cargo which would make the berth available. The Free Anchorage was an "extension of the port of Buenos Aires" which at the relevant date was in a commercial sense "the port" for the purposes of the chartered voyage.

I am bound to say that I regard this conclusion as more satisfactory than the suggested alternative. It seems to me that, if we are looking for a general test of an "arrived ship" applicable to all ports with their great varieties of structure, formation and local condition, it is unwise to identify the "commercial area" too closely with the idea of a fixed geographical limit. True, at Buenos Aires itself you do have the inner harbour, with the hailing stations at the channel entrances; and it may be that all this area is intended to be covered by the Court of Appeal's decision. It is impossible to say; on the evidence I do not see any particular reason why the whole of it should be described as a "part of the port where a ship can be loaded."[45] But consider the conditions at another port, Bahia Blanca, with which the *Leonis* case[46] was concerned. Who can say what the limits of the "commercial area" were at that port, except that it was any place away from the jetty where it was reasonable and possible for a ship to lie waiting its turn to load?

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[40] (1924) 30 Com.Cas. 210, C.A.; affirmed [1926] A.C. 545.

[41] [1908] 1 K.B. 499.

[42] 30 Com.Cas. 210, 224.

[43] [1926] A.C. 545, 579.

[44] [1908] 1 K.B. 499.

[45] [1958] 2 Q.B. 385, 401.

[46] [1908] 1 K.B. 499.

It can, no doubt, be said that it was only the resolution of the port authority of September 1, 1954, that made the Free Anchorage a proper, as indeed it was the only permitted, waiting place for maize ships, and from that it can be argued that it was not, therefore, the " usual waiting place " intended by the decisions I have quoted. It was this line of argument, I think, that led Ashworth J. to decide that, though the Buenos Aires Roads are within the " legal fiscal and administrative limits of the port " of Buenos Aires,"[47] the *Aello* was not an arrived ship on October 12, because the " exclusion of vessels from the dock area " did not have the effect of extending the commercial area to the " roads."[48] He did not think that there could be a " fluctuating " commercial area " consistently with the authorities. With all respect to the contrary opinion expressed in his most valuable judgment, that is just what I do think, given the necessary conditions that I have outlined. I intend no disrespect if I put it in a homely metaphor, but it appears to me a mistake to regard this legal conception of a " commercial area " as if the area were a green on a golf links which the parties to the charterparties positively identified in their minds at the date of the making of their contract: within its limits one set of circumstances, outside them another. If that were the right view, I should agree that you could not, as it were, change the rules of the game during the course of it. But I do not think that the parties ought to be treated as contracting with each other in this precise way; in other words, it is not the port conditions as at August 27, the charterparty date, that govern the conception of " commercial " area," but the port conditions as the vessel found them when she arrived there in due course in October. Nevertheless, I ought to say that I find the ground upon which he based his judgment more satisfactory than the different test adopted by the Court of Appeal, since his depends essentially on the transitory nature of the September resolution.

It is true, too, that the Free Anchorage lies some 29 to 37 kilometers down the estuary from what was to be the eventual loading spot. Is that mere defect of propinquity an essential point? I cannot help thinking that the Court of Appeal did so regard it; and a close following of that passage of Buckley L.J.'s judgment[49] upon which I have commented would justify that view. But I cannot see why this is important in the circumstances. How much propinquity is needed to qualify a ship as arrived, and why? It seems to be common ground that if the *Aello* had entered the inner harbour on October 12 and been assigned to a waiting mooring or berth, say in the Darsena Norte or, perhaps, out in the waters of the harbour, she would have been arrived, even though she was not in a position where she could be loaded and would have had to wait just as long for her loading berth. If so, the resolution of September 1 merely substituted one permitted waiting place for another. The reason for it, according to the evidence, was to save time and money for waiting ships, not to add to them. The new system meant that, when the *Aello* did get her giro, she could go straight into her berth in second tier. It was 2½–3 hours' steaming time from her anchorage to the berth. There is no worthwhile difference between this length of time and the time, longer or shorter, that would have been occupied in getting her out of a waiting berth or mooring in the inner harbour, under congested conditions, and into a loading berth. It is time that matters in this context, not propinquity as such. In my opinion, propinquity is only of importance as showing that a vessel has been brought as near as conditions allow to what will be the eventual loading spot, and normally, of course, waiting vessels should and will want to get as near in as they can: but, given the special conditions imposed by the port authority and prevailing in October, 1954, it was no objection to the *Aello* being an arrived ship in the port that the part of it she anchored in was some 22 miles from her loading berth.

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[47] [1957] 1 W.L.R. 1228, 1235.
[48] Ibid. 1239.

The respondents' argument, however, embraced two other points on the issue whether the lay days could begin before October 29. Even supposing, they said, that the *Aello* was arrived when she reached the Free Anchorage in the sense that she was then in a place that could be called the commercial area, yet she was not "ready to load" until October 29, because (a) she did not obtain the giro or permit to enter the area where she could be loaded until that date, and (b) she did not get her police permit allowing communication with the shore until she actually berthed.

The Court of Appeal[50] did not find it necessary to deal with either of these points owing to their finding that she was not in the commercial area when in the Free Anchorage. Ashworth J.

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[49] [1908] 1 K.B. 499, 512.

[50] [1958] 2 Q.B. 385, 402.

rejected the argument based on the police permit [51] but accepted that based on the giro.[52] I am myself clearly of the opinion that, if the *Aello* was or had been on October 12 an arrived ship in what has been called the geographical sense, the absence of police permit or giro did not prevent or would not have prevented her lay days from beginning, and I will deal very shortly with the two points.

To take the giro. It is, of course, possible to take the view that until the giro was granted the *Aello* had not arrived, because she had not got into the required area of the port. That is one thing. But, if you do not take that view and think that she was in the port within the meaning of the charterparty, the giro became under the prevailing conditions nothing but official permission to enter a loading berth. If the absence of such permission prevents an arrived ship from claiming that its lay days have begun, the distinction between port charters and berth charters established by *Leonis* v. *Rank* [53] disappears again and every ship waiting for a berth, however correct its standard of propinquity, must also be waiting for its lay days to begin. In my opinion, this point is unmaintainable. As Scrutton L.J. pointed out in *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*,[54] the *Leonis* decision [55] that lay days can begin for a vessel under a port charter, even though she is in a spot where loading is impossible, does involve some adaptation of the significance of "ready "to load" to those circumstances.

I think that the point about the police permit fails too. Certainly it has been held that a vessel which has not obtained her quarantine clearance is not ready to load (see *The Austin Friars* [56]); but quarantine requirements strike directly at the state of the ship and its crew and passengers, and failure to obtain clearance leads to positive detention of the ship. The police clearance that the *Aello* required, coming from an up-river port, was something altogether different from this. The usual course for such a vessel was to wait until she had entered a waiting berth or a loading berth in the inner harbour—the evidence is not clear on this point—and then to ask for her police clearance. No one could come on board from the shore until this was obtained, but, the ship having already been cleared at Rosario in Argentine territory, the Buenos Aires clearance was, according to the evidence, little more than a formality. It was not to be expected that it would take long enough to cause any impediment to the commencement of loading, and, even if for some reason the crew state was not such as to satisfy police requirements, the use of the vessel was not interfered with. Whatever the consequences were, they would be exacted by subsequent proceedings. I am in full agreement with the learned trial judge that the absence of the police permit did not prevent the *Aello* from being "ready to load" while in the Free Anchorage.

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[51] [1957] 1 W.L.R. 1228, 1240, 1241.

[52] Ibid.

[53] [1908] 1 K.B. 499.

[54] [1917] 2 K.B. 204, 212, 213.

[55] [1908] 1 K.B. 499.

[56] (1894) 10 T.L.R. 633.

For these reasons I take the view that the appeal ought to succeed. The action was one in which the respondents were the plaintiffs, their claim being for a sum of money consisting partly of demurrage which they had paid under protest upon the vessel leaving Buenos Aires and partly of dispatch money which they claimed to be due to them on the basis that lay days began only on October 29. In my opinion the action ought to have been dismissed.

There remains the question of the cross-appeal. This does not arise for consideration unless the *Aello* is held not to have been an arrived ship during the period October 12–29, because, if she was, the shipowners have nothing to complain of—the delay has fallen on the charterers. On the other hand, if she was not then an arrived ship, the owners have this claim against the charterers, which has so far prevailed in the first court and the Court of Appeal, that the cause of her failure lay in the charterers' not providing the necessary cargo and cargo certificate to qualify her for the giro as soon as she reached the Free Anchorage, and that, accordingly, the charterers must make good in damages the amount of demurrage and dispatch money which the owners lose in the action.

On this issue I agree with the conclusion of Ashworth J. and the Court of Appeal, though it seems to me an oddity that the law should have to take such a roundabout method of establishing that, as between owner and charterer, the lay days began on October 12, not October 29. I think that the point is concluded by the decision of this House in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[57] Moreover, I have had an opportunity of reading in advance the opinion that has been prepared by my noble and learned friend, Lord Cohen, and I am in full agreement with what he says on the point. I do not think it necessary, therefore, to take up your Lordships' time by travelling over it separately; but, in deference to the able argument that was pressed upon us by counsel for the charterers, I will say a word or two about the legal position as I understand it.

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[57] [1905] A.C. 501.

The problem that faces any court today is that of producing some reading of the law that takes account of and gives proper weight to three such divergent decisions as those of *Little* v. *Stevenson & Co.*,[58] *Jones Ltd.* v. *Green & Co.*[59] and *Ardan* v. *Weir*.[60] Of the three I think that we are bound to treat the last as containing the general rule and the other two as being special cases dependent upon bargains that excepted them from the ordinary. *Ardan* v. *Weir*[61] was decided with the other cases before the minds of the learned members of this House; they refer to one expressly and the other by implication, and their decision was clearly intended to establish a general rule for the future.

It remains difficult not to accept that *Little* v. *Stevenson & Co.*[62] and *Ardan* v. *Weir*[63] represent different lines of thought about the same subject, because the explanation of the former which is given by the latter fails to make plain what is the "ordinary course" or the "contingency or fortuitous circumstance not contemplated by either of the parties" (see *per* Lord Davey[64]), which in the one case does and in the other does not make the charterer liable. If his duty is to have his cargo ready when the ship has got as near as she can until it is ready, which is what *Ardan* v. *Weir*[65] seems to decide, what does it matter if the vacancy that occurs thereafter is fortuitous or unforeseen? He is already in default.

In my view, the only way of reconciling all three decisions is to treat *Little* v. *Stevenson & Co.*[66] as if it were really the same sort of case as *Jones Ltd.* v. *Green & Co.*,[67] namely, one in which the owners are taken to have deliberately agreed with the charterers to take their ship to the port and in effect to keep it there at their own risk until the charterers provided the cargo for it in some such turn as that afforded by the orders on a colliery book. In such a context references to unexpected or fortuitous vacancies have their relevance; without that context I cannot see that they do.

Contests of this sort are essentially disputes about the placing

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[58] [1896] A.C. 108.
[59] [1904] 2 K.B. 275.
[60] [1905] A.C. 501.
[61] Ibid.
[62] [1896] A.C. 108.
[63] [1905] A.C. 501.
[64] Ibid. 512.
[65] [1905] A.C. 501.
[66] [1896] A.C. 108.
[67] [1904] 2 K.B. 275.

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of the risk of delay as between charterer and owner. That being so, I think it much better to have a clear general rule such as that propounded in *Ardan* v. *Weir*[68] and not to introduce exceptions upon it. As between the two of them, the provision of cargo is the charterer's concern, and so are all the steps which lead up to its being available. Where the completion of the ship's voyage is entirely dependent upon the availability of the cargo, I think it only natural that the law should throw the burden of any delay that occurs upon the charterer's side. I do not myself share, therefore, the wishes expressed by Greer J. in *Vergottis* v. *William Cory & Son Ltd.*,[69] or by Parker L.J. in the Court of Appeal in the present case,[70] that the charterer's responsibility could be limited to that of doing whatever was reasonable to get the ship to the contractual destination. After all, how far back do you go to start the reasonable course? Is the court to investigate the date and placing of the charterer's contracts that secure the cargo, the possible alternative sources of supply, the various courses of action open to him when his suppliers looked like failing to meet their commitments? I am sure that in this case, as the parties have agreed in their admissions, the charterers did everything that was reasonable to do to procure the completion cargo, the cargo certificate and the giro; but that in itself seems to me an insufficient reason for throwing the consequences of their failure on to the owners of the ship.

LORD COHEN. My Lords, in this action the respondents claim (1) dispatch rebate which they allege to be payable under clause 16 of the charterparty relating to the ss. *Aello*, and (2) refund of demurrage which they paid to the appellants under protest in order to obtain the bills of lading relating to the cargo on the said ship. The appellants resist the claim and in the alternative counterclaim damages for an alleged breach by the respondents of the charterparty in not having a cargo available to enable the appellants to obtain a giro and become an arrived ship on October 12, 1954.

The facts have been fully stated by the noble and learned Lord on the Woolsack. I will only refer to them so far as is necessary to explain my reasons for the conclusions I have reached on the various points which were argued before your Lordships.

The two main points at issue were stated by Parker L.J.[71] in the Court of Appeal as follows:

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[68] [1905] A.C. 501.
[69] [1926] 2 K.B. 344, 354.
[70] [1958] 2 Q.B. 385, 402, 403.
[71] Ibid. 400.

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" (1) Whether the [appelants'] ship the *Aello* became an " arrived ship when she anchored in the roads at Buenos Aires on " October 12, 1954."

" (2) Whether, if the *Aello* was not then an arrived ship, the " [respondents] were themselves in breach of any duty which prevented her from being an arrived ship at any time before October " 29, 1954."

If the first question is answered in the affirmative, the appellants will be entitled to succeed on their appeal. It is only if it is answered in the negative that the second question arises.

In connection with the first question three subsidiary questions were discussed:

I. What were the legal, fiscal and administrative limits of the port of Buenos Aires? The importance of this point is that if the Free Anchorage in the roads lay outside these limits (I shall refer to them hereafter as " the legal limits ") the appeal necessarily fails because it was common ground between the parties that the commercial area of the port the attainment of which has been held to be essential if a ship is to become an arrived ship could not extend beyond the legal limits of the port.

II. Does the fact that the *Aello* had not got a police permit before it entered the inner harbour prevent it being an arrived ship before that time?

III. A similar question arises for the absence of a giro (berthing permit).

I shall deal first with these subsidiary questions.

Like the learned trial judge, I have no hesitation in holding on the evidence that the Free Anchorage in the roads is within the legal limits of the port of Buenos Aires. Like him, I rely on the contents of the Digest, an official publication of the Argentine Government. This conclusion is also supported by the affidavit evidence, in particular that of Mr. Rafael de la Vega, sworn on March 13, 1957. Mr. de la Vega is a member of the Argentine Bar specialising in Argentine maritime law, and he is the only qualified expert on that law who gave evidence in the case. He deposes in paragraphs 7, 8 and 9 of his affidavit as follows:

" 7. Decided cases and authorities can be cited in abundance " to prove that the Argentine Government, which owns and controls every part of the port and its vicinity, is always ready both " to allow and at times to order merchant vessels to use the " Buenos Aires roads for every kind of commercial operations, as " it considers the roads or outer harbour as a valuable auxiliary " to the inner harbour of Buenos Aires and of La Plata.

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"8. The roads have been and are continually used for discharging part-cargoes, such as oil from vessels whose draft does "not permit them to enter the docks or basins with their full "cargo, as also for discharging any cargo which the authorities "consider to be of an explosive or dangerous nature, or otherwise "undesirable for introduction into the inner harbour.

"9. Another use of the roads is as a waiting-place for vessels "booked to load or discharge at Buenos Aires, but for which no "berth is presently available in the inner harbour. Our roads "constitute a satisfactory outer harbour, being cheaper than the "inner harbour, and have from the earliest times been used as "an anchorage, . . ."

From other evidence it appears that grain cargoes were not loaded or discharged in the roads, but this is irrelevant in considering the legal limits of the port.

It was objected that the roads were described in article 1703 as part of the ports of Buenos Aires and La Plata, and not merely as part of the port of Buenos Aires, and could not, therefore, be within the legal limits, still less within the commercial area, of the port of Buenos Aires. I do not think this objection is sound. The same stretch of water may, in my opinion, lie within the legal limits of each of two ports, and this seems to be the position in the case of Buenos Aires roads. It is clear from the evidence that some commercial operations were performed in the roads by ships destined for the port of Buenos Aires, and that when they were performed the same appropriate dues were charged as would have been payable had they taken place in the inner part of the port.

I turn to the question of the effect of the absence of a police permit before October 29. On this point also I agree with the learned trial judge. As he says, evidence which was uncontradicted establishes that in the case of a vessel which, like the *Aello*, has already loaded part of her cargo at an up-river port and has therefore satisfied the police authorities there, the police inspection at Buenos Aires when she arrives to load the balance of her cargo is little more than a formality the necessity for the compliance with which will not normally hold up commercial operations. One witness, Mr. Thomas Reece Thomas, in his affidavit sworn on March 13, 1957, puts it even more strongly. Paragraph 10 of his affidavit is in these terms: "10. The big difference is that an "irregularity discovered by the Quarantine Officer may hold up "the readiness for loading, but any irregularity discovered through "the Customs or the Prefecture visits will not delay the vessel's "commercial operations." As appears from paragraph 9 of the same affidavit, "the Prefecture" means the Maritime Police. I have called attention to paragraph 10 because of the distinction drawn therein between breaches of quarantine regulations and breaches of police requirements. This distinction is important, since it has been held by Jeune P. in *The Austin Friars* [72] and by a Scottish court in *John and James White* v. *The Steamship Winchester Company* [73] that failure to comply with a quarantine regulation would prevent a ship being ready to load. As Lord Shand said in the latter case [74] in the passage cited by Jeune P. in *The Austin Friars* [75]: "The vessel would be an arrived ship in "name only, but not in reality, so far as regarded the charterer, "whose duty and obligation—the loading or unloading—should "begin on arrival. The charterer might be quite ready to unload, "or ready with a cargo waiting to load the vessel, but the disqualification of the ship would prevent this. . . ." In other words, commercial operations would be impossible. The evidence in the present case to which I have already referred shows that the effect of the want of a police permit is very different. It would not delay commercial operations though it would no doubt expose those who established contact with the shore without it to penalties. The case is really more on a par with *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[76] In that case the ship was allowed to enter the dock and was attached to mooring buoys on October 28 as there was no berth then available. She had not opened hatches or made other preparations at the buoys as the merchants were not ready to receive cargo. The Court of Appeal held that lay days ran from October 28, Swinfen Eady L.J. saying [77]: "The ship was ready to discharge in a business "and mercantile sense, and the idle formality of incurring useless "expense was not necessary as a condition precedent to the commencement of the lay days."

I turn now to the question of the giro. The Court of Appeal,[78] having decided that the *Aello* was not an arrived ship because it was not within the commercial area of the port before October 29, did not find it necessary to decide whether the absence of a giro prevented her from being an arrived ship. Ashworth J.[79] held that the want of a giro was fatal to the *Aello* being an arrived ship before October 29, 1954. I am unable to agree that this is necessarily so. We are dealing here with a port charter, not a berth charter. If the Free Anchorage was not within the commercial area of the port, the *Aello* could not, in my opinion, be an arrived ship before October 29, 1954, and the appeal must fail; but if the Free Anchorage was within the commercial area of the port, the *Aello* might have become an arrived ship when she entered the Free Anchorage on October 12, since that was the spot where maize ships awaiting access to a berth had then to lie.

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[72] 10 T.L.R. 633.
[73] (1886) 23 Sc.L.R. 342.
[74] Ibid. 347.
[75] 10 T.L.R. 633, 634.
[76] [1917] 2 K.B. 204.
[77] Ibid. 208.
[78] [1958] 2 Q.B. 385, 402.
[79] [1957] 1 W.L.R. 1228, 1241, 1242.

I turn, therefore, to the first question posed by Parker L.J., namely: Was the *Aello*, apart from any question of police permit or giro, an arrived ship when she anchored in the Free Anchorage on October 12, 1954?

I have been privileged to read the opinion which has been delivered by my noble and learned friend, Lord Radcliffe, on this question. I agree with his reasoning and conclusions and desire to add but few observations of my own.

As I read the judgment of Kennedy L.J. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[80] he was saying that in the case of a charterparty naming a port and nothing more as the point of destination, the test of whether a ship had become an arrived ship was whether the ship had reached the commercial area of the port; he regarded, I think, the question what was the commercial area in any particular case as one to be decided on the facts of the case. To put the matter in other words, he was saying that the test to be applied was what would a man of business, a marine officious bystander, to adapt Mackinnon L.J.'s well-known phrase,[81] looking at all the facts of the case, including any relevant port regulations, regard as the commercial area of the port.

I cannot doubt that a resolution such as the oral resolution adopted by the port authority on September 1, 1954, prescribing the place where ships intending to load maize cargoes were to await their turn for a berth is a relevant regulation. The propinquity of a ship to the actual loading spot is, of course, an important factor in reaching a conclusion as to whether a ship has become an arrived ship, and I am not aware of any case where a ship as far away as 22 miles from the loading berth has been held to have arrived; but as speed increases, distance loses some of its importance, and if the port authority prescribes that ships intending to load or unload a particular class of cargo are to await their loading turn to berth in a particular area within the legal limits of the port, I think that that area is, so far as that category of ship is concerned, within the commercial area of the port. It is, to adapt the language of Kennedy L.J.,[82] the place where maize ships awaiting access to a berth usually lie.

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[80] [1908] 1 K.B. 499.

[81] See *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227; 55 T.L.R. 611; [1939] 2 All E.R. 113, C.A.

I have not overlooked the fact that at the time when the charterparty was made the resolution in question was not in force, but I think that, in determining whether a ship is an arrived ship, it is right to regard the position as it is at the date when the ship is alleged to have arrived. I should have felt much doubt as to what the position would have been before September 1, but I differ from Parker L.J. in that I think that, whatever may have been the position before that date, the commercial area of the port, so far as ships intending to load maize were concerned, included the Free Anchorage so long as the resolution of September 1 remained in force.

For these reasons, as well as for the reasons given by Lord Radcliffe, I cannot resist the conclusion that a business man, if he were asked the question while the resolution of September 1, 1954, was in force whether a maize-carrying ship awaiting its turn in the roads was an arrived ship, would have answered the question in the affirmative.

If this view be correct, it would be unnecessary to consider the cross-appeal, but as I understand the majority of your Lordships agree with the Court of Appeal, I proceed to consider the cross-appeal. On this point I respectfully agree with Parker L.J. that the principle laid down in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[83] is plain and that it governs the present case. Parker L.J. states that principle in these terms[84]: " . . . if the " provision of a cargo is necessary to enable the ship to perform " its obligation, namely, to become an arrived ship, the absolute " obligation of the shipper is to provide the cargo, or at any rate " a reasonable part of it, in time to enable the ship to perform " its obligation."

Bearing in mind Parker L.J.'s injunction that a judgment must be read in the light of the facts of the case in which it is delivered, I return to *Ardan* v. *Weir*.[85] In that case the charterparty was a berth charterparty and the ship was to proceed to the port of Newcastle, New South Wales, to collect a cargo of

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[82] [1908] 1 K.B. 499, 521.

[83] [1905] A.C. 501.

[84] [1958] 2 Q.B. 385, 405.

[85] [1905] A.C. 501.

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coal. It was a custom of the port of Newcastle that a vessel was not allowed to occupy a loading berth until she had received a loading order from a colliery. The ship arrived at her destination on July 14, 1900, and was ready to load, but there was no cargo ready for her until August 13, and then not enough. She had twice to be removed from her berth under a regulation of the port that she must not occupy a berth when not loading, and her loading was not completed until August 26. The appellants claimed damages on the footing that the reasonable time within which loading should have been completed began on July 14. This House, restoring the judgment of the Lord Ordinary, upheld the claim. The respondents in that case relied on the decision of this House in *Little* v. *Stevenson & Co.*,[86] but Lord Halsbury L.C., who had been party to the decision in that case, and Lord Davey distinguished it. Lord Halsbury said[87]: " My Lords, I " am very sorry if any observations of mine or of the late Lord " Herschell have been supposed to throw any doubt upon so well-" recognised a principle of commercial law as that a merchant is " under an absolute obligation to supply the cargo. The case " which is supposed to have created the doubt is *Little* v. *Steven-" son & Co.*,[88] and the passage referred to is at p. 116, beginning: " ' The proposition of law ' (that I disputed) was ' that a merchant " ' must be always ready with his cargo at all times and in all " ' places, and under all circumstances to take advantage of any " ' such contingency, if it should arise.' My Lords, the passage " itself should be referred to, and Lord Herschell's, which is at " p. 118, three lines from the bottom: ' It is alleged that the " ' obligation existed in point of law, that at all ports, under all " ' circumstances, however unreasonable it might be to anticipate " ' such a contingency, however deficient the quay might be in " ' the means necessary for storing, or protecting, or preserving " ' cargo, whatever difficulties there might be, in short, that was " ' an obligation always resting upon the shipper.' My Lords, I " thought then, and I think still, that, to use Lord Herschell's " language, such an obligation on the shipper would be most " unreasonable."

Lord Davey, speaking of *Little* v. *Stevenson & Co.*,[89] said[90]: " I think that what was there laid down must be read with regard " to the facts of that case, and that all that was meant was that " the shipper's or charterer's obligation is only to have his cargo

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[86] [1896] A.C. 108.
[87] [1905] A.C. 501, 510.
[88] [1896] A.C. 108.
[89] Ibid.
[90] [1905] A.C. 501, 512.

"ready when the ship is ready to receive it in ordinary course, "and that he is not bound to be prepared for a contingency or "fortuitous circumstance not contemplated by either of the "parties."

My Lords, in *Ardan* v. *Weir*[91] the charterparty was a berth charterparty, whereas in the present case we are concerned with a port charterparty. I cannot think that this difference affects the principle. In either case, if the provision of a cargo is necessary to enable a ship to become an arrived ship, the absolute obligation of the charterer is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation. In the present case the *Aello* was within the legal limits of the port; to enable it to get a giro and proceed to the loading point the only missing requisite was the availability of the cargo. In these circumstances it seems to me to follow that the respondents were in breach of the obligation of a charterer as defined by their Lordships in *Ardan* v. *Weir*.[92]

This conclusion is supported by two decisions of the First Division of the Court of Session, *Lilly & Co.* v. *D. M. Stevenson & Co.*[93] and *Krog & Co.* v. *Burns and Lindemann.*[94] In the last-mentioned case the loading berth only became available as a result of a chance vacancy, and the charterers relied on *Little* v. *Stevenson & Co.*,[95] but both the Lord Ordinary and the First Division distinguished that case, saying—I quote from the judgment of the Lord Ordinary[96]: "And the only qualification of that "duty [the duty of the charterer to do anything that is necessary "on his part, according to the custom of the port to enable the "vessel to get a berth], which the House recognised was that "the charterer was not bound to have cargo ready in anticipation "of a remote and improbable contingency." The judgment of Lord M'Laren in the Inner House[97] put the point less forcibly, but he was clearly of opinion that the charterer's liability extended to cover any foreseeable contingency.

Mr. Roskill, for the respondents, contended that the true principle could be stated as follows: "If . . . the arrival of the ship "or the commencement of lay time is dependent upon some "antecedent act of the charterer, the charterer is under a duty "to co-operate with the shipowner so far as lies in the charterer's "power to enable the ship to arrive and lay time to commence."

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[91] [1905] A.C. 501.

[92] Ibid.

[93] (1895) 22 R. 278.

[94] (1903) 5 F. 1189.

[95] [1896] A.C. 108.

[96] 5 F. 1189, 1193.

[97] Ibid. 1195, 1196.

He submitted that, if this were the measure of the obligation, his clients could not be liable in damages, since it was admitted in paragraph 3 of the admissions " That at all material times . . . " (iii) . . . there was nothing which the plaintiffs " [respondents]; " Bunge & Born Lda, or (to the extent that they were concerned) " Agencia Maritima Sudocean S.R.L. could have done which would " have resulted in the procurement of a completion cargo or in a " certificate of the Junta Nacional de Granos or a ' giro ' being " issued before they were in fact procured or issued." He relied, in support of his proposition, on the speech of Lord Herschell in *Little* v. *Stevenson & Co.*[98] and on the observations of Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[99]

Having regard to the explanation of *Little* v. *Stevenson & Co.*[100] given by their Lordships in *Ardan* v. *Weir*,[101] I do not think Lord Herschell's observations[102] assist Mr. Roskill. The observations of Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[103] express an opinion which would assist Mr. Roskill, but they are prefaced by the words " Unless the decision of the House of " Lords in the *Ardan Steamship Co.* v. *Andrew Weir & Co.*[104] " compels me to decide otherwise." Parker L.J. in the present case[105] cited with approval the observations of Greer J.[106] to which I have referred, but having no such way out as Greer J. was able to find in *Vergottis's* case,[107] he went on to consider whether he was precluded from giving effect to his prima facie opinion by the decision in *Ardan* v. *Weir*[108] and answered the question in the affirmative. I respectfully agree with him.

Mr. Roskill also relied on the decision of the Court of Appeal in *Jones Ltd.* v. *Green & Co.*[109] That case also related to coal cargoes from Newcastle, New South Wales. The ship arrived at Newcastle on September 1, 1900, but was unable to obtain a loading berth until December 15, 1900, because the coaling order which according to the custom of the port was a sine qua non to obtaining the berth was only forthcoming on the previous day. The court held that the charterers had fulfilled their obligations as the ship had obtained a berth in accordance with her proper turn at the colliery. Vaughan Williams L.J.[110] relied on the decision in *Little* v. *Stevenson & Co.*[111] and based himself on the state of knowledge of the parties to the contract. It may be that the decision can be supported on that ground, but if not I agree with what is said in Scrutton on Charterparties, 16th ed., p. 152, note (*i*), that *Jones Ltd.* v. *Green & Co.*[112] must be regarded as overruled by *Ardan* v. *Weir.*[113]

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[98] [1896] A.C. 108, 117.

[99] [1926] 2 K.B. 344, 354.

[100] [1896] A.C. 108.

[101] [1905] A.C. 501.

[102] [1896] A.C. 108, 117.

[103] [1926] 2 K.B. 344, 354.

[104] [1905] A.C. 501.

[105] [1958] 2 Q.B. 385, 402.

[106] [1926] 2 K.B. 344, 354.

[107] [1926] 2 K.B. 344.

[108] [1905] A.C. 501.

[109] [1904] 2 K.B. 275.

[110] Ibid. 279.

[111] [1896] A.C. 108.

In the present case I do not think there were any facts known to both parties which modify the obligation of the charterers to provide a cargo. The material factor which prevented the ship becoming an arrived ship was the resolution of September 1, 1954. That, at the date of the charterparty, was known to neither party. There is no evidence as to whether the shortage of maize which caused the hold-up at the roads was known to either party, but I think it would be more likely to be known to the charterer than to the shipowner, and if the loss caused by the delay has to be borne by one or other of two innocent parties I see nothing unjust in its falling on the charterers.

For these reasons I would dismiss the cross-appeal.

It was argued that the breach of the charterer's obligations was a matter of defence as well as of counterclaim on the principle referred to in *Mackay* v. *Dick,*[114] that a party may be precluded from relying on the other party's failure to perform some act, when that failure resulted from the first party's own omission. I do not think that principle can assist the appellants in the present case. If I am wrong in the opinion I have expressed that the ship is an arrived ship, like Parker L.J.[115] I think that the failure of the respondents to provide a cargo is a matter of counterclaim, not defence.

In the result I would allow the appeal and dismiss the action on the ground that the ship was an arrived ship on October 12, 1954. I would therefore make no order on the counterclaim. If, however, the majority of your Lordships are of opinion that the ship did not become an arrived ship until October 29, 1954, I would dismiss both appeal and cross-appeal.

LORD KEITH OF AVONHOLM. My Lords, I direct myself to the two substantial questions in this case, for on all other points I agree with what I understand to be the opinions of all your Lordships.

The first main question is whether the *Aello* was an arrived ship when she anchored in the Buenos Aires Roads on October 12,

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[112] [1904] 2 K.B. 275.

[113] [1905] A.C. 501.

[114] (1881) 6 App.Cas. 251.

[115] [1958] 2 Q.B. 385, 406.

1954. I have no reason to think that the question cannot be answered satisfactorily by an application of the principles elaborated in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[116] I had intended to examine the opinions in that case somewhat closely, but having had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Jenkins, on this part of the case, with which I entirely agree, I find myself relieved of this task.

I would only add a few words on my view of the facts to which the principles of the *Leonis* case [117] fall to be applied.

It is clear on the evidence that prior to September 1, 1954, the usual place for grain ships to lie for loading was somewhere in the dock area reached after traversing a dredged channel leading from the " intersection " to Buenos Aires. I would have no hesitation in holding that prior to the coming into operation of the resolution that compelled the *Aello* to anchor in the roads when she arrived there on October 12, the free anchorage was not within the commercial area of the port for ships such as the *Aello*. After that date the position, I think, remained the same. I tabulate shortly the considerations that have led me to form this opinion, most of which cover the position before as well as after the coming into operation of the resolution of September 1, 1954.

1. The free anchorage was not an area within the port in which grain ships usually lay when waiting to load.

2. The lying of the *Aello* in the roads was a purely temporary incident, the result of a temporary restriction imposed by the port authority. It does not appear to me to present a materially different situation from what would have arisen if, owing to congestion of shipping in the port or some obstruction in the entrance channel, the *Aello* had had to wait in the roads till there was room for her to move in. Lord Watson in *Dahl* v. *Nelson Donkin & Co.*[118] regarded such an order as equivalent to a physical obstacle to entering a dock.

3. The vessel lay some 22 miles from the dock area and had still to finish her voyage to Buenos Aires in the sense that she had to be piloted and be assisted with tugs along a 22-mile channel in order to reach the usual " place " for loading as distinguished from the actual loading " spot."

4. No restriction such as was imposed by the resolution of September 1, 1954, was known to, or could reasonably have been

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[116] [1908] 1 K.B. 499.

[117] Ibid.

[118] 6 App.Cas. 38, 58.

contemplated by, charterer, shipper, or shipowner when the charterparty was made.

5. No loading or unloading of grain ships ever took place at the anchorage in the roads. There was evidence that such a proceeding would be dangerous if not impracticable.

6. The ship was no doubt as near as she could get to "the "actual loading spot" for some time after her arrival at the anchorage, but that, in my opinion, is immaterial. A point "as "near as circumstances permit to the actual loading spot" must, in my opinion, be within the port in its commercial sense, apart from stipulation in the charterparty.

7. The ship could not, in my view (though this is, perhaps, more a conclusion from the foregoing facts), be reasonably held to have been placed at the disposal of the charterer while she was lying at the roads.

8. The fact that oil vessels or other types of vessel might load or discharge in the roads is nothing to the point. There may be different commercial areas in a port for different types of vessel and cargo, or a vessel may have to load or discharge outside a port. In any event we do not know the terms of the charterparties for oil vessels. They may contain a clause "as near thereto as she "may safely get" or "as near thereto as circumstances permit"; a clause which is absent from the present charterparty.

For these reasons I reach the conclusion that the *Aello* was not an arrived ship when she anchored in the roads. Ashworth J. and the Court of Appeal, in my view, arrived at a correct result on this point.

The second main question is whether, if the vessel was not an arrived ship so far as her position was concerned, when she anchored in the roads on October 12, 1954, she must be deemed to be an "arrived ship" and ready to load because she could go no further, and could not obtain a giro by reason of the charterers' failure to have any cargo available to load aboard her on her arrival in the roads. The affirmative to this question, which is maintained by the appellants, proceeds on a line of authority which I find it necessary to examine with some care. The principle which I understand is relied on seems first to have made its appearance clearly in a number of Scottish shipping cases where there was applied, or rejected, a principle approved by this House in another Scottish case which was not a shipping case. In *Mackay* v. *Dick*[119] Lord Blackburn stated the proposition thus:

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[119] 6 App.Cas. 251, 263.

"I think I may safely say, as a general rule, that where in a "written contract it appears that both parties have agreed that "something shall be done, which cannot effectually be done "unless both concur in doing it, the construction of the contract "is that each agrees to do all that is necessary to be done on his "part for the carrying out of that thing, though there may be no "express words to that effect. What is the part of each must "depend on circumstances." Lord Watson in the same case[120] accepted a passage from Bell's Principles which, though adequate to cover the case then in hand, is, according to the late Professor Gloag in his erudite work on Contract (2nd ed. at p. 279), too widely stated. Gloag states the principle thus: "Where the "condition under which an obligation is undertaken is potestative, "so that its accomplishment is within the power of the party "conditionally liable, it may be held that his implied obligation "is not merely to impose no obstacle to accomplishment, but to "take active steps to promote it." He adds: "This is by no "means a general rule." After illustrations of cases in which it could not apply he concludes that the cases where an obligation to promote the accomplishment of a condition has been applied are those which fall within the rule formulated by Lord Blackburn. So far as I have observed *Mackay* v. *Dick*[121] was first referred to in a shipping case in *Lilly & Co.* v. *Stevenson & Co.*[122] It was also cited in this House in *Little* v. *Stevenson & Co.*[123] and in *Vergottis* v. *William Cory & Son Ltd.*[124] This rule is stated in very much the same way in English shipping cases. It is clearly recognised by Brett L.J. in *Nelson* v. *Dahl*,[125] a charterparty case, where he says "that where the act to be accomplished "is to be brought about by the joint effort of both parties, the only "implication, in the absence of an express contract to the con- "trary, is that each will use his best endeavours to forward the "accomplishment of the common object." In *Barque Quilpé Ltd.* v. *Brown*,[126] another charterparty case, Vaughan Williams L.J. said[127]: "The second point is, that in this contract, as in "every other, there is an implied contract by each party that "he will not do anything to prevent the other party from "performing the contract or to delay him in performing it." He adds that this is not to be taken as a special affirmative contract, but a stipulation implied in every contract.

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[120] 6 App.Cas. 251, 270.
[121] 6 App.Cas. 251.
[122] (1895) 22 R. 278.
[123] [1896] A.C. 108.
[124] [1926] 2 K.B. 344.
[125] 12 Ch.D. 568, 592.
[126] [1904] 2 K.B. 264.
[127] Ibid. 271.

Starting from this point I would examine a number of cases cited at the hearing in which there was considered the liability of charterers in damages for detention of ships which, through alleged failure of the charterers to provide a cargo, were prevented from arriving in dock, or at a berth, so as to become arrived ships. I shall take these in order of date.

In *Lilly & Co.* v. *Stevenson & Co.*[128] a vessel under charterparty had to proceed to a port in the Forth and receive at a berth or berths pointed out by the charterers a full cargo of coals. The ship arrived at Bo'ness on November 13. A berth was available on November 14, but as no coal was ready for her the ship lost her turn. The Lord Ordinary held[129] that the berth was lost through the fault of the charterer in not having a cargo ready, relying on the rule of *Mackay* v. *Dick.*[130] The fault would appear to have been in the arrangements made with the colliery company by the charterers, who were fully familiar with the rule of the port. His judgment was affirmed by the Second Division of the Court of Session.

Little v. *Stevenson & Co.*[131] was a case that originated in the Sheriff Court and this House was accordingly not at liberty to consider the evidence in the case, being confined to the facts found in the interlocutor of the Second Division.[132] The Second Division, reversing the sheriffs, had found that the charterers under a berth charterparty were not liable for failing to provide a cargo which would have enabled the ship to become an arrived ship. Under the charterparty the ship was to load a cargo of coal at Bo'ness "at the berth pointed out by the charterers' agent if "required," and "Lay days to count from the time the master "has got the ship reported berthed and ready to receive cargo, "and given notice of the same in writing to charterers, agents," etc.

What had happened, as appears from the opinion of Lord Trayner in the Court of Session,[133] though not fully set out in the interlocutor of the court, was that the ship arrived off Bo'ness on October 19, 1893. She could not get into the docks, the usual "place" of loading and discharge, because of congestion of shipping. On October 21, a loading berth became vacant which the ship could have had, if she had had a cargo ready, out of her turn, for there were some 20 or 30 ships ahead of her. It was on this fact that the shipowners relied and it would seem that appellants' counsel in this House wished the case to be remitted to the Court of Session for this fact to be added to the facts found in the interlocutor under appeal. In the Court of Session Lord Trayner, finding for the charterers, referred to the case of *Lilly & Co.* v. *Stevenson & Co.*,[134] and held that it did not apply. He said [135]: " But to prevent any misapprehension I may repeat here, " that if the reporting or berthing of the ship had been prevented " or hindered by the act or fault of the defenders, I should have " been prepared again to hold that such a state of facts did not prevent the running of the lay days, not because there had then been " fulfilment of the obligation on the part of the ship, but because " the shipper by his act or fault having prevented such fulfilment, " he could not take advantage to the detriment of another from " what had been brought about by his own fault." In this House Lord Halsbury L.C., referring to the opportunity that had arisen for a berth on October 21, said [136]: " The proposition of law is that " a merchant must be always ready with his cargo at all times and " in all places and under all circumstances to take advantage of " any such contingency if it should arise. There is not a fragment " of authority for any such proposition." Lord Herschell used almost identical language.[137] Referring also to the conditions of the charterparty, he said [138] that they would imply a duty on the charterer " of doing any act that was necessary on his part, " according to the custom of the port, to enable her to get a " berth," and, in a later passage,[139] that he [the shipper] was " bound to do whatever is reasonable on his part with the view of " getting the ship berthed at the earliest period that is reasonably " possible." In certain circumstances that might be his duty but not " at all ports and under all circumstances, however remote and " improbable might be the contingency." I think it must be assumed that the House saw no reason to send the case back to the Court of Session for any additional statement of facts or to differ from the opinion of Lord Trayner. The appeal was accordingly dismissed.

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[128] (1895) 22 R. 278.
[129] Ibid. 280.
[130] 6 App.Cas. 251.
[131] [1896] A.C. 108.
[132] (1895) 22 R. 796, 800.
[133] Ibid. 798.

In *Krog & Co.* v. *Burns & Lindemann* [140] a ship under charterparty had to proceed to Methil and there load a cargo of coals from such colliery as the charterers should select. She was to be loaded in 72 running hours commencing when the steamer was ready to receive cargo, reported at Customs House, berthed and written notice given to charterers' agent. The ship arrived at Methil on July 28 and gave notice that she was ready. There were then 10 ships ahead of her and there was no vacancy at the loading crane. A chance vacancy occurred at an unsuitable berth on July 29, and another vacancy at a suitable berth on July 30, owing to the ships ahead having no cargo ready. The ship herself had no cargo ready and so lost the vacant berth. She was finally berthed on August 3, loaded by August 5, and sailed on August 6. The Lord Ordinary held [141] that it was the duty of a charterer to do " any act that is necessary on his part, according to the custom " of the port to enable the vessel to get a berth," citing *Little* v. *Stevenson*.[142] He said the charterers were responsible for the acts or omissions of the colliery. They knew that there would be difficulty in providing cargo and they took the risk with their eyes open. He held the charterers liable for the detention. On appeal to the First Division his judgment was affirmed, Lord M'Laren pointing out [143] that contingencies of this kind were frequent and that the charterers could have gone to another colliery when they knew (10 days before the ship reached Methil) that the Bowhill colliery could not supply the coal in time.

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[134] 22 R. 278.
[135] Ibid. 796, 800.
[136] [1896] A.C. 108, 116.
[137] Ibid. 118, 119.
[138] Ibid. 118.
[139] Ibid. 119.
[140] (1903) 5 F. 1189.

Jones v. *Green* [144] (with which may be read *Barque Quilpué Ltd.* v. *Brown* [145]) was a case which turned on somewhat special circumstances. A ship under charterparty had to proceed to a loading berth at Newcastle, New South Wales, and there load in the usual and customary manner a full cargo of (blank) coals as ordered by the charterers. No loading time was stipulated. Wallsend coal, which was in short supply, was selected by the charterers. It was a custom of the port that no loading berth would be allocated without a colliery order. The ship arrived at Newcastle on September 1, 1900, and was only berthed on December 15, on getting a colliery order. It was held that the charterers were not liable for the delay. Kennedy J. held that under the charterparty the ship was to load in colliery turn and had been so loaded; also that the custom of the port in so loading was known to the shipowner, and that it was not unreasonable for the charterers not to substitute another coal which might have enabled them to get a berth sooner. The Court of Appeal (Vaughan Williams, Romer and Stirling L.JJ.) dismissed an appeal, holding that the circumstances were known to both parties, and that the charterers were entitled to a reasonable time for getting cargo having regard to the known circumstances of delay. The case of *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[146] which at this time had not got further than the Outer House of the Court of Session, was distinguished.

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[141] 5 F. 1189, 1193.
[142] [1896] A.C. 108.
[143] 5 F. 1189, 1196.
[144] [1904] 2 K.B. 275.
[145] Ibid. 264.

In *Ardan Steamship Co.*[147] the charterparty was in similar terms to that of the preceding case and for the same loading port. The charterparty was dated May 30, 1900. On June 9 the charterers contracted with the Lambton colliery for coal to be shipped under the charterparty "in regular colliery turn as customary." On July 14 the ship reached Newcastle, New South Wales. Two ships had arrived just before her intending to ship the same coal. On August 13 the loading of the two ships ahead was completed and a colliery order and a berth was obtained for the ship in question (the *Ardandearg*). Two shifts from the berth during loading were required because of shortage of coal and loading was not completed until August 23. Damages for 31 days' detention were claimed, that is, from July 14 to August 13.

This House, reversing the Second Division of the Court of Session, held the charterers liable for the detention.

The judgment, as I see it, proceeded entirely on the circumstances of that case. The House took the view, differing from the Lord President in the Court of Session, as appears most clearly from Lord Davey's speech,[148] that there were no special circumstances known to both parties which modified the obligation of the charterers. After pointing out that the berthing master at Newcastle could have given a berth to the *Ardandearg* on July 14, 1900, the day following her arrival in port if coal had been ready for her, he poses the question: "By whose default was it that "the ship did not get a loading order? The answer, in my "opinion, can only be that it was the default of the respondents "in not providing the cargo when the ship was ready to go on "the berth to receive it . . . In short, the respondents have not "satisfied my mind that it was any part of their contract with "the appellants that the latter should await the turn of the "colliery or take the risk of the cargo not being ready."

I would treat this case as turning simply on fault on the part of the charterers in failing to have a cargo ready to enable a ship to become an arrived ship. The charterers could not say that there was any contingency not contemplated by them, for they had contracted for coal "in regular colliery turn," and the colliery company was not able to supply sooner than it did. In other words, the ratio is the same as entered into the decisions in *Lilly & Co.* v. *Stevenson & Co.*[149] and *Krog & Co.* v. *Burns and Lindemann.*[150] That this is so can, I think, be seen from the judgment of the Lord Ordinary (Lord Pearson) in the Court of Session,[151] which was restored by this House. The Lord Ordinary points out [152] that the charterers had contracted with the colliery company to load "in regular colliery turn as customary, strikes, etc., excepted." These words, he says, "gave the defenders [the charterers] the "right to have the ship served in regular turn, but exposed them "to the risk of having to wait for her turn until ships arriving "earlier were loaded. This contract was not disclosed to the "pursuers, [the shipowners] who contracted with the defenders "alone." And later he says [153]: "I hold then (1) that the delay "was caused not by the exceptional congestion of shipping, but "by the failure of the defenders to perform their primary duty of "providing a cargo." In these circumstances it seems to me that there was good ground for saying that it was the act of the charterers, in entering into such a contract, that impeded them in providing a cargo that would have enabled the ship to be berthed earlier and become an arrived ship.

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[146] (1904) 41 Sc.L.R. 230; 6 F. 294.

[147] [1905] A.C. 501.

[148] Ibid. 514.

In *Vergottis* v. *William Cory & Son Ltd.*[154] the defendants had contracted to buy coal from a colliery company for shipment from Barry. They chartered the *Panaghis Vergottis* to proceed to a Welsh port and load a cargo of nominated coal in such dock as might be ordered by them, with a loading time of 144 running hours. The vessel was nominated to and accepted by the colliery company. She arrived in the roads on April 10 but did not, owing to absence of cargo, enter dock till April 19. Detention damages were claimed, for the period from April 11 to 19, for failure by the charterers to take steps that would have let the ship enter the dock when she arrived in the roads. Sufficient coal had not been provided to satisfy the dock authority's requirements, with the result that several ships which arrived in the roads after the *Panaghis Vergottis* were allowed to load ahead of her, and the *Panaghis Vergottis* lost her turn. The court held that there was no absolute obligation to provide a cargo until a ship was an arrived ship, but that the charterers should have had a cargo ready when the ordinary turn came for the ship to enter the dock.

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[149] (1895) 22 R. 278.

[150] (1903) 5 F. 1189.

[151] 6 F. 294.

[152] Ibid. 298.

[153] Ibid. 300.

[154] [1926] 2 K.B. 344.

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Greer J. said[155]: "I think there is an implied term in the charter-"party that the defendants would do whatever was reasonable in "order to enable the plaintiff's ship to get into the dock and so be-"come an arrived ship"; and later[156]: "In refusing to assist the "plaintiff's ship to get into the dock by complying with the require-"ments of the dock authority, the charterers broke their contract, "and are liable to pay the agreed damages."

Hogarth v. *Cory Bros. & Co. Ltd.*[157] was the case of a ship under charterparty to load coal at Calcutta on a berth charter. The ship arrived in the port on December 27, 1920, but was not berthed till February 13, 1921. She could have been berthed earlier if the dock authorities had been informed that coal for the ship was available; which in fact it was, but it was allowed to be put on other ships. The charterers were held to be in default. Delivering judgment of a Board of the Privy Council, Lord Phillimore said[158]: "If a ship is prevented from getting to a loading "berth owing to an obstacle created by the charterer, or owing "to the default of the charterer in performing his duty, then it is "well established that the shipowner has done all that is needful "to bring the ship to the loading place, and that the charterer "must pay for the subsequent delay."

My Lords, all these cases are, in my view, but illustrations of the application of the principle stated by Lord Blackburn in *Mackay* v. *Dick*,[159] Brett L.J. in *Nelson* v. *Dahl*,[160] Vaughan Williams L.J. in *Barque Quilpué Ltd.* v. *Brown*[161] and Gloag on Contract, to which I have already referred. The obligation on the charterer is not the same as is placed on him in the case of an arrived ship. There the obligation to have a cargo ready is absolute and immediate, frustration or exceptions in the charterparty apart. The charterer takes the risk of difficulties or delays in bringing a cargo forward, however unforeseen and unexpected, if he has not provided against them in his contract. In the case of a ship that has not arrived he is not, in my opinion, responsible for such contingencies. Absolute obligation there may be to provide a cargo, but the question is when does that obligation mature. His obligation in such a case is, under an implied term of the contract, to do what within him lies to secure for his part the performance of the contract, that is the arrival of the ship, without undue delay. It will, I think, be found that in the cases

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[155] [1926] 2 K.B. 344, 355.
[156] Ibid. 356.
[157] (1926) 32 Com.Cas. 174.
[158] Ibid. 178.
[159] 6 App.Cas. 251, 263.
[160] 12 Ch.D. 568, 592.
[161] [1904] 2 K.B. 264, 271.

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unjustifiable failure to fulfil the implied term is expressed not in terms of breach of contract, but as fault, or failure of duty, of the charterer. The accomplishment must be something that is, or should have been, within the power of the charterer to perform. The failure may be in a lack of foresight, or in the arrangements made beforehand for having cargo available at the right time. It would indeed be unfortunate if it were otherwise, for it would obliterate any distinction between an arrived ship and a ship which had not arrived, so far as concerned the obligation of the charterer to supply a cargo. One reason for the difference is that in the case of an arrived ship so far as the provision of cargo is concerned no question of joint performance arises. In the case of a non-arrived ship there is a duty on both parties to secure the arrival of the ship as speedily as possible. This is the joint act to which both must make his contribution. The charterer is responsible if he impedes its accomplishment by failing to take such measures as are, or should have been, in his power to achieve that result. He might do so by nominating an unsuitable berth, or in some other way. But the most common cause is by failing to take proper and reasonable steps to have a cargo available. This is, I think, too often spoken of as if it was an independent obligation on a level with that arising in the case of an arrived ship, whereas it is merely one of the contributions that the charterer must make, for his part, to the achievement of a common object. It also lacks the absoluteness of the other, for failure in performance must, in my opinion, be judged by what was reasonably possible, or reasonably to be anticipated, in all the circumstances of the case. Some reference was made by Lord Davey in the *Ardan Steamship Co.* case [162] to dicta of Lord Blackburn in *Postlethwaite* v. *Freeland*,[163] and in *Ford* v. *Cotesworth*.[164] I should doubt whether Lord Blackburn had anything other than the general principle in mind or was thinking of the obligation except in the context of an arrived ship. Lord Davey also referred to *Gardiner* v. *Macfarlane, M'Crindell & Co.*,[165] but *Gardiner* v. *Macfarlane, M'Crindell & Co.*[166] was clearly a case of an arrived ship.

I turn then to the relevant circumstances of this case, which may be very shortly stated. It is clear that the sellers of the maize, an Argentine State organisation, referred to conveniently as I.A.P.I., had sold in short supply. They had a monopoly of purchase from Argentine farmers and of sale for export. Maize was accordingly not coming forward to the port in sufficient quantity to supply the ships in port waiting to receive it. It was because of the congestion of maize ships in the vicinity of the docks and wharves that the order of September 1, 1954, was made by the port authority which, when it came into operation later in the month, required maize ships to wait in the roads and to take their turn in obtaining a berth for loading as maize came forward. As a completion cargo came forward each ship in turn received from the berthing officer a giro, or berthing permit, and moved in to a loading berth. No ship did, or could, get a berthing permit to load maize except in strict turn and according to the availability of maize for loading at the port. Nor did the *Aello* miss her turn. This situation, of course, had not arisen when the charterparty was made, and there is nothing in the evidence to suggest that it could even have been anticipated. When the ship arrived in the roads charterer and shipowner were tied hand and foot. There was nothing either could do to enable the ship to enter the port. The charterer could do nothing to accelerate or improve the arrival of maize, and nothing that he could have done at the time of the contract with the Argentine Government could, so far as the evidence goes, have made any difference in the result. Allocation, indeed, of any cargo of maize would seem to have depended on the coincidence of the arrival at the port of sufficient maize for a ship, or ships, with the turn of the ship in the roads. I am unable to see in the circumstances that there was any failure by the charterers to do anything in their power to facilitate the entrance of the ship into the port. Reasonable measures were what was required of them. But no measure, reasonable or unreasonable, could, as I see it, have had any different result.

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[162] [1905] A.C. 501, 511, 512.

[163] (1880) 5 App.Cas. 599, 619.

[164] (1868) L.R. 4 Q.B. 127, 134.

[165] (1893) 20 R. 414.

[166] Ibid.

This situation may be thought to be unusual, but it is a situation which may become increasingly common and may present charterers and shipowners with difficult problems. It is a situation in which the sale and export of grain are a Government monopoly, and in which the operation of the ports which are nationalised undertakings is also a Government monopoly. Shippers and shipowners, if they are going to trade and traffic with the Argentine at all, must submit to the dictates and regulations of the Argentine Government. The circumstances do not provide a situation in which it can easily be said that the shipper or charterer is responsible for the failures or omissions of the Government. It is idle for the shipowner to say to the charterer: " If " you had provided a cargo I could have got entry to the port." The reply is: " There was no point in my providing a cargo until

" the ships ahead of you had been served. Only then could you " have got entry to the port." True there were a number of empty loading berths. But these were out of commission for the loading of maize and maize ships were not being sent there. (See the evidence of Barzacos and Fowler.) The suggestion that the *Aello* failed to get a berth because of the failure of the charterers to have a cargo ready is, in the circumstances, quite unreal. I find difficulty in distinguishing the situation from that which might arise from a congestion of shipping preventing entry to a port, or some temporary closing of a port, which in a sense this was so far as maize ships were concerned. As the witness Fowler put it, the situation in September and October had developed to the point at which with the shortage of maize there was " a glut " of ships." On its facts, I should say that this case is a fortiori of *Little* v. *Stevenson & Co.*[167] for there there was a chance opportunity of the ship getting a berth if a cargo had been ready, whereas here there was no such opportunity at all. It was in that case that Lord Halsbury said [168]: " And I can imagine it would be " a most serious thing if such a proposition [that a merchant must " always be ready with his cargo] were supposed to be laid down to " regulate the mercantile community, because it might very " seriously imperil the conduct of merchants in their business if " it were to be supposed that all those twenty or thirty ships (for " it is said there were twenty or thirty ships there) were guilty of a " breach of an implied duty (the charterparty being in the ordin- " ary form) in not having their cargoes ready. I think I am " entitled to say that no such case has ever been suggested in the " courts." In the whole circumstances I cannot hold that there was any failure of performance on the part of the charterers here to enable the *Aello* to become an arrived ship.

I should add that had I thought otherwise I would have found no difficulty, from the fact that we have here a port charterparty, in applying the ratio of *Ardan Steamship Co.*[169] and similar cases relating to berth or dock charterparties to entry to a port.

For the reasons, however, which I have endeavoured to state, I would dismiss the appeal and allow the cross-appeal.

LORD JENKINS. My Lords, the appellant shipowners and the respondent charterers are agreed that the question whether the *Aello* became an arrived ship, and lay days began to run, when she anchored in Buenos Aires roads on October 12, 1954, as contended by the shipowners, or only when she entered the inner harbour on October 29, 1954, as contended by the charterers, should be resolved by the application to the facts of this case of the general principles with respect to the ascertainment of the time of arrival of ships engaged under port, as distinct from dock or berth, charterparties, laid down in the well-known case of *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[170] The principles there stated have been accepted as correct in a number of subsequent cases, including the case in your Lordships' House of *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*,[171] in which their validity as general principles was clearly recognised, although the actual decision of a majority of the House was to the effect that their application was excluded or qualified by the terms of the particular charterparty then under consideration. It is not suggested that the charterparty in the case now before your Lordships contains any provision which could have the effect of ousting or modifying these well-established general principles.

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[167] [1896] A.C. 108.

[168] Ibid. 116.

[169] [1905] A.C. 501.

But granted acceptance of their validity as general principles, and their applicability to a charterparty in the terms of the document now before your Lordships, ample room, of which counsel on both sides have fully availed themselves, is left for controversy as to the precise meaning of some of the language used by Buckley L.J., as he then was, and Kennedy L.J., in the course of their exposition (concurred in by Lord Alverstone C.J.) of these general principles in *Leonis Steamship Co. Ltd.* v. *Rank Ltd*[172]; and as to the result of their application to the facts of this particular case.

I should next refer to the main statements of principle contained in the judgments of Buckley and Kennedy L.JJ. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[173] which was a case where a vessel ordered under a port charterparty to Bahia Blanca to load wheat duly entered the named port and anchored within a few ship-lengths of the railway pier from which cereals were usually loaded and gave notice of readiness to load, but was delayed in getting a berth there owing to the crowded state of the port, and it was held that the lay days commenced 12 hours (the period stipulated by the charterparty) after the notice of readiness, and not from the time the vessel obtained a berth alongside the pier. Buckley L.J. said[174]:

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[170] [1908] 1 K.B. 499.

[171] [1926] A.C. 545.

[172] [1908] 1 K.B. 499.

[173] Ibid.

[174] Ibid. 512.

"The true proposition, I think, is that where the charter is to "discharge in a named place which is a larger area in some part "or in several parts of which the ship can discharge, the lay days "commence so soon as the shipowner has placed the ship at the "disposal of the charterer in that named place as a ship ready, "so far as she is concerned, to discharge, notwithstanding that "the charterer has not named, or has been unable owing to the "crowded state of the port to name, a berth at which in fact the "discharge can take place.

"In that which follows, I shall use the word 'berth' to "express and include a berth, or a wharf or a quay, or a place "where by the use of lighters or other means a vessel can load or "discharge, and the words 'place of discharge' as meaning a "place named in the charterparty of larger area than a berth "within which are a berth or berths, and investigate whether the "authorities do not support the proposition that under such a "charter as this the lay days begin to run when the vessel has "reached the place of discharge, but has not reached a berth. "The proposition is certainly true where the named place is a "dock. It is not disputed that the second proposition in Mr. "Carver's work on Carriage by Sea, 4th ed., s. 627 (2), is correct, "namely, that 'When a particular dock is named the lay days "'will begin as soon as the ship is ready, and at the freighter's "'disposal, inside the dock, though not alongside the quay; even "'though the work can only take place at the quay.' If this is "so it is difficult to grasp any ground of principle differentiating "a dock from that part of a port at which the ship would be as "closely proximate to a berth as she would be in a dock. What "logical difference can exist? The ship either is not or is an "arrived ship when she has not reached a berth. If she is when "the named place is a dock, why is she not when the named place "is a port and she is at a place as closely proximate to a berth as "she would be in a dock?"

Buckley L.J.[175] referred to the case of *Tapscott* v. *Balfour*[176] and continued: "He" (that is to say Bovill C.J. in that case) "said: 'If when she arrives there the place is so crowded that "'she cannot load, the loss must fall on the charterer; the ship-"'owner has done all he was required to do when he has taken "'his vessel to the usual place of loading in the port.' I point "attention to those words—'the usual place of loading in the "'port.' In those words I find an expression of the meaning to

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[175] [1908] 1 K.B. 499, 513.

[176] L.R. 8 C.P. 46.

"be given to what has been called the commercial ambit of the "port as distinguished from the whole port in a geographical or "maritime sense. It means, not the whole port, but such part "of the port as is a proper place for discharging, whether the "vessel has reached a berth or not. It is that part of the larger "area (the port) which can appropriately be described as the "place of discharge, meaning by that expression an area, and not "a berth."

After reviewing a number of authorities, Buckley L.J.[177] referred to *Pyman Bros.* v. *Dreyfus Bros. & Co.*[178] and continued: "For the reasons which I have given I think it is right, and at "any rate I think we should not disturb it. The proposition "which it affirms seems to me to have been this: that under a "charterparty which names an area, but not expressly or by the "words 'as ordered' a berth, the lay days run from the time "when the ship arrives in the named place of larger area (in that "case it was the outer harbour of Odessa), and is at the disposition "of the charterers for loading, . . ."

He concluded his judgment by saying[179]: "*Pyman Bros.* v. "*Dreyfus Bros. & Co.*,[180] I think, is good law and it governs this "case. The lay days here began, I think, when the vessel anchored "near the railway pier. The appellants, therefore, are entitled to "succeed."

Kennedy L.J. said[181]: "Now, the answer to the inquiry "whether the ship can or cannot properly be described as an "'arrived' ship obviously depends upon the point which the "parties have chosen to designate in the charterparty as the "destination. The degree of precision is purely a matter of "agreement between them." He went on to distinguish between port, dock and berth charterparties, and observed[182]: "It is when "the stipulated point of destination is a port only, without further "limitation, as in the present case, that a question as to the "fact of the ship's arrival at her destination is likely to arise." Then,[183] after quoting a passage in the judgment of Lord Esher M.R. in *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*,[184] and referring to *Brown* v. *Johnson*[185] and *Kell* v. *Anderson*,[186] the learned Lord Justice said this[187]: "If, then, we find a charterparty

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[177] [1908] 1 K.B. 499, 516.
[178] 24 Q.B.D. 152.
[179] [1908] 1 K.B. 499, 517.
[180] 24 Q.B.D. 152.
[181] [1908] 1 K.B. 499, 518.
[182] Ibid.
[183] Ibid. 519.
[184] (1885) 15 Q.B.D. 580, 587.
[185] (1842) 10 M. & W. 331.
[186] Ibid. 498.
[187] [1908] 1 K.B. 499, 520.

"naming a 'port' simply, and without further particularity or "qualification, as the destination for the purpose of loading or unloading, we must construe it in regard to the 'arrival' of the ship "at that destination as meaning that port in its commercial sense. "that is to say, as it would be understood by persons engaged in "shipping business, and in regard to the arrival of a ship there "for the purposes of the charterparty. In the case of a small "port, 'port' may or may not mean the whole of the geographical "port. In the case of a widely extended area, such as London, "Liverpool or Hull, it certainly signifies some area which is less "than the geographical port, and which may, I think, not unfitly "be called the commercial area.

"But then comes the question what does the expression the "'port,' viewed commercially, or the 'commercial area' in this "connection mean? Certainly it does not mean the loading berth, "that is to say, the actual spot at which the work of loading or "unloading the ship is performed. As Channell J. remarks in "his judgment in the present case [188]: 'It would be very peculiar "'if there were a greater obligation on the ship to go to a specific "'berth when [where] the charterparty was less specific by "'naming a port only than where it was more specific and named "'a dock.'"

Then, after discussing the effect that custom might have on the question, he continued [189]: "In the absence of any proof of "a custom of this kind—and I may note in passing that no "evidence of such a custom was given in the present case—the "commercial area of a port, arrival within which makes the ship "an arrived ship, and, as such, entitled to give notice of readiness "to load, and at the expiration of the notice to begin to count "lay days, ought, I think, to be that area of the named port of "destination on arrival within which the master can effectively "place his ship at the disposal of the charterer, the vessel herself "being then, so far as she is concerned, ready to load, and as "near as circumstances permit to the actual loading 'spot' (I "use the convenient word which was employed by Denman J. "in *Tapscott* v. *Balfour* [190] and by Bramwell L.J. in *Davies* v. "*McVeagh* [191]), be it quay or wharf, or pier, or mooring, and in "a place where ships waiting for access to that spot usually lie, "or, if there be more such loading spots than one, as near as "circumstances permit to that one of such spots which the "charterer prefers."

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[188] [1907] 1 K.B. 344, 354.

[189] [1908] 1 K.B. 499, 521.

[190] L.R. 8 C.P. 46.

[191] (1879) 4 Ex.D. 265.

Later Kennedy L.J. said [192]: "The proposition which is stated "by Mr. Carver at pp. 751 and 752 (s. 624a) of the 4th edition "of his most valuable work on Carriage by Sea, and is restated "at p. 760 (s. 627), appears to me to be entirely right: 'When "'the place named is a port, or other wide district, the lay days "'begin when the ship is ready, and at the freighter's disposal, "'within the named place in its commercial sense; though she "'may not be in a position to take in or discharge cargo, and "'though she may not be at the wharf, dock, or other part of "'the place to which the charterer may have properly required "'her to go.'"

I think the only other citation I need make from this judgment is where the learned Lord Justice said [193]: "If, as she then "lay (sc. the *Leonis*), she was then an 'arrived' ship at the "charterers' disposal, and ready to load, it is, under such a "charterparty as the present charterparty of the *Leonis*, imma-"terial whether she was in a place in which the physical act of "loading was possible or impossible."

Such being the general principles to be followed in determining the time and place at which a vessel under a port charterparty becomes an arrived ship, I should next state briefly the facts to which they have to be applied in the present case. Pursuant to the charterers' orders the *Aello* in the first instance proceeded up the River Parana to Rosario and there loaded a part cargo of maize, completing this operation at 6 p.m. on October 11, 1954. She was then ordered by the charterers to proceed to Buenos Aires and there load the balance of such cargo (no further notice of readiness to load being required under the charterparty). Accordingly, the *Aello* returned down river to Buenos Aires and anchored in Buenos Aires roads at 1.30 p.m. on October 12, 1954. Buenos Aires roads are in the vicinity of a point in the estuary known as "Intersection," which is marked by a moored hulk for the use of port officials. From "Intersection" a dredged channel leads upstream to a point some six miles below the water-front of the city where it bifurcates into North and South channels leading into basins or docks disposed along the water-front. "Intersection" has no artificial features apart from the moored hulk to which I have referred, all the docks, basins, quays, grain elevators and other facilities for the loading and unloading of vessels being located along the water-front in what is (without prejudice) conveniently described by Ashworth J. as the dock area. Disposed along the outer edge of the dock area are three vanguardia or hailing stations from which the arrivals and departures of ships are recorded. "Intersection" is some 22 miles down river from the nearest point in the dock area at which facilities for loading grain are provided. Vessels proceeding from or to the dock area, to or from "Intersection" or the roads adjacent thereto, have to keep to the dredged channels, and there is no question of their anchoring at any intermediate point. The roads include two anchorages known as the Quarantine Anchorage and the Free Anchorage, in the latter of which the *Aello* anchored on October 12, 1954. At "Intersection" vessels coming in from abroad are subjected to medical, customs and police examinations of the usual character. Vessels coming in from up-river ports, such as the *Aello* in the present case, having received the necessary clearances with respect to these matters on their original entry, are not as a rule troubled with them again, but are required, as are all vessels, to obtain a final police permit before being allowed to commence loading, such permit being normally obtained at the quayside immediately before loading begins. I should add that port pilots (as distinct from river or deep sea pilots, as the case may be) are taken on at "Intersection"; and that dues are charged on vessels anchoring in the roads, and also for special operations such as lightening. So far as commercial operations are concerned, incoming vessels are required by the port regulations to unload inflammable or explosive cargo at "Intersection." Cargo is sometimes also unloaded there for the purpose of lightening a vessel proceeding up river, and it appears that bunkering and the taking on of stores may also be carried out there. It appears also that ships with "free pratique," that is to say, passed out of quarantine, are allowed to wait in the Free Anchorage if unable to enter the inner harbour, or if waiting for orders. But the loading of grain at "Intersection," which (like any other loading or unloading operations at "Intersection") would have to be carried out by means of lighters sent out from the dock area, is considered impracticable and is never done.

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[192] [1908] 1 K.B. 499, 523.

[193] Ibid. 527.

The *Aello* was obliged to remain in the Free Anchorage until October 29, 1954, when she proceeded to a berth in the inner harbour and was ready to load by 2 p.m. on that day. The reasons for the delay between October 12, when the *Aello* anchored in the roads, and October 29, when she went on to berth in the inner harbour, were that under a resolution passed by the port authorities on September 1 in consequence of an acute shortage of maize cargoes, no vessel intending to load maize was allowed to enter the inner harbour without a giro or berthing permit, and no giro could be issued to any vessel unless a cargo of maize was available for her; and that no such cargo became available for the *Aello* until October 29. Before September 1 it was not necessary in order to obtain a giro that a cargo of maize should be actually available, and maize ships were allowed to enter the inner harbour and wait there for their cargo, and they usually did so. Under the system introduced by the resolution of September 1, 1954, maize cargoes as and when available were allotted to vessels in turns fixed by the order in which they came into the roads. There was never any shortage of berths. The difficulty lay solely in the fact that the demand for maize cargoes exceeded the supply.

On behalf of the owners, Mr. Mocatta, applying to the facts of the present case the language used by Kennedy L.J. in the passage already quoted from his judgment in *Leonis* v. *Rank*,[194] beginning, " In the absence of any proof of a custom of this " kind . . . ," contended that the *Aello* when she anchored in Buenos Aires roads on October 12, 1954, was within the commercial area of the port as therein defined. Mr. Mocatta said that when anchored in the roads the *Aello* satisfied the prerequisite of being within the legal, administrative and fiscal limits of the port, a proposition which I am content to accept, notwithstanding Mr. Roskill's argument to the contrary based on evidence to the effect that the roads were used in common by the ports of Buenos Aires and La Plata. Mr. Mocatta went on to say that when in the roads the *Aello* satisfied Kennedy L.J.'s requirements of being (i) within that area of the named port of Buenos Aires on arrival within which the master could effectively place his ship at the disposal of the charterers, (ii) so far as she was concerned ready to load, (iii) as near as circumstances permitted to the actual loading spot, and (iv) in a place where ships waiting for access to that spot usually lay. Mr. Mocatta went on to argue that it was not necessary that the *Aello* in order to be an arrived ship should be in a place where it was possible or usual to load or discharge (see, for example, Kennedy L.J.'s citation [195] from Carver and his observation to the effect that it was immaterial whether the *Leonis* was " in a place in which the physical act of loading was " possible or impossible " [196]), and that the distance from the actual loading spot was immaterial. Mr. Mocatta relied on " The " true proposition " stated by Buckley L.J. in the passage [197] to which I have already referred, and claimed that it was satisfied by the *Aello* on the facts of this case. But Buckley L.J. explained his meaning more clearly and, as I think, more correctly in his definition of what he called " the commercial ambit " of the port in the passage already quoted.[198]

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[194] [1908] 1 K.B. 499, 521, 522.

[195] Ibid. 523.

[196] Ibid. 527.

[197] Ibid. 512.

I find myself unable to accept Mr. Mocatta's submissions on this part of the case. If there had been no shortage of maize and no resolution of September 1, 1954, I think it would have been manifestly impossible to hold that the *Aello* was an arrived ship in point of geographical position when she anchored in the roads. I do not see how it could then reasonably have been held that the *Aello* could effectively have been placed at the disposal of the charterers lying as she did 22 miles from the nearest " actual " loading spot " for maize and in a place in which the loading of maize was for practical purposes in fact inherently and permanently impossible. Nor do I see how it could reasonably have been held that the *Aello* when anchored in the roads was as near as circumstances permitted to the actual loading spot, seeing that she could have proceeded into the inner harbour, as in the conditions I am postulating she would have been allowed to do. I do not think the resolution of September 1 makes any difference in the result. Its effect was to oblige the *Aello* to stay in the roads pending the availability of cargo entitling her to enter the inner harbour, and Mr. Mocatta claimed that when in the roads she was by reason of the resolution of September 1, which allowed her to go no further, within Kennedy L.J.'s requirement of being as near to the actual loading spot as circumstances permitted. I hope I am not doing less than justice to Mr. Mocatta's argument if I put it thus:

(i) The *Aello* was within the legal, fiscal and administrative limits of the port:

(ii) She was as near as circumstances permitted to the actual loading spot for maize:

(iii) She was where she lay at the disposal of the charterers in that so soon as cargo was made available for her (which it was the charterers' business to do) she could enter the inner harbour, berth, and begin loading in a matter of three hours:

(iv) It mattered not that where she lay it was impossible for her to load:

(v) The roads were a place in which under the resolution of September 1 vessels awaiting access to the actual loading spot usually lay:

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[198] [1908] 1 K.B. 499, 513.

(vi) The roads were within the commercial area of the port, in view of the commercial activities carried on there as above described, albeit they did not include the loading of maize.

I do not think this line of reasoning can be accepted consistently with the principles stated in *Leonis* v. *Rank.*[199] The essential effect of those principles is, as I understand them, to impute to charterer and shipowner under a charterparty requiring a vessel to proceed to a given port and there load, without further details as to place, the intention that the shipowner will (in point of geographical position) have performed his duty of making the vessel available to load at the port in question when he has brought it to the " commercial area " of the port, that is to say, the area in which the actual loading spot is to be found and to which vessels seeking to load cargo of the relevant description usually go, and in which the business of loading such cargo is usually carried out. The area presumed to be intended by the hypothetical owner and charterer is further particularised in point of proximity to the actual loading spot as being the area on arrival within which the master can effectively place the ship at the disposal of the charterer, and the position of the ship in which is to be as near as circumstances permit to the actual loading spot and in a place where ships waiting for access to that spot usually lie.

The judgments, as I think, clearly postulate as the " commercial area " a physical area capable (though no doubt only within broad limits) of identification on a map. When the given ship enters that area and positions herself within it in accordance with the requirements just stated, she is (in point of geographical position) an arrived ship: until she does so she is not an arrived ship, and lay days and demurrage are to be calculated accordingly.

It is, of course, essential for the purpose of apportioning responsibility for delay between owner and charterer that the ship having complied with such requirements should not be prevented from being an arrived ship because conditions at or in the vicinity of the actual loading spot in the shape, for example, of obstruction by other vessels are such as to make loading for the time being impossible. So to hold would be to cast on the owner the responsibility for delay which should properly fall on the charterer, and in effect to obliterate the distinction between port and berth charters which Buckley and Kennedy L.JJ. were at such pains to draw. But this affords no support for the proposition that a ship which is compelled by port regulations to remain for the time being in a place in which it is impossible to load her is while remaining in that position an arrived ship because she is not allowed to go any further.

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[199] [1908] 1 K.B. 499.

I agree with the passage in the judgment in the present case of Parker L.J., where he says[200]: "The commercial area was "intended to be that part of the port where a ship can be loaded "when a berth is available, albeit she cannot be loaded until a "berth is available." I also agree with his view (expressed on the same page) to the effect that there is no conflict between the judgments of Buckley and Kennedy L.JJ.

It appears to me that Mr. Mocatta's argument in effect does away entirely with the conception of "the commercial area of "the port" and substitutes a wholly different test, namely: "Is "the ship within the legal, fiscal and administrative limits of the "port, and, if so, is she as near as circumstances admit to the "actual loading spot?" If this test is satisfied, the ship is an arrived ship however far (within the limits aforesaid) the ship may be from the actual loading spot and although it may be wholly impossible to load her where she lies, provided that she is as near the actual loading spot as port regulations or other circumstances permit her to go, and time begins to run against the charterer accordingly. I see no justification for this radical departure from the principles of *Leonis* v. *Rank*[201] as heretofore understood. Mr. Mocatta placed considerable reliance on *Pyman Bros.* v. *Dreyfus Bros. & Co.*,[202] which was cited with approval in *Leonis* v. *Rank*,[203] but I do not think it affords any real support for his argument.

As to the submission that under the resolution of September 1 the roads were a place where vessels awaiting access to the actual loading spot usually lay, I think the true view is that these vessels were awaiting access to the commercial area of the port as distinct from being in the commercial area of the port and awaiting access to the actual loading spot in that area.

As to the commercial activities carried on at "Intersection" as above described, it appears to me that these did not make "Intersection" a commercial area of the port for the purpose of loading maize.

As to the resolution of September 1, 1954, I think it operated to exclude the *Aello* from the commercial area of the port (which

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[200] [1958] 2 Q.B. 385, 401.

[201] [1908] 1 K.B. 499.

[202] 24 Q.B.D. 152.

[203] [1908] 1 K.B. 499.

I take broadly speaking to comprise the inner harbour and dock area) and not to extend the commercial area of the port to "Intersection."

The view I have formed to the effect that the *Aello* was not an arrived ship in point of geographical position until she entered the inner harbour and went on berth on October 29, 1954, makes it unnecessary for me to express any opinion on the questions whether her lack of a giro and/or a police permit until October 29 would have prevented her from being ready to load until that date even if she had been in other respects an arrived ship, and I refrain from doing so.

I would, accordingly, dismiss the appeal.

As to the defence based on the principle of *Mackay* v. *Dick*,[204] I agree with my noble and learned friend, Lord Cohen, that this principle has no application here.

I also agree with Lord Cohen for the reasons he gives that the owners' counterclaim for damages based on the charterers' absolute obligation to provide cargo was rightly allowed by Ashworth J. and upheld in the Court of Appeal, and is indeed concluded against the charterers by the case in your Lordships' House of *Ardan Steamship Co.* v. *Andrew Weir & Co.*[205]

I would, accordingly, dismiss the cross-appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the first main issue in this litigation is whether the ship *Aello* was an arrived ship when at 1.30 p.m. on October 12, 1954, she anchored in the Free Anchorage in the roads at Buenos Aires. Under the charterparty entered into on the Centrocon form on August 27, 1954, it was provided by clause 2 that the ship was to proceed as ordered by the charterers " to the under-mentioned ports or places " and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bulk, which cargo the charterers bound themselves to ship. Clause 3, so far as material, provided: " The " steamer shall load as follows, viz., at one or two safe loading " ports or places in the River Parana, not higher than San Lorenzo " . . . quantity at charterers' option, but not more than the " steamer . . . can safely carry over Martin Garcia Bar . . . and " the balance of the cargo in the port of Buenos Aires or Eva " Peron or Montevideo at charterers' option (to be declared by " charterers in writing before the steamer is ready to leave her " last up-river loading port)." From that clause it is apparent and it is not in contest that the charterparty was within the category of port charterparties. The charterparty provided that after loading the steamer was to proceed to Hamburg and there discharge.

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[204] 6 App.Cas. 251.

[205] [1905] A.C. 501.

The *Aello* was directed by the charterers to proceed up river to Rosario. She there loaded a quantity of 5,750 metric tons of maize. A letter dated October 11 was then sent to the master of the *Aello* requesting him to proceed with the ship "to the "port of Buenos Aires in order to continue loading there." Accordingly, she sailed from Rosario at 7.40 p.m. on October 11. When she anchored in the Buenos Aires roads at 1.30 p.m. on October 12 she was between 19 and 22 miles from what might be called the docks area of Buenos Aires. It would have taken the *Aello* about 2½ to 3 hours to cover the intervening distance. In order to proceed to the docks area it was necessary for the ship to have a giro or berthing permit. Under the system prevailing before September a giro would readily have been issued provided that the Argentinian Grain Board (which controlled the arrangements for exporting maize) issued a certificate allocating the parcel of grain required to complete a cargo. But in the period preceding September 1, 1954, the supplies of maize that were reaching the Grain Board were inadequate, and the consequence of this was that ships were delayed in loading and had to wait either in one of the basins or alongside ships that were being loaded. Consequent upon this a new system was put into operation as the result of a resolution adopted on September 1, 1954: under the new system a giro would only be issued if, in addition to the possession of a certificate of the Grain Board, it could be shown that the requisite cargo of maize for the particular ship was in fact immediately available.

The charterers, who carry on business in Budapest, make purchases in bulk of cereals, including maize, for the Hungarian Government. In entering into the charterparty of August 27, 1954, they assumed an absolute obligation to supply cargo to the ship in accordance with the terms of the charterparty. The arrangements that they had chosen to make to such end were no concern of and no responsibility of the shipowners. Because the sale of maize from the Argentine was controlled, purchases for export could only be made from a government organisation which was referred to in the litigation as I.A.P.I. That organisation purchased its maize from farmers and producers. The exporting arrangements were then regulated by the Grain Board.

The charterers had on June 23, 1954, made contracts with

Bunge Aktiengesellschaft, Zurich, under which maize was to be shipped by Messrs. Bunge & Born Lda, Buenos Aires, and they in turn made a contract to purchase from I.A.P.I. In the period after the middle of September, 1954, I.A.P.I. were still receiving inadequate supplies of maize. As a consequence of this, when the *Aello* arrived in the roads at Buenos Aires her cargo was not available. The same state of affairs applied in the case of other ships whose purpose was to load maize at Buenos Aires. As I.A.P.I. were the only suppliers upon whom to draw supplies of maize, supplies were made available in the order of the sequence in which ships which were to load maize had reached the roads. So it came about that under the system which had been put into operation in September the *Aello* was not permitted to proceed beyond the roads. She was not allowed to do so until her cargo was available for her. It was not until October 29 that the availability of maize made the issuing of a giro possible. When it was issued, a pilot was sent so that the *Aello* could proceed. The pilot went on board at 10.0 a.m. and, assisted by tugs, the ship started to move in. She was ready to start loading at 2.0 p.m. and actually began loading at 3.15 p.m. If she was an arrived ship on October 29, and not before, then it is common ground that the loading performance would give entitlement to dispatch money, and the sum demanded by the shipowners as a payment for demurrage was not owing.

It was contended, however, on behalf of the shipowners that lay days ran after the ship reached the roads. It was said that she was then an arrived ship (a) because of the position that she had reached, and (b) because so far as the ship was concerned she was ready to load. It was said that so far as position was concerned the ship was within the legal, fiscal and administrative limits of the port of Buenos Aires and was within an area where her master could effectively place her at the disposal of the charterers, and was as near as the circumstances permitted to the actual loading "spot" and was in a place where ships waiting for access to that spot usually lay.

The question is posed, therefore: Was the *Aello* an arrived ship on October 12? In the competing submissions made on behalf of charterers and shipowners reliance was placed by each party upon the decision of the Court of Appeal in the celebrated case of *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[206] The authority of that case has not been assailed and in the years since 1908 it must have guided shipowners and charterers in the ordering of their affairs. In his speech in your Lordships' House in *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[207] Viscount Cave L.C. spoke of "a series of authorities which cannot now be "shaken," and within that category included *Nelson* v. *Dahl*[208] and *Pyman Bros.* v. *Dreyfus Bros. & Co.*[209] and *Leonis Steamship Co.* v. *Rank Ltd.*,[210] and Lord Sumner spoke[211] of "the rule "as settled in *Leonis Steamship* v. *Rank.*[212]" The problem becomes one as to its interpretation and its application to the facts of the present case. In that case[213] the charterparty provided that the *Leonis* after arrival at Montevideo should proceed as ordered by the charterer to one or two loading ports or places in the River Parana but with certain options in the charterers which included an option to load the entire cargo at Bahia Blanca. The vessel was in fact ordered to Bahia Blanca and so the charter fell to be construed as though it had merely provided that the vessel was to proceed to Bahia Blanca and there load. It was provided by the charterparty that lay days were to commence 12 hours after notice that the vessel was ready to load. The vessel arrived off the pier at Bahia Blanca: she anchored, as Channell J. held, "in the river within the port a few ship's lengths off the "pier."[214] The evidence showed that Bahia Blanca was a port at which cereals were usually loaded alongside the pier. When the vessel arrived there were many vessels waiting to be loaded. The charterer wanted the ship to go alongside the pier to load but the crowded state of the port caused a long delay before that was possible. So the vessel was kept waiting for a berth at the pier. She was anchored in the place where vessels usually lay while so waiting. After she had anchored her master gave a notice that the vessel was ready to load. The question arose as to whether the vessel was an "arrived" ship, and the Court of Appeal held that she was, so that lay days commenced 12 hours after the notice was given.

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[206] [1908] 1 K.B. 499.

The essence of the inquiry in that case was as to whether the vessel had reached the port of Bahia Blanca which she was contractually obliged to reach before her master could properly inform the charterers that the ship was at their disposal for loading purposes. In effect the inquiry was as to what the contracting parties meant when they referred to the port of Bahia Blanca.

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[207] [1926] A.C. 545, 551.
[208] 12 Ch.D. 568.
[209] 24 Q.B.D. 152.
[210] [1908] 1 K.B. 499.
[211] [1926] A.C. 545, 567.
[212] [1908] 1 K.B. 499.
[213] Ibid.
[214] [1907] 1 K.B. 344, 351.

So in the present case the question arises as to what the parties meant when they referred to the port of Buenos Aires. Had the *Aello* on October 12, 1954, reached the port of Buenos Aires? If the port of Buenos Aires had on October 12, 1954, some different identity from that which it possessed a few weeks previously (i.e., on August 27, 1954, the date of the contract), I approach the inquiry on the basis that it is to the position on October 12 that regard must be had. I think that it is clear that over a period of time there may, as a result of the operations of man or possibly of the forces of nature, be change effected in that which is denoted when mention is made of a particular port. Such changes are unlikely to occur within the brief period of a few weeks. Over a period of years the size of ships may increase and the places for their reception may need to be enlarged.

If, then, there is a contractual provision that a ship must proceed to a named port, how is a court to approach the mixed inquiry of law and fact as to whether the ship has reached its destination? If a charter provides that a ship must go to some named berth it will ordinarily be a straightforward issue of fact as to whether the ship has reached that berth. If the obligation is to reach a named dock, the limits of possible controversy as to whether a ship has reached such dock will be narrow. But if the obligation is to go to a port there is less precision in the contractual definition of the destination which is to be reached. If some pilotage questions were involved in reference to a named port it would not at all follow that the term " port " in such context meant the same as it would mean if there were questions of port dues or of customs duties: nor does it follow that the term " port " when used to designate the place where a ship is to go to load cargo means the same as in any of such other contexts. If a charter provides that a vessel is to proceed to a port and there load it is, I think, clear, as was said by Channell J. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[215] that it would not be sufficient for the vessel to get to the outskirts of the port. He endorsed the view that the ship must get within the commercial port as distinguished from the legal or geographical port.

In his judgment in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[216] Buckley L.J. referred with approval to a passage in Mr. Carver's work on Carriage by Sea (4th ed., s. 627 (2)) to the effect that if a particular dock is named in a charter lay days would begin to run when the ship was ready and at the freighter's disposal inside the dock, even though the ship was not alongside a quay, and even though the work could only take place at the quay. Buckley L.J. then proceeded: "If this is so it is difficult to grasp any "ground of principle differentiating a dock from that part of a "port at which the ship would be as closely proximate to a berth "as she would be in a dock. What logical difference can exist? "The ship either is not or is an arrived ship when she has not "reached a berth. If she is when the named place is a dock, why "is she not when the named place is a port and she is at a place "as closely proximate to a berth as she would be in a dock?" This passage emphasises that if a ship is required to go to a certain port so that she may there load she may become an arrived ship, even if she is at anchor at a place where the charterer does not intend to load her, or even could not load her provided that the place bears a relationship to the actual or probable loading spot comparable with that which would exist between presence in a dock and presence at a particular berth in a dock. Buckley L.J. was dealing with a case where the ship lay but a few ship's lengths from the pier at which she was to load. He referred [217] with approval to *Pyman* v. *Dreyfus*,[218] in which case, in reference to a ship which had to proceed to Odessa and there load, and which reached the outer harbour of Odessa, Mathew J. said [219]: "Here "the vessel arrived on December 22, at a point where she was at "the disposition of the charterers. They had only to indicate the "place to which she was to go for her cargo, and she would have "been there immediately."

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[215] [1907] 1 K.B. 344, 352.

[216] [1908] 1 K.B. 499, 512.

In the judgment of Kennedy L.J.[220] there is a passage which directs a clear approach. "In the case of a port," the Lord Justice said, "and nothing more, being designated in a charter-"party as the point of destination our courts have acted in "accordance with those dictates of reason and practical expedi-"ency which ought to be paramount especially in the region of "mercantile business. Just as a port may have one set of "limits, if viewed geographically, and another for fiscal or for "pilotage purposes, so when it is named in a commercial docu-"ment, and for commercial purposes, the term is to be construed "in a commercial sense in relation to the objects of the particular "transaction."

My Lords, the parties to the charterparty now being considered knew and understood that if the ship should be required to go to the port of Buenos Aires it would be with the object of loading wheat and/or maize and/or rye. The evidence shows that it was never contemplated that such loading would take place in the Buenos Aires roads. It was commercially impracticable to load a cargo of grain in the roads and it was never done. There was in the present case no necessity for the master of the *Aello* to give a notice of readiness to load after arrival at the port of Buenos Aires. That was because of the provisions of clause 13 of the charter and because the ship had in the first place gone to Rosario. But, had there been any such necessity, I do not think that if the *Aello* had been due to arrive in the port of Buenos Aires in the period before September, the master could have served such a notice upon arrival at the roads. The reason would have been that the *Aello* would not then have been at the port "in its commercial sense, that is to say, as it would be understood "by persons engaged in shipping business and in regard to the "arrival of a ship there for the purposes of the charterparty." My Lords, I do not think that there was any difference in the period after the middle of September. The purposes of the charterparty did not change. The *Aello* could only load when she reached "the commercial area," which in this case meant the commercial area within which cereals were loaded. It was such area that both parties had in mind, certainly before September, when they used the designation "Port of Buenos Aires." That area was not changed by the order of September 1. The port of Buenos Aires as designated for the purposes of this charterparty was not thereby enlarged. In my view, the effect of the order of September 1 was to prevent some ships from entering the port. The ships so prevented were those which were destined to load maize. In the case of such ships the authorities in effect ordained that because they were purposing to enter the port in order to load maize they should not be allowed to enter until such time as it could be shown that after entering the port they would be able to carry out their purpose of loading.

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[217] [1908] 1 K.B. 499, 516, 517.

[218] 24 Q.B.D. 152.

[219] Ibid. 157.

[220] [1908] 1 K.B. 499, 519

In his judgment Kennedy L.J. explained[221] that when he spoke of the "commercial area" he meant that area of the named port of destination on arrival within which a master can effectively place his ship at the disposal of the charterer, the vessel being ready to load and as near as circumstances permit to the actual loading "spot," and in a place where ships waiting for access to that spot usually lie, or, if there be more loading spots

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[221] [1908] 1 K.B. 499, 521.

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THE AELLO.

Lord Morris of Borth-y-Gest.

than one, as near as circumstances permit to that one of such spots which the charterer prefers. The element of proximity was present in the facts of the case with which the Lord Justice was dealing and he illustrated what he regarded as "the point of "arrival" by reference to *Pyman Bros.* v. *Dreyfus Bros & Co.*[222] The Lord Justice also quoted the words of Mathew J. to which I have already referred.[223]

The phraseology used in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[224] and other cases shows that it is no easy matter to employ the appropriate words to describe an area of water which is itself within a larger area, but Kennedy L.J. conveys the conception when he speaks of the commercial area within the port which is usually occupied by vessels whose obligation and purpose is to receive a cargo.[225] A vessel may be within that area but may not be actually loading: she may be waiting to be loaded—or waiting to move to a berth at which she can be loaded. But if it can reasonably be said that a ship which is required to go to a port in order there to load has reached the commercial area of the port within which are the loading spots for her specified cargo, so that she next awaits details as to her particular loading spots and directions as to proceeding to them, then it can also fairly be said that she has arrived at her destination. I agree with Parker L.J. in thinking that Kennedy L.J. was in his judgment making a contrast between an area where loading takes place as opposed to the actual loading spot. Where loading is to be at a berth Parker L.J. neatly stated the matter as follows[226]: "The commercial area was intended to be that part of the port "where a ship can be loaded when a berth is available, albeit "she cannot be loaded until a berth is available." If there had been no temporary port regulations such as that which operated from the middle of September until the month of December I do not consider that if the *Aello* had been directed to the port of Buenos Aires in order to load maize the shipowners would or could have considered that the *Aello* had reached her destination when she reached the roads. When, on a date subsequent to September 1, the *Aello* was directed to the port of Buenos Aires in order to load maize, her destination was no different from that which it would have been under a direction earlier given. The effect of the order of September 1 was to make access to the destination dependent upon a condition being satisfied.

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[222] 24 Q.B.D. 152.
[223] Ibid. 157.
[224] [1908] 1 K.B. 499.
[225] Ibid. 523.
[226] [1958] 2 Q.B. 385, 401.

It would be wrong to suppose that in no case could a ship which was ordered to a particular port in order there to load become an arrived ship unless she had reached a position equally as close to her probable or possible loading spot as was the ship in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[227] The application of the tests laid down in that case must have widely varying results which will reflect the widely varying circumstances in different ports. The evidence in the present case leads me to the view that, certainly before the resolution of September 1, those concerned with the movements of the *Aello* would not have considered that she had reached her destination (that is, the port of Buenos Aires) until she had passed one or other of the hailing stations. Though overmuch importance should not be attached to words used by particular persons, it is at least of interest to note how one practical man, the master of the *Aello*, made his entries in his log book. Thus the entry in reference to October 12—1.30 p.m. was: " Anchored off Buenos Aires. Waiting for our turn to enter the " port . . ." The entries relating to the days from October 13 to 27 were: " Anchored and awaiting orders to enter the port." It must be added, however, that there is an entry on October 28— " The laydays expire." Entries on October 29 include the following: 10.15 p.m.—" Weighed anchor. Full speed ahead to enter " the port," and 1.0 p.m.—" Entering the port assisted by two " tugs."

So also it is of interest to note the terms in which information was supplied in response to a request made in November, 1954, to the Port Administrator. The information sought was as to the purport of the official verbal resolution of September 1, 1954, which issued from the berthing office of the Buenos Aires Port Administration, and which came into force about the middle of that month. The answers of the Port Exploitation Department included the following:—

" Point I. Up to September 1 last, all seagoing ships coming " from foreign ports, and/or home ports, obtained their entry to " the port without any delay, including the ships which had to " load or complete loading maize, which all berthed at the " elevator in the 1st, 2nd or 3rd tier in the New Port or anchored " in the North Basin, either to operate or to await their loading " turn.

" Point II. The resolution referred to in this point was taken " as a measure to relieve a purely circumstantial situation existing

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[227] [1908] 1 K.B. 499.

"in only one certain section of the port, it being decided for this "reason that, as from September 1 last, ships should not be "placed in the third tier nor should they anchor in the North "Basin waiting turn to load grain, but that they must do this in "the roads. This measure only affected the ships destined to "load maize, whereas those that had to load other cereals or "general cargo came directly into port."

The words "came directly into port" were there used in their colloquial sense as a general term covering the docks, the basins, the boca, the riachuelo. The words indicate the geographical delimitation which was so much emphasised in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[228]

"Point IV. Regarding this matter, we have to say that the "steps taken to anchor ships in the roads were not due to a state "of congestion in the port but to ensure orderly operating to "avoid berthing ships in certain sections. (Basin 'D' South "Side, Pierhead No. 4 and Basin 'E' of the New Port.)"

These answers seem to illustrate and to reinforce the view that the *Aello* was excluded from the port of Buenos Aires until October 29. Such exclusion resulted not from congestion in the port but from a shortage of maize. A further answer showed that in the case of ships destined to load maize the Grain Board loaded them in turn in the order of their arrival in the roads.

The evidence showed that a ship could not proceed from the roads without having received a giro. The roads served both Buenos Aires and La Plata. Thus Article 1703 of the Digest provided:

"All ships may enter the Port of the Capital or of La Plata at "any hour of the day or night provided that they have first "obtained the authorisation of the Control Office after having "fulfilled the requirements called for by the Health and Naviga-"tion Laws."

All these references serve to illustrate how the term "the Port "of Buenos Aires" was in practice used by those concerned with the movements of cargo-carrying ships to designate an area—which may broadly be referred to as the docks area or the commercial area. That area was contained within such wider area as constituted the port for legal, administrative or fiscal purposes. The docks area or the commercial area would have places which were regularly used by ships which were loading or discharging particular types or classes of cargo. The places or probable places from which maize would be loaded were recognisable and identifiable.

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[228] [1908] 1 K.B. 499.

My Lords, for the reasons that I have indicated I conclude that in a business and commercial sense the *Aello* had not completed her passage to the port of Buenos Aires in order there to load maize until she had arrived within what might in this case be called the docks or commercial area, and which contained the places where the loading of maize would take place.

The *Aello* would not in any event be an arrived ship when she anchored in the roads if, as Mr. Roskill contended, the roads were not within the legal, fiscal and administrative limits of the Port of Buenos Aires. A consideration of the evidence relating to this matter has not lead me to differ from the conclusion reached by Ashworth J. that the roads can properly be said to be within those limits.

It was further contended by Mr. Roskill that even if, contrary to his contention, the *Aello* was an arrived ship when she reached the roads on October 12, the lay days would not then begin because, as he contended, she was not then ready to load, and could not have given a notice of readiness to load had there been an obligation to give such a notice. In the first place Mr. Roskill submitted that the absence of a " giro " prevented the ship from being ready to load. My Lords, a " giro " is a permit to go to a particular berth, and if the *Aello* had on October 12 arrived at the port of Buenos Aires the failure of the charterers to obtain the berthing permit that they needed would not have meant that the ship was not ready to load. But on the view that I have formed the *Aello* was not an arrived ship on October 12, for the reason that she had not completed her journey to her destination, which was the commercial area which contained the loading spots where the loading of maize took place. The absence of a giro was a circumstance which showed that the ship was not allowed to proceed to her destination, but the absence of a giro did not constitute some separate reason for saying that the ship was not ready to load. The ship had not reached the area within which she was to be loaded, and her readiness to load would have to be considered when she did reach it. In the second place Mr. Roskill submitted that as the *Aello* did not possess a police permit she was not ready to load: until the police had gone on board and given their permit there was, he submitted, no right of passage for any persons to or from the shore. But the evidence showed that the necessity for a police visit, with a view to giving a police permit, which visit in practice would not take place at the roads but when a ship was in the commercial area, would not in fact cause any delay in actual loading.

My Lords, on the view that the *Aello* was not an arrived ship on October 12, it is, I think, apparent, on the facts of the case, that she would have been an arrived ship on that date, and at a time approximately three hours after she had reached the roads, had the charterers had their cargo ready. There was no shortage of space or of berths at the places where maize could be loaded. The charterers required the ship to proceed to the port of Buenos Aires. The instruction was given so that the ship should load maize. The ship proceeded to and attempted to comply with the instruction but was prevented from completing her voyage because the charterers had no maize to load. It would be a strange result if in such circumstances the charterers could, without incurring liability, bring about the losses to the shipowners which delay would cause. If, then, the charterers choose to order the ship to enter the Port of Buenos Aires in order to load maize, and if the only reason why the ship does not and cannot enter the port is because the charterers have no maize, and if the ship is kept idly waiting until they get some maize—are they responsible to the ship for such damage as the delay has caused? The general legal position relating to the availability of cargo for arrived ships does not present itself for consideration. It is to be observed also that there are no provisions in the charterparty introducing any contractual terms as to waiting for turns to load. In the present case the ship could not arrive and lay time could not begin unless and until the charterers had cargo available. In those circumstances it was acknowledged that the charterers were under some measure of duty to co-operate. It was said, however, that the charterers were under no higher obligation than to take all reasonable steps to have a cargo available, and that the admissions of fact made by the parties record that the charterers acted reasonably in every step which they took to procure a completion cargo, and that such a completion cargo could not have been procured earlier than it was procured. It was said, therefore, that the shipowners were without redress against the charterers for the delays and losses to which the shipowners, certainly without any fault on their part, had been subjected.

My Lords, it is not disputed that a charterer is under an absolute obligation to provide a cargo, but the question that is raised concerns the time when that obligation must be fulfilled under circumstances such as those of the present case. If charterers require a ship to proceed to a destination which can only be reached if the charterers have their cargo at that destination, are the charterers under obligation to avoid causing delay to the ship by a failure to have their cargo there? Can the charterers resist any claim by proving that they had acted reasonably and had done their best? If the charterers say that they will have their cargo available after the ship has arrived so that loading can thereafter take place within the lay days, but if the ship is not permitted to arrive because cargo is not available, must shipowners suffer the loss occasioned by the delay, and which results from circumstances not within their control? My Lords, in the answering of the questions that I have posed direct guidance is, I consider, to be found in the decision in your Lordships' House in *Ardan* v. *Weir*.[229] The steamship in that case was chartered under a berth charter to proceed to a berth to be named at Newcastle, New South Wales, in order to load coal. The ship reached Newcastle on July 14 and was ready to load but had to wait until August 13 before she could arrive at her berth. The delay was owing to no fault on the part of the ship but resulted from the fact that coal could not be loaded on the ship on July 14. Coal could not then be loaded because at Newcastle a ship was not permitted to occupy a loading berth unless actually loading coal pursuant to a loading order from a colliery. Such orders were issued to ships in turn. Even after the ship was able to arrive at a berth in order to load she was twice required to leave the berth because the supply of coal failed. It was contended that if the ship had been able to load in ordinary course the loading would have been completed by July 23. In fact it was not completed until August 23. The shipowners claimed damages for the detention of the ship for 31 days. The delay and loss of time was, they said, caused by the fact that the charterers had not timeously provided a cargo. In spite of a submission that the charterers had done everything reasonable to get a cargo and were not answerable for delay the claim succeeded. It succeeded after the hearing of full arguments in which the effect of *Little* v. *Stevenson*[230] and *Jones* v. *Green*[231] was debated. Lord Halsbury L.C., in the course of his speech,[232] distinguished " cases in which it is either " proved or assumed that there are particular circumstances " known to both the parties, and with reference to what they may " be supposed to contract, which may affect both the providing " and the loading of the cargo." So also Lord Davey in his speech [233] referred to cases where the cargo is to be provided from a particular place and the charter has been made in view of circumstances by which, as both parties know, the procuring of a cargo from that place may be delayed. Lord Davey referred to the regulation of the port in regard to the occupation of loading berths and proceeded [234]: " . . . it is also said that by the regulation, 'the turn of the colliery' became incorporated in and "formed part of 'the turn of the port,' and therefore that the "delay took place from the practice of the port, over which "the respondents had no control, and which they had no power to "displace, for the benefit of this particular ship. This, I think, "is the main ground of Lord Kinnear's opinion.

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[229] [1905] A.C. 501.
[230] [1896] A.C. 108.
[231] [1904] 2 K.B. 275.
[232] [1905] A.C. 501, 511.

"But, however the argument is put, I cannot accede to it. It "appears to me that it is only putting the old question in another "way. By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it "was the default of the respondents in not providing the cargo "when the ship was ready to go on the berth to receive it. It is "said that the respondents did nothing unreasonable. Be it so. "But through their misfortune (it may be) they have failed to "perform their contract with the shipowners. In short, the "respondents have not satisfied my mind that it was any part of "their contract with the appellants that the latter should await "the turn of the colliery or take the risk of the cargo not being "ready. And I am of opinion that, in accordance with the "authorities which were cited in the course of the argument, "the respondents are liable to pay damages to the appellants for "the detention of the ship."

In that passage Lord Davey clearly rejected the submission that the charterers could repel liability for delay if they could show that they had done what was reasonable to obtain a cargo. My Lords, in the present case it is shown that the ship was delayed between October 12 and 29 solely because the charterers had no cargo available, and the charterers ought not to be permitted to exonerate themselves from liability by showing that they had acted reasonably. The arrangements for having cargo available were entirely their concern and not the concern of the shipowners. The shipowners had no control over the arrangements that the charterers had made. Even though the charterers had made their arrangements with care the fact remained that

[233] [1905] A.C. 501, 512.

[234] Ibid. 513, 514.

they failed to have cargo available at the time when it should have been available.

The claim for the shipowners was, I think, properly framed as one for damages. Their ship ought not to be deemed to have arrived in a place at which it had not in fact arrived.

I would dismiss both appeal and cross-appeal.

Appeal dismissed.
Cross-appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

J. A. G.

J. C.*
1960
July 28;
Oct. 5.

PETER HAROLD RICHARD POOLE . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Crime—Practice—Nolle prosequi—Accused discharged—Trial for same offence on new information without fresh inquiry and committal—Validity—Criminal Procedure Code (Laws of Kenya, 1948, *c.* 27), *s.* 82.

Crime—Indictment—Two indictments for same offence—Two informations in existence against same person for same offence on same facts—Whether inherently bad at common law.

Crime — Evidence — Demonstration in absence of accused — Abridged repetition in his presence—No prejudice—Curable irregularity—No miscarriage of justice—Criminal Procedure Code (Laws of Kenya, 1948, *c.* 27), *ss.* 193, 381.

Eastern Africa—Kenya—Criminal law—Nolle prosequi—Subsequent trial on new information without fresh inquiry and committal—Validity—Criminal Procedure Code (Laws of Kenya, 1948, *c.* 27), *s.* 82.

By section 82 of the Criminal Procedure Code of Kenya: "(1) "In any criminal case and at any stage thereof before verdict or "judgment . . . the Attorney-General may enter a nolle prosequi ". . . by stating in court . . . that the Crown intends that the "proceedings shall not continue, and thereupon the accused shall "be at once discharged in respect of the charge for which the nolle "prosequi is entered . . . ; but such discharge . . . shall not operate "as a bar to any subsequent proceedings against him on account "of the same facts."

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* *Present*: LORD TUCKER, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

The appellant, who had been committed for trial by a magistrate on a charge of murder, was arraigned before the Supreme Court of Kenya on the charge on an information signed on behalf of the Attorney-General. After Crown counsel had opened the case, and before the first witness was called, one of the jury stated that he had a conscientious objection on religious grounds to giving a verdict in the case. After an adjournment of about three hours Crown counsel, on resumption of the court, entered a nolle prosequi and at the same time handed in a fresh information, which had been signed during the adjournment by the acting senior Crown counsel on behalf of the Attorney-General, charging the appellant with murder in the same terms as the first information. The appellant, having been immediately discharged in respect of the charge for which the nolle prosequi had been entered, was thereupon served with the new information and was at a later date tried on it and convicted. The appellant appealed against his conviction, contending, inter alia, that on the true construction of section 82 of the Criminal Procedure Code the entry of the nolle prosequi brought the prosecution to an end subject always to the right of the Crown to start another prosecution against him de novo by re-arresting him and taking him again before a subordinate court with a view to a fresh committal for trial:—

Held, (1) that the opening words of section 82 of the Code made it clear that a nolle prosequi may be entered at different stages, and before an information has been signed; and that on the proper construction of the section the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the information in respect of which it was entered, and that if the second information took effect from the date of the signature it was not rendered invalid by the existence at that moment of the former information. If, on the other hand, the second information only took effect when filed, it was valid from that moment and unaffected by the entry of the nolle prosequi in respect of the first information (post, pp. 240, 245).

Rex v. *Noormahomed Kanji* (1937) 4 E.A.C.A. 34 and *Sey* v. *The King* (1950) 13 W.A.C.A. 128 approved.

(2) That, while the Criminal Procedure Code recognised no such plea as autrefois arraign, and there was nothing in the Code which expressly prohibited or authorised the existence at the same time of two informations against the same person for the same offence on the same facts, such a situation was not inherently bad at common law, though the court would not allow an accused to be tried on both indictments. Accordingly, the second information was not inherently bad by reason of the pendency of the earlier one for the same offence against the appellant on the same facts (post, pp. 242, 244).

Rex v. *John Swan and Elizabeth Jefferys* (1751) Foster's Crown Cases 104, *Rex* v. *Stratton* (1779) 1 Doug.K.B. 239, *Reg.* v. *Dunn* (1843) 1 C. & K. 730 and *Reg.* v. *Mitchel* (1848) 3 Cox C.C. 93 considered.

Dictum of Crompton J. in *Reg.* v. *Allen* (1862) 1 B. & S. 850

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at 856 that "there cannot be two prosecutions against a man for "the same offence at the same time" explained (post, p. 244).

Section 193 of the Criminal Procedure Code provides that all evidence at a trial shall be taken in the presence of the accused, and section 381, inter alia, that no order passed by a court shall be reversed on appeal on account of any irregularity in the proceedings during the trial unless the irregularity has occasioned a failure of justice.

A prosecution witness having, on the direction of the judge, but in the absence of the appellant, indicated outside the court room (which was too small for the purpose) certain positions and distances, the demonstration was immediately repeated at the same place in the presence of the appellant, but took only about half the time occupied by the first demonstration. The appellant contended that the whole trial must take place in his presence and that no action taken by the judge could cure the irregularity, which vitiated the whole trial:—

Held, that the appellant's presence throughout the trial was not an absolute requirement necessarily going to the root of the conviction, and that in the circumstances he had been in no way prejudiced by the incident, which was curable under section 381. The decision in such cases must always be a matter of degree. Further, the circumstances of the present irregularity were not of such a nature as would bring the case within the principles on which the Board intervenes in the exercise of its criminal jurisdiction (post, pp. 234–235, 235).

Order of the Court of Appeal for Eastern Africa affirmed.

Appeal (No. 26 of 1960), by special leave, by Peter Harold Richard Poole from an order of the Court of Appeal for Eastern Africa (O'Connor P., Forbes V.-P., Gould and Windham JJ.A. and Farrell J.) (March 21, 1960) dismissing his appeal against his conviction on December 10, 1959, in the Supreme Court of Kenya (Sinclair C.J. and a jury) for the murder by shooting on October 12, 1959, of Kamawe Musunge, an African house boy. The appellant had been sentenced to death. The Crown's case was that in the course of an altercation with Kamawe the appellant shot him with a pistol and that Kamawe died a few minutes later.

The following facts relating to the proceedings leading up to the trial are taken from the judgment of the Judicial Committee: On November 11, 1959, the Resident Magistrate at Nairobi having heard the witnesses adduced on behalf of the prosecution, whose evidence was recorded in the form of depositions, directed that a charge be drawn up against the appellant of the murder of Kamawe on October 12, 1959, contrary to section 199 of the Penal Code and that he be committed to the Supreme Court for trial.

On November 18, 1959, an information was signed by the Deputy Public Prosecutor for the Attorney-General which recited as follows: "At the sessions holden at Nairobi on the 30th "November, 1959, the Court is informed by the Attorney-General "on behalf of Our Lady the Queen that Peter Harold Richard "Poole is charged with the following offence:—"; then followed the charge of murder of Kamawe on October 12, 1959.

On that information the appellant was arraigned on November 30, 1959, and pleaded not guilty. He was given in charge of the jury and the case for the Crown was opened by Crown counsel. Before the first witness was called one of the jury stated that he had a conscientious objection on religious grounds to giving a verdict of guilty in this case. After a short adjournment counsel for the appellant submitted that the juror's statement did not incapacitate him from sitting, but that if the court held otherwise the case should proceed with 11 jurors. It being then 11.20 a.m. Crown counsel asked for an adjournment, and the court adjourned until 2.15 p.m. It appeared that during the adjournment the acting senior Crown counsel on behalf of the Attorney-General signed a fresh information dated November 30 charging the appellant with the offence of murder in the same terms as the first information dated November 18. On the resumption of the court after the adjournment Crown counsel submitted there was no power to discharge the juror as he was not incapable. He said that the court might have inherent power to discharge the jury but he thought it safer to enter a nolle prosequi, which he then did and at the same time handed in the fresh information dated November 30. Counsel for the appellant contended that there was no inherent power to discharge the jury in the circumstances and that it was not a case in which a nolle prosequi could be entered. The Chief Justice thereupon ruled as follows: "In "view of the entry of a nolle prosequi the accused is discharged "in respect of the charge for which the nolle prosequi is entered."

After the appellant had been discharged and left the dock he was asked by the Deputy Registrar to accompany him to the ante-room of the court, where he served him with the new information of that date and executed a warrant as authority for the prison officers to detain him pending his trial upon the new information. It was not contested that the acting senior Crown counsel was duly authorised under section 83 to enter a nolle prosequi and sign an information. Thereafter the appellant was duly tried on the new information at the December Sessions of the Supreme Court holden at Nairobi and convicted on December 10.

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The appellant now appealed, contending that the trial was a nullity by reason of the fact that the Attorney-General had entered a nolle prosequi in respect of a previous information charging the same offence as that on which he was subsequently convicted without a fresh committal by a subordinate court.

1960. July 25, 26 and 27. *F. H. Lawton Q.C.* and *Harold Cassel* for the appellant. The appeal is based on three grounds: (1) That the proceedings in which the appellant was convicted were barred by the entry of a nolle prosequi in respect of the same charge. (2) That without the institution of fresh proceedings in respect of the charge for which a nolle prosequi had been entered in his case, and a fresh preliminary investigation and committal for trial, no valid information against the appellant for the same offence could be signed or filed by the Attorney-General, nor had the Supreme Court jurisdiction to try or sentence him. (3) That in breach of provisions of the Criminal Procedure Code of Kenya part of the appellant's trial took place in his absence, "without personal "attendance having been dispensed with." It would appear not only from the facts of this case, but from those of other cases in East Africa, that nolle prosequi is used there by the Crown in circumstances which seem a little strange to English practitioners.

The primary task is to ascertain the proper construction of section 82 of the Code. One must look first at the ordinary meaning of the words; secondly, at the context in which they appear; and thirdly, at the common law meaning of nolle prosequi and at the common law consequences of an entry of nolle prosequi, because it would appear that the intention of the Code was to put into operation a slightly modified form of English criminal procedure. The use by the Crown of the nolle prosequi started about the reign of Charles II, and it would appear that in its early days it was used by the Crown in order to protect the subject from vexatious prosecution. So the conception of the Crown for its own purposes entering a nolle prosequi does not seem historically to be the right one. The effect of a nolle prosequi at common law was to bring the prosecution to an end altogether. The submission is that after the entry of the nolle prosequi the Crown must start all over again.

On its proper construction, and in the context of surrounding sections of the Code, the effect of section 82 is that when a person is charged with murder and a nolle prosequi is entered he is discharged from that charge of murder. Under section 255 of the Code once the Attorney-General has performed his functions by issuing an information he has performed them; the position here is similar to where the Attorney-General in England has refused his fiat to the House of Lords—he cannot keep altering his mind about it. If the Crown is right here the Attorney-General could file another information at any time—it might be two years later—for on their view they do not have to start again; they can start at half-time. That would certainly be a very great hardship on the appellant; but there would be no hardship if the effect of section 82 is to bring the prosecution to an end altogether and prevent the Crown, without a fresh preliminary investigation and committal, from starting another prosecution against the same defendant in respect of the same charge. The Crown cannot succeed unless they can keep alive the committal proceedings—without that the Supreme Court has no jurisdiction to try the case. There cannot be two indictments for the same offence at the same time. Once the nolle prosequi has been entered and the case brought to an end, it is then open to the Crown, by virtue of the proviso to subsection (1) of section 82 in regard to "subsequent proceedings," to do what it likes about the same or any other offence provided that it is on the same facts.

In this context "subsequent proceedings" means proceedings instituted after the entry of the nolle prosequi in manner provided by section 89 of the Code, namely, by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without a warrant. The Code lays down the procedural steps to be taken thereafter, including the holding of a preliminary investigation, committal for trial, and the signing of an information charging him with an offence. The construction placed on section 82 by the Court of Appeal below is much too narrow.

If, after the Attorney-General has signed an information, but before the beginning of the trial, he decides to enter a nolle prosequi, then according to the Crown during that period the accused person remained committed for trial, and, therefore, the entering of the nolle prosequi at that stage did not have the effect, say the Crown, of modifying in any way the order of committal for trial made by the magistrate under section 236 of the Code. But it is quite clear that section 82 envisages that something shall be done that affects the order made under section 236, because he is to be discharged. If he remained a person committed for trial the subsequent proceedings might be years later. The fact that the second information was signed before the entry of the nolle prosequi makes it a nullity. The conception of a discharge which does not bring an end to a prosecution is certainly one unknown to English common law, and exactly the same position is to be applied here.

The Code obviously tries to follow the broad outline of English criminal procedure; and the basic authority on the consequences in English common law of entering a nolle prosequi seems to be *Salmon* v. *Smith.*[1] The last case in this country on the effect of nolle prosequi appears to be *Rex* v. *Wylie.*[2] [Reference was also made to *Gilchrist* v. *Gardner*[3]; *Goddard* v. *Smith*[4]; *Reg.* v. *Allen*[5]; *Reg.* v. *Ridpath*[6]; *Rex* v. *Stratton*[7]; *Reg.* v. *Hyde*[8] and *Cooper* v. *Tiffin*[9]; and to Archbold, Practice of the Crown Office, 1844 ed., p. 62.]

It is accordingly submitted that all proceedings on the information of November 30, 1959, which charged the appellant with the charge in respect of which the nolle prosequi was entered were barred, and his arraignment, plea, trial, conviction and sentence thereon were all void and of no effect.

With regard to the third ground of appeal—that part of the appellant's trial took place in his absence—the submission is that the first demonstration by the witness of positions and distances was part of the trial, and that the appellant's absence therefrom was an irregularity which could not be cured and vitiated the trial: see *Tameshwar* v. *The Queen.*[10] The proper course for the Chief Justice to have taken was to discharge the jury.

L. G. Scarman Q.C., *J. G. Le Quesne* and *K. C. Brookes* (Crown counsel, Kenya) for the Crown. Two points were put for the appellant on the first part of his case: (1) the construction of section 82 of the Code and the effect of a nolle prosequi entered under that section; (2) the second information—that on which the appellant was tried—was signed before the entering of the nolle prosequi and for that reason was a nullity. The Crown's first submission is that upon a proper construction of section 82 of the Code the Supreme Court had jurisdiction to deal with the appellant on the information of November 30. Secondly, that information was effectual when it was filed in court, and it was filed, it is conceded, after the entry of the nolle prosequi. Thirdly, if that second submission is wrong, then it is contended that it is a misapprehension of the common law to say that there cannot be two informations or indictments in existence at the same time charging the same offence on the same facts—there is no objection in law to that, whatever the practice may have been.

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[1] (1669) 1 Wms.Saund. 202.
[2] (1919) 83 J.P. 295.
[3] (1891) 12 N.S.W.L.R. 184.
[4] (1704) 6 Mod. 261.
[5] (1862) 1 B. & S. 850.
[6] (1713) 10 Mod. 152.
[7] (1779) 1 Doug.K.B. 239.
[8] (1848) 3 Cox C.C. 90.
[9] (1789) 3 Term Rep. 511.
[10] [1957] A.C. 476; [1957] 3 W.L.R. 157; [1957] 2 All E.R. 683, P.C.

The judgment of the Court of Appeal below on the construction of section 82 is adopted where they said: "So far as section 82 of "the Code is concerned, we are unable to find anything in the "wording of the section to indicate that a nolle prosequi entered "in respect of a charge in an information operates as a discharge "of the proceedings on the preliminary inquiry . . . in our view, "therefore, the entry of a nolle prosequi . . . does not discharge "the proceedings at the preliminary inquiry . . . so as to preclude "the filing of any other charge upon information based on the "facts disclosed at that preliminary inquiry; and we have not "found any other provision of the Code which appears incon-"sistent with this construction of the provisions of section 82." Any strangeness that may be found in that position arises only from the fact that one is dealing with a strange situation—one not known to English law and created by the opening words of section 82, which permits the entering of a nolle prosequi at a stage prior to indictment or information.

It was conceded for the appellant that if there are two informations on the file based on the same facts, but charging different offences, e.g., murder and grievous bodily harm, and at that stage a nolle prosequi is entered in respect of the charge of murder, the information in respect of grievous bodily harm based on the same facts is untouched, and the Crown can proceed upon that information without having to go right back to the preliminary steps. That being so, it would appear that in the present case the appellant is accepting that the word "proceedings" in section 82 (1) refers to proceedings in respect of the charge for which the nolle prosequi was entered.

Section 82 has been construed in the courts of East and West Africa for many years in the sense for which the Crown contends, and if there is any doubt their view should be followed: *Wachira* v. *Reginam*[11]; *Rex* v. *Kanji*[12]; *Sey* v. *The King*.[13] The construction given to section 82 by the Court of Appeal here is correct. With regard to suggested procedural difficulties if the Crown's construction is adopted, there is no insuperable practical difficulty in regard to exhibits; as to recognisances, the Court of Appeal took the view that they would continue; the position as to depositions

[11] (1956) 23 E.A.C.A. 562.

[12] (1937) 4 E.A.C.A. 34.

[13] (1950) 13 W.A.C.A. 128.

is discretionary: *Rex* v. *Collins*.[14] There is nothing in the Code (or section 13 of the Criminal Justice Act, 1925) which would entitle the prosecutor to prosecute on depositions alone.

The legal position in respect of nolle prosequi in England is, first, that it can only be entered after indictment: *Rex* v. *Wylie*.[15] It was said for the appellant here that the effect of nolle prosequi was to bring the prosecution entirely to an end; but see *Reg.* v. *Allen*[16]—reliance is placed on Blackburn J.'s judgment. The beginning of the King's suit is indictment or information, and he can interfere by nolle prosequi if the suit has been started over which he has complete control. The nolle prosequi still governs the proceedings in which it can be entered. That being so, the appellant can get no support from the English cases as to his submission on the extent of nolle prosequi because English cases only show it as having effect in the suit in which it can be entered. *Goddard* v. *Smith*[17] was dealing with the same sort of problem as arose in *Allen's* case[18]; it does support the Crown's submission here. There is no suggestion that one has to go back beyond the grand jury to a preliminary inquiry—of course one has to go back to the grand jury. Those early cases do not support the proposition that in English law nolle prosequi affects proceedings prior to the indictment or information. *Gilchrist* v. *Gardner*[19] cannot be regarded as correct in English law. *Rex* v. *Stratton*[20] does not add anything. *Reg.* v. *Ridpath*[21] shows that nolle prosequi was not only used to prevent vexatious prosecutions, it was also used by the Crown to correct a defect in pleading. [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 10, p. 399; Stephen's History of the Criminal Law (1883 ed.), vol. 1, p. 292, and Holdsworth, History of English Law, vol. 5, p. 176.] On its proper construction section 82 (1) of the Code, bearing in mind with what it deals, limits the effect of a nolle prosequi to proceedings in respect of the charge for which it is entered.

The second part of the argument for the appellant upon juristion was that the second information had been signed before the nolle prosequi was entered, and therefore, in any event, whatever the view of the court about the effect of nolle prosequi, it was a bad information. This point was not taken in terms in the court below, and while in a capital case it is not sought to rely on that, the point also does not appear expressly to have been taken in the appellant's case. It is an odd point; the Crown's submission is that under the Code the information is not valid or effectual until it is both signed and filed. It is a short point of construction on sections 250 and 255 of the Code. If the signature is the moment at which a valid and effectual information comes into being, there was in this case a valid and effectual information prior to the entry of the nolle prosequi unless there is a rule of law to the effect that the pendency or existence on the file of a previous information charging the same offence on the same facts makes the second a nullity. The submission is that there is no such rule at all. That is one way of putting it. The second way is: if filing with a registrar is necessary to make the information valid and effectual, it was filed before the court gave effect to the nolle prosequi. That nolle prosequi is not effective until the court gives effect to it. If the Crown's submission on this second point is right, it is enough to support this trial irrespective of the interpretation of section 82 of the Code. There was here a valid and effectual information before the nolle prosequi was entered. There is nothing in the Code or in the common law to prevent there being on the file at one and the same time two or more informations charging the same offence on the same facts. The Crown can put on the file as many indictments as it likes; the right of the accused is to be tried once and have one decision.

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[14] (1938) 54 T.L.R. 842; [1938] 3 All E.R. 130; 26 Cr.App.R. 177.

[15] 83 J.P. 295.

[16] 1 B. & S. 850.

[17] 6 Mod. 261.

[18] 1 B. & S. 850.

[19] 12 N.S.W.L.R. 184.

[20] 1 Doug.K.B. 239.

[21] 10 Mod. 152.

The Code does not provide for autrefois arraign. Under section 3 English common law is incorporated. The cases relied on for the common law rule are: *Rex* v. *John Swan and Elizabeth Jefferys*,[22] which states the basic principle of law in this matter; it is authority for the proposition that there were two indictments in being before the first was quashed: *Rex* v. *Stratton*[23]; *Reg.* v. *Dunn*[24] and *Reg.* v. *Mitchel.*[25] Lastly on this, the presence of an indictment does not make a coroner's inquisition a nullity: Roscoe's Criminal Evidence, 16th ed., p. 233. The English common law indicates that there is no plea of autrefois arraign available to enable a defendant to submit successfully that the second information is a nullity.

[Counsel was not required to argue on the third point—as to the appellant's absence from part of the trial.]

Lawton Q.C. in reply. Under the Code subsequent proceedings cannot come about otherwise than in accordance with its provisions. The word "charge" in section 82 (1) is used in a different sense from that in which it is used in sections 89 and 233, and has a wider meaning. He was discharged in respect of the offence charged. Both in regard to "the charge" and "the proceedings" the words must be used in their ordinary wide meaning. [Reference was made to *Sey* v. *The King*.[26]] The actual literal construction of the section is easier than that contended for by the Crown, and it makes it easier to get over any procedural difficulties. Nolle prosequi is a discontinuance of the King's suit, and he must begin again by a new written complaint—be it called indictment, information or inquisition. [Reference was made to Hawkins, Pleas of the Crown, vol. 2, p. 295.] The eighteenth century practice was to quash one of two indictments before one started the trial on the other. It was unheard of to have two indictments relating to exactly the same facts.

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[22] (1751) Foster's Crown Cases 104.

[23] 1 Doug.K.B. 239.

[24] (1843) 1 C. & K. 730.

[25] (1848) 3 Cox C.C. 93.

July 28. Lord Tucker announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reason at a later date.

Poole was executed on August 18.

Oct. 5. Their Lordships' reasons for dismissing the appeal were delivered by Lord Tucker. On July 28 their Lordships announced that they would humbly advise Her Majesty that the appeal be dismissed. They now give their reasons.

Except for one incident in the course of the trial (which will be dealt with at once) no complaint was made before the Board on behalf of the appellant with regard to the evidence, the summing-up or the conduct of the trial. The exception was the following incident. At the conclusion of the evidence of a witness for the prosecution named Titoro, who had said that he saw the appellant shoot the deceased man named Kamawe, the Chief Justice asked the witness to indicate certain positions and distances which he had described, but this could not conveniently be done in the court room as it was too small. He accordingly proceeded with the witness and counsel for the prosecution and defence to the steps outside the judges' entrance where the witness indicated the positions and distances of which he had spoken. The distances indicated were all agreed with counsel, sometimes after having been paced out. On returning to court counsel for the prosecution stated that he did not know whether the appellant

[26] 13 W.A.C.A. 128.

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had been present at the demonstration. It was ascertained that he had not been present. The court was then adjourned to the same place and the demonstration repeated in the presence of the appellant. The second demonstration took about half the time occupied by the first, which had taken from 15 to 20 minutes. There was no material variation in the positions or distances indicated on each occasion.

Section 193 of the Criminal Procedure Code of Kenya provides: "Except as otherwise expressly provided, all evidence taken in "any inquiry or trial under this Code shall be taken in the "presence of the accused, or, when his personal attendance has "been dispensed with, in the presence of his advocate (if any)." It was contended on behalf of the appellant that this being a felony the whole trial must take place in the presence of the prisoner and that no action taken by the trial judge could cure the irregularity which had occurred and which vitiated the whole trial.

It will be observed that section 193 draws no distinction between felonies and misdemeanours. Moreover, section 381 of the Code provides: "Subject to the provisions hereinbefore con-"tained, no finding, sentence or order passed by a court of "competent jurisdiction shall be reversed or altered on appeal "or revision on account—(*a*) of any error, omission or irregularity "in the complaint, summons, warrant, charge, proclamation, "order, judgment or other proceedings before or during the trial "or in any inquiry or other proceedings under this Code; or . . . "(*c*) of any misdirection in any charge to a jury, unless such "error, omission, irregularity or misdirection has in fact "occasioned a failure of justice:

"Provided that in determining whether any error, omission "or irregularity has occasioned a failure of justice the court shall "have regard to the question whether the objection could and "should have been raised at an earlier stage in the proceedings."

The Court of Appeal for Eastern Africa, after considering certain English authorities and some Indian decisions under section 537 of the Indian Code of Criminal Procedure, which is in similar terms to section 381 of the Kenya Code set out above, were of opinion that although an irregularity had occurred and it could not be said that the accused's presence had been dispensed with, his presence throughout a trial was not an absolute requirement necessarily going to the root of a conviction, and that in the circumstances of this case the appellant had been in no way prejudiced by the incident which was curable under section 381.

Their Lordships are in agreement with this reasoning and would only observe that the decision in such cases must always be a matter of degree. The consequences of accepting to the full the submission of counsel for the appellant would result (to take an extreme case) in vitiating a trial because a formal witness had given his name and address in the witness box after an adjournment and it had not been noticed that the prisoner had not yet been brought up from the cells. On the other hand, it is not difficult to envisage many instances in which his absence would be fatal.

Their Lordships should, perhaps, add that whatever be the proper interpretation of the relevant provisions of the Kenya Code, the circumstances of the present irregularity are not of such a nature as would bring the case within the principles upon which the Board intervenes in the exercise of its criminal jurisdiction.

Their Lordships accordingly pass to the important ground of appeal upon which special leave was granted and which was the reason for the appeal before the Court of Appeal for Eastern Africa having been heard by a full court of five judges, viz., that the trial was a nullity by reason of the fact that the Attorney-General had entered a nolle prosequi in respect of a previous information charging the same offence as that upon which the appellant was subsequently convicted without a fresh committal after investigation by a subordinate court.

Before recounting the circumstances in which the nolle prosequi was entered it will be convenient at this stage to set out the relevant sections of the Criminal Procedure Code of Kenya (Laws of Kenya, 1948, Chap. 27).

" 3.—(1) All offences under the Penal Code shall be inquired " into, tried, and otherwise dealt with according to the provisions " hereinafter contained.

" (2) . . .

" (3) Provided, however, and notwithstanding anything in " this Code contained, the Supreme Court may, subject to the " provisions of any law for the time being in force in the Colony, " in exercising its criminal jurisdiction in respect of any matter " or thing to which the procedure prescribed by this Code is " inapplicable, exercise such jurisdiction according to the course " of procedure and practice observed by and before His Majesty's " High Court of Justice in England at the date of the coming into " operation of this Code."

" 66. Every court has authority to cause to be brought before " it any person who is within the local limits of its jurisdiction "and is charged with an offence committed within the Colony, or "which according to law may be dealt with as if it had been "committed within the Colony, and to deal with the accused "person according to its jurisdiction."

"69. The Supreme Court may inquire into and try any offence "subject to its jurisdiction at any place where it has power to "hold sittings:

"Provided that except under section 84, no criminal case shall "be brought under the cognizance of the Supreme Court unless "the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court."

"82.—(1) In any criminal case and at any stage thereof before "verdict or judgment, as the case may be, the Attorney-General "may enter a nolle prosequi, either by stating in court or by "informing the court in writing that the Crown intends that the "proceedings shall not continue, and thereupon the accused shall "be at once discharged in respect of the charge for which the "nolle prosequi is entered, and if he has been committed to prison "shall be released, or if on bail his recognizances shall be discharged; but such discharge of an accused person shall not "operate as a bar to any subsequent proceedings against him on "account of the same facts.

"(2) If the accused shall not be before the court when such "nolle prosequi is entered the registrar or clerk of such court "shall forthwith cause notice in writing of the entry of such nolle "prosequi to be given to the keeper of the prison in which such "accused may be detained, and also, if the accused person has "been committed for trial, to the subordinate court by which he "was so committed, and such subordinate court shall forthwith "cause a similar notice in writing to be given to any witnesses "bound over to prosecute and give evidence and to their sureties "(if any) and also to the accused and his sureties in case he shall "have been admitted to bail.

"83. The Attorney-General may order in writing that all or "any of the powers vested in him by the two last preceding "sections and by Part VIII of this Code be vested for the time "being in the Solicitor-General or a Crown Counsel, and the "exercise of these powers by the Solicitor-General or a Crown "Counsel shall then operate as if they had been exercised by the "Attorney-General:

"Provided that the Attorney-General may in writing revoke any order made by him under this section."

"89.—(1) Proceedings may be instituted either by the making "of a complaint or by the bringing before a magistrate of a person "who has been arrested without warrant.

. . . . . .

"(4) The magistrate, upon receiving any such complaint or "where an accused person who has been arrested without a "warrant is brought before him, shall, subject to the provisions "of the next succeeding subsection, draw up or cause to be "drawn up and shall sign a formal charge containing a statement "of the offence with which the accused is charged, unless such a "charge shall be signed and presented by a police officer."

"138. A person who has been once tried by a court of "competent jurisdiction for an offence and convicted or acquitted "of such offence shall, while such conviction or acquittal has not "been reversed or set aside, not be liable to be tried again on the "same facts for the same offence."

"226. Any magistrate empowered to hold a subordinate court "of the first, second or third class may commit any person for "trial to the Supreme Court:

"Provided that it shall not be competent for a magistrate "empowered to hold a subordinate court of the third class to "commit a European for trial to the Supreme Court.

"227. Whenever any charge has been brought against any "person of an offence not triable by a subordinate court or as to "which the subordinate court is of opinion that it is not suitable "to be disposed of upon summary trial, a preliminary inquiry "shall be held according to the provisions hereinafter contained "by a subordinate court, locally and otherwise competent.

"228. A magistrate conducting a preliminary inquiry shall, at "the commencement of such inquiry, read over and explain to "the accused person the charge in respect of which the inquiry "is being held, but the accused person shall not be required to "make any statement in reply thereto."

"233.—(1) If, after examination of the witnesses called on "behalf of the prosecution, the court considers that on the "evidence as it stands there are sufficient grounds for committing "the accused for trial, the magistrate shall frame a charge under "his hand declaring with what offence or offences the accused is "charged and shall read the charge to the accused person . . ."

"246. In the event of a committal for trial the written charge "(if any), the depositions, the statement of the accused person, "the recognizances of the complainant and of the witnesses, the "recognizances of bail (if any), and any documents or things "which have been put in evidence, shall be transmitted without "delay by the committing court to the Registrar of the Supreme "Court, and an authenticated copy of the depositions and state- "ment aforesaid shall be also transmitted to the Attorney- "General."

"249. If, prior to the trial before the Supreme Court, the "Attorney-General is of opinion, upon the record of the com- "mittal proceedings received by him, that the case is one which "may suitably be tried by a subordinate court, he may cause "the depositions to be returned to the court which committed "the accused, and thereupon the case shall be reopened, tried "and determined in the same manner as if such person had not "been committed for trial:

"Provided that in every such case the accused shall be "entitled to have recalled for cross-examination or further cross- "examination all or any of the witnesses for the prosecution.

"250.—(1) If, after the receipt of the authenticated copy of "the depositions as aforesaid, the Attorney-General shall be of "the opinion that the case is one which should be tried upon "information before the Supreme Court, an information shall be "drawn up in accordance with the provisions of this Code, and "when signed by the Attorney-General shall be filed in the "registry of the Supreme Court.

"(2) In any such information the Attorney-General may "charge the accused person with any offence which, in his "opinion, is disclosed by the depositions either in addition to, or "in substitution for, the offence upon which the accused person "has been committed for trial."

"251. The Registrar or his deputy shall indorse on or annex "to every information filed as aforesaid, and to every copy thereof "delivered to the officer of the court or police officer for service "thereof, a notice of trial, which notice shall specify the par- "ticular sessions of the Supreme Court at which the accused "person is to be tried on the said information, and shall be in "the following form, or as near thereto as may be:—

"'A.B.

"'Take notice that you will be tried on the information "'whereof this is a true copy at the sessions of the Supreme "'Court to be held at on the day of 19 '."

"255. All informations drawn up in pursuance of section 250 "of this Code shall be in the name of and (subject to the pro- "visions of section 83) signed by the Attorney-General, and when "so signed shall be as valid and effectual in all respects as an "indictment in England which has been signed by the proper "officer of the court in accordance with the Administration of "Justice (Miscellaneous Provisions) Act, 1933."

"257. The practice of the Supreme Court in its criminal "jurisdiction shall be assimilated as nearly as circumstances will "admit to the practice of His Majesty's High Court of Justice in "its criminal jurisdiction and of Courts of Oyer and Terminer "and General Gaol Delivery in England."

"272. If any information does not state, and cannot by any "amendment authorized by the last preceding section be made "to state, any offence of which the accused has had notice, it "shall be quashed either on a motion made before the accused "pleads or on a motion made in arrest of judgment.

"A written statement of every such motion shall be delivered "to the Registrar or other officer of the court by or on behalf of "the accused and shall be entered upon the record."

"275. Any accused person against whom an information is "filed may plead—(*a*) that he has been previously convicted or "acquitted, as the case may be, of the same offence; or (*b*) that "he has obtained the King's pardon for his offence.

"If either of such pleas are pleaded in any case and denied to "be true in fact, the court shall try whether such plea is true in "fact or not.

"If the court holds that the facts alleged by the accused do "not prove the plea, or if it finds that it is false in fact, the "accused shall be required to plead to the information."

[His Lordship then stated the facts set out above in respect of the entry of the nolle prosequi and the making and serving of the second information and continued:] It was contended by counsel for the appellant that on the true construction of section 82 of the Code the entry of the nolle prosequi brought the prosecution to an end subject always to the right of the Crown to start another prosecution against the accused de novo by rearresting him and taking him again before a subordinate court with a view to a fresh committal for trial. He submitted that the words "the "proceedings shall not continue" in section 82 (1) referred to the "proceedings" which had been instituted under section 89 (1) and that the words "discharged in respect of the charge" refer to the charge drawn up and signed under section 89 (4), and that the words "subsequent proceedings" in the penultimate line of section 82 (1) similarly imply proceedings which could only be initiated in accordance with section 89 (1). He sought to reinforce his submission on the ground of certain procedural difficulties which he suggested would necessarily follow from the construction relied upon by the Crown.

Their Lordships will return later to the procedural consequences and will for the present content themselves with the construction of the language of section 82 in the context in which they appear in relation to a nolle prosequi entered at the stage at which it was entered in this case. Unlike the procedure with regard to nolle prosequi in England, where it cannot be used until an indictment has been found (see the observations of Darling J. in *Rex* v. *Wylie*[1]) the words "in any criminal case and at any "stage thereof before verdict or judgment" in subsection (1) and the provisions of subsection (2) make it clear that in Kenya a nolle prosequi may be entered at different stages and before an information has been signed. It follows from this that the words "the charge" must necessarily have a different meaning according to the stage at which it is entered. If entered before committal it must necessarily refer to the charge drawn up and signed under section 89 (4), and if entered after committal and before an information has been signed it will have reference to the charge drawn up under section 233. Where an information has been duly signed under section 250 and the accused has been arraigned and pleaded to it it contains the only effective charge, and that is the charge and the only charge in respect of which the accused is discharged and it is the proceedings on that information which shall not continue.

Reverting to the consequences said to follow from the construction contended for by the Crown, it is said that a person may remain committed for trial for an indefinite period and it is asked what is to happen to the exhibits which have been remitted to the Registrar of the Supreme Court under section 246; similarly it is asked what is to happen to the recognisances of the witnesses bound over to give evidence at the trial having regard to the provisions of section 82 (2). Finally it is said that grave injustice may be done to an accused under the provisions of section 299 of the Code which provides for the circumstances in which the depositions of a witness may be read at the trial when he is absent from the colony.

Their Lordships do not consider these consequences necessarily follow. The exhibits are in the custody of the court and the court on application made and notice given would clearly have jurisdiction to make such order as seemed proper with regard to the exhibits.

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[1] (1919) 83 J.P. 295.

As to the recognisances of the witnesses, it appears that they are merely bound over to attend and give evidence in the Supreme Court and subsequently they receive notice of the time and place of trial. There is nothing in section 82 (2), as pointed out in the judgment of the Court of Appeal, which operates to discharge the witnesses from attendance at any subsequent trial of which they may receive notice.

With regard to the reading of the depositions of absent witnesses, it is not to be assumed that the court will not be alert to ensure that the provisions of that section shall not be allowed to operate so as to cause injustice to an accused person as a consequence of the use of the nolle prosequi procedure by the Crown. It must also be remembered that all prosecutions in Kenya are in the hands of the Attorney-General. There are no private prosecutions. The provisions of the Code should not be interpreted on the assumption that the wide powers vested in the Attorney-General may be abused by the indefinite postponement of trials by means of the use of the nolle prosequi procedure for which he would be answerable as a minister of the Crown. In any event there is in their Lordships' opinion nothing in the difficulties envisaged above sufficient to compel a construction of section 82 different from that which it would otherwise seem to bear. It should perhaps be noted that a further difficulty was much relied upon on the hearing before the Court of Appeal, viz., as to the procedural difficulty of bringing an accused person before the Supreme Court again after he had been released upon entry of a nolle prosequi. This objection was disposed of in the judgment of the Court of Appeal by reference to section 66 of the Code, which had not been cited in argument and was not relied upon in the present appeal.

Their Lordships have so far confined their observations to the proper construction of section 82 of the Code without reference to previous authority or, except for passing references, to the careful and detailed reasoning of the judgment of the Court of Appeal for Eastern Africa delivered by the Vice-President. The interpretation now placed upon the section is, however, in accord with the previous decision of the Court of Appeal for Eastern Africa in the case of *Rex* v. *Noormahomed Kanji*,[2] decided on a similar provision in the Criminal Procedure Code of Uganda, and of the West African Court of Appeal in the case of *Sey* v. *The King*[3] upon the corresponding provisions of the Criminal

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[2] (1937) 4 E.A.C.A. 34.

[3] (1950) 13 W.A.C.A. 128.

Procedure Code of the Gold Coast, as it then was. In the present case the Court of Appeal for Eastern Africa have followed their previous judgment in the case of *Noormahomed Kanji* for substantially the reasons which their Lordships have endeavoured to express.

It is necessary, however, to deal with a further and independent submission of counsel for the appellant to the effect that, whatever be the proper construction of section 82, there were in the present case two separate informations in existence at the same time for the same offence against the same person, which he contended was a situation which the law would not recognise as legally possible. He agreed that there could be two or more separate informations for different offences based on the same facts in existence at the same time and that a nolle prosequi entered in respect of one such information would not preclude a trial or trials on the others, but he submitted that there could not be in existence at the same time two informations against the same man for the same offence on the same facts.

There is nothing in the Criminal Procedure Code which expressly prohibits or authorises such a course, but section 275 provides for pleas of autrefois acquit and convict, and no such plea as autrefois arraign is recognised. Furthermore, there is no limit to the number of informations which the Attorney-General may sign.

It was, however, argued that the situation was so alien to the practice at common law that it must be regarded as inherently bad in the absence of express statutory authorisation. The researches of counsel for the Crown, however, reveal that so far from being inherently bad there is ancient authority to the contrary effect, though the court will not allow an accused to be tried upon both indictments. In *Rex* v. *John Swan and Elizabeth Jefferys* [4] the prisoners were indicted for murder. They pleaded Not Guilty at the Chelmsford summer assizes and their trial was postponed to the next assizes. In the meantime the Attorney-General preferred another bill against them charging Swan with petty treason and Jefferys with murder, and at the next assize a true bill was found and the prisoners arraigned upon it. The prisoners pleaded in abatement ore tenus that another indictment was depending for the same offence and pleaded over to the treason and felony. Counsel for the prisoners contended they should not have been arraigned on the new bill pending the former indictment on which issue had been joined. They asked that the trial on the first indictment should proceed before the prisoners were called upon to plead to the second. The court (Wright J., with whom Foster J. was sitting at the request of the former) was of opinion that the charge in the bill last found must be answered notwithstanding the pendency of the former, for autrefois arraign was no plea in the case, but that the court must take care that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact. The court proposed that the first indictment should be quashed by consent, to which counsel agreed, and the trial on the second indictment proceeded.

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[4] (1751) Foster's Crown Cases 104.

In *Rex* v. *Stratton*[5] the Solicitor-General, in support of a motion to quash an information filed ex officio by the Attorney-General, to which the defendants had pleaded in order that another which stated the offence more particularly might be filed. stated that the defendants could suffer no injury by quashing the indictment because the Crown might go to trial and judgment on the new one notwithstanding the pendency of the other; for that on indictments or informations for crimes the pendency of another prosecution for the same offence cannot be pleaded as it might to informations for penalties. Lord Mansfield observed that if it was proper to stop the information he did not see why the Attorney-General might not do it by entering a nolle prosequi without the interference of the court. Bullen J. said that what the Solicitor-General had stated, viz., that the pendency of the first information would be no plea to the second, was decisive against the motion. The court accordingly refused to quash the information. In *Reg.* v. *Dunn*[6] a true bill for perjury was found by the grand jury against the defendant at the Durham spring assizes in 1843 and the case remitted to the next summer assizes. Before the summer assizes it was discovered that there were defects in the indictment, and, accordingly, a fresh bill was prepared and found by the grand jury in July, 1843. Counsel for the prisoner submitted that he was entitled to be tried on the first indictment before the second. Wightman J. held that the defendant was entitled to have the first indictment disposed of before he could be tried on the second. Mr. Archbold, for the Crown, then proposed to enter a nolle prosequi on the first indictment, but Wightman J. held that this could only be done with the authority of the Attorney-General. Mr. Archbold then moved to quash the first indictment upon the ground of defects apparent on its face, which application was granted upon terms as to costs.

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[5] (1779) 1 Doug.K.B. 239.

[6] (1843) 1 C. & K. 730.

Reg. v. *Mitchel*[7] was a decision of the Court of Queen's Bench in Ireland in 1848. Blackburne C.J. posed the question[8]: Is the plea of an indictment pending a bar to this information for the same matter? And proceeded as follows[9]: "In support "of the affirmative, that it is, there is neither precedent, the "authority of any case, the dictum of any judge, or even the "opinion of any text-writer: but, on the other hand, there are "authorities that such a plea is utterly invalid." He went on to examine the authorities, some of which have been referred to above, and to quote from Hale's Pleas of the Crown, Vol. 2, pp. 221 and 222, and Chap. 34 of Hawkins on Pleas in Abatement. He said[10]: "I have only further to add on this part of "the case, that even if the plea of a former prosecution depending "could be pleaded, the entering of the nolle prosequi would be "an answer to it, and this appears to have been plainly decided "by *The King* v. *Stratton* in Douglas's Rep."

In Roscoe's Criminal Evidence, 16th ed., at p. 233, it is stated: "Where there are two indictments (sic) for the same "act (e.g., by coroner's inquisition and the justices), defendant "ought to be tried on both at once."

In the light of the authorities cited above the statement by Crompton J. in *Reg.* v. *Allen*[11] to the effect that there cannot be two prosecutions against a man for the same offence at the same time cannot have been intended to mean that there cannot be two indictments in existence for the same offence against the same person on the same facts.

Their Lordships are therefore satisfied that a second indictment or information is not inherently bad by reason of the pendency of an earlier one for the same offence against the same person on the same facts.

In the present case whether or not there were at any moment of time two such informations in existence depends upon the proper construction of sections 250 and 255 of the Criminal Procedure Code. Section 255 provides that the indictment "when "so signed shall be as valid and effectual in all respects as an "indictment in England which has been signed by the proper "officer of the court in accordance with the Administration

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[7] (1848) 3 Cox C.C. 93.

[8] Ibid. 118.

[9] Ibid.

[10] Ibid. 119.

[11] (1862) 1 B. & S. 850, 856.

"of Justice (Miscellaneous Provisions) Act, 1933." Is the word "when" used temporarily or is it equivalent to "if" with the result that the information takes effect on being filed in accordance with section 250? Counsel for the appellant contended that it took effect at the moment of signature, and this was the view of the Court of Appeal. On the other hand, counsel for the Crown before the Board submitted that on a proper construction of the two sections read together the word "when" should not be given a temporal meaning.

Their Lordships' decision in the present case does not depend upon the preference of one interpretation to the other, as in their view on the proper construction of section 82 of the Criminal Procedure Code the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the information in respect of which it was entered, and that if the second information took effect from the date of signature it was not rendered invalid by the existence at that moment of the former information. If, on the other hand, the second information only took effect when filed, it was valid from that moment and unaffected by the entry of the nolle prosequi in respect of the first information. This being the position, their Lordships do not consider it necessary in this case to determine whether under sections 250 and 255 an information signed by the Attorney-General becomes valid and effectual on signature before being filed or on filing after signature.

For the reasons set out above their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

Solicitors: *Merriman, White & Co.; Charles Russell & Co.*

C. C.

J. C.*
1960
Oct. 10.

REGINALD ERNEST VERE DENNING . . APPELLANT;
AND
DAVID GEOFFREY EDWARDES AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Eastern Africa—Kenya—Vendor and purchaser—Specific performance—Agreement for sale of land in Highlands—Part payment of purchase price—Alleged creation of unregistered charge—Admissibility of agreement—Indian Transfer of Property Act, 1882 (*No. IV of*

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* *Present*: VISCOUNT SIMONDS, LORD MORRIS OF BORTH-Y-GEST and the Rt. Hon. L. M. D. DE SILVA.

J. C.

1960

DENNING
v.
EDWARDES.

1882), *s.* 55 (6) (*b*)—*Crown Lands Ordinance* (*Laws of Kenya,* 1948, *c.* 155), *s.* 127 (2).

Eastern Africa—Vendor and purchaser—Highlands land—Written consent of Governor required—Agreement to sell does not "effect any "transaction"—Endorsement of consent on agreement unnecessary —Consent given subsequent to sale—Validity—Crown Lands Ordinance, s. 88 (1) (3).

Section 55 (6) (*b*) of the Indian Transfer of Property Act, 1882 (applicable in Kenya), gives the buyer of immovable property a charge on the property for the amount of any part of the purchase price paid in anticipation of delivery.

The Crown Lands Ordinance of Kenya, c. 155 of 1948, provides by section 127 (2), inter alia, that no evidence of a charge upon registered land shall be receivable unless created by an instrument in writing and the instrument has been registered.

On a claim by the respondents for, inter alia, specific performance of an agreement whereby the appellant agreed to sell to them certain land held by him in the Highlands of Kenya under a registered Crown lease, the appellant contended that money passed from the respondents to him in circumstances which gave rise to a charge and that in consequence the agreement, not having been registered, was inadmissible under section 127 of the Crown Lands Ordinance:—

Held, that what was rejected under section 127 was evidence of specified transactions—of sale, lease, transfer or charge, whereas here the agreement was not tendered as evidence of a charge; no charge was sought to be proved and the existence or otherwise of a charge was irrelevant to any issue in the suit, and the agreement was, accordingly, not excluded by section 127 (2) from being received in evidence in the suit.

Dayal Singh v. *Indar Singh* (1926) L.R. 53 I.A. 214 distinguished.

By section 88 of the Crown Lands Ordinance: "(1) No person "shall, except with the written consent of the Governor, sell [etc.] ". . . any land . . . in the Highlands . . . nor shall any person "enter into any agreement for any of the transactions referred to "in this subsection without the written consent of the Governor. ". . . (3) Any instrument, in so far as it purports to effect any "of the transactions referred to in subsection (1) . . . shall be void "unless the terms and conditions of such transactions have received "the consent of the Governor which shall be endorsed on the "instrument," which consent had not been obtained for the present agreement prior to its execution:—

Held, that the agreement to sell was not void under section 88 of the Ordinance. An agreement to sell did not "effect any trans-"action" within the meaning of subsection (3) of section 88, which was not therefore applicable to the agreement in question, and the consent of the Governor need not be endorsed on it. Subsection (3) of section 88 was not applicable to agreements for the transactions mentioned in subsection (1).

Further, there was nothing contrary to law in entering (as here) into a written agreement of sale before the Governor's consent was obtained; the legal consequence was that the agreement was inchoate till that consent was obtained, but it became complete and completely effective after it was obtained.

Judgment and order of the Court of Appeal for Eastern Africa affirmed and case remitted to the Supreme Court for further hearing.

APPEAL (No. 15 of 1959) from a judgment and order of the Court of Appeal for Eastern Africa (O'Connor P., Briggs V.-P. and Forbes J.A.) (November 22, 1958) setting aside a judgment and decree of the Supreme Court of Kenya (Pelly Murphy J.) (March 14 and May 26, 1958) and remitting the original suit for trial to the Supreme Court.

The following facts are taken from the judgment of the Judicial Committee: The respondents instituted this action in the Supreme Court of Kenya against the appellant claiming specific performance of an agreement dated April 17, 1954, whereby the appellant agreed to sell to the respondents a certain parcel of land. The respondents also asked for other forms of relief. The appellant in his defence for stated reasons prayed that all the relief asked for by the respondents be refused. He also made a counterclaim. It will be seen from what follows that questions regarding the other relief asked for by the respondents and the counterclaim did not arise on this appeal. The Supreme Court held that by reason of the combined operation of section 55 (6) (*b*) of the Indian Transfer of Property Act, 1882 (applicable in Kenya) and section 127 (2) of the Crown Lands Ordinance, the agreement was inadmissible in evidence, and dismissed the respondents' action. On appeal the Court of Appeal for Eastern Africa held that the Supreme Court had erred in holding that the agreement was inadmissible. It rejected a further submission made at the hearing of the appeal that the provisions of section 88 of the Crown Lands Ordinance rendered the agreement void. Setting aside the decree of the Supreme Court it ordered that the case be remitted to that court for further proceedings.

The question of admissibility arose in the following way. Section 55 (6) of the Indian Transfer of Property Act, 1882, was to the following effect: " (6) The buyer is entitled— . . . (*b*) . . . " to a charge on the property, as against the seller and all persons " claiming under him with notice of the payment, to the extent " of the seller's interest in the property, for the amount of any " purchase-money properly paid by the buyer in anticipation of " the delivery and for interest on such amount;"

The rest of the subsection dealt with circumstances in which delivery of the property was refused and had no bearing on the present appeal. Subsections (1) to (5) were also irrelevant.

The appellant contended that money passed from buyers to seller in circumstances which gave rise to a charge, and he argued that in consequence the agreement was inadmissible under section 127 of the Crown Lands Ordinance, which said: "127. No "evidence shall be receivable in any civil court: (1) of the sale, "lease or other transfer inter vivos of land registered under this "Part, unless such sale, lease or other transfer is effected by an "instrument in writing and such instrument has been registered "under this Part. (2) Of a lien, mortgage or charge (other than "such as may arise or be created in favour of the Crown or the "Government under or by virtue of any Ordinance or other "enactment) of or upon such land unless the mortgage or charge "is created by an instrument in writing, and the instrument has "been registered under this Part."

The land was situate in the Highlands of Kenya and held by the appellant under a Crown lease registered under the Crown Lands Ordinance. It was not disputed that it was land to which section 127 was applicable.

1960. June 28, 29. *Ralph Millner* for the appellant. It is common ground that the agreement of April 17, 1954, does not bear any endorsement of the consent of the Governor, and the first submission is that under subsection (3) of section 88 of the Crown Lands Ordinance the agreement is void. If that submission is right, it is an end of the case. Further, the consent of the Governor was never given prior to the agreement being entered into. Secondly, if the agreement was not void, it is common ground that a part of the purchase-money was paid, and the submission is that this is a case to which section 55 (6) (*b*) of the Indian Transfer of Property Act, 1882, applies, and it gave rise by operation of law to a charge in favour of the purchasers, and the instrument not having been registered was not receivable in evidence by virtue of section 127 (2) of the Crown Lands Ordinance.

With regard to section 88 (1) of the Ordinance, this was certainly an "agreement for sale," and clearly can only be entered into with the written consent of the Governor. That subsection, on a proper construction, means on the face of it that the written consent must be obtained before anyone may do the things therein set out. The agreement is therefore void under the express provisions of subsection (3) of section 88, which states as an unqualified requirement endorsement of the Governor's consent. This agreement did not have an endorsement on it, and it is begging the question to say that the consent was obtained afterwards. *Musson* v. *Rodriguez*[1] is of assistance—section 20 of the Interpretation and General Clauses Ordinance of Kenya, c. 1 of the Laws of Kenya, 1948, is very similar to section 19 of the Interpretation Ordinance of Trinidad and Tobago. The absence of the endorsement here is conclusive for all purposes, and the charge and everything is void. Nobody threw any light on the form in which the consent was eventually given.

Section 88 (1) expressly requires the consent of the Governor for each type of transaction, which includes agreements to sell. A " transaction " in subsection (3) includes an agreement to sell. It would require specific clear words if subsection (3) were to apply only to conveyances as distinct from agreements to sell. For the meaning of " purport " see *In re Broad*; *Smith* v. *Draeger*.[2] Reading the agreement as a whole, it is admittedly plainly one intended to be effective unless and until rendered ineffective by the refusal of consent. The case is not covered by section 129 (*e*) of the Crown Lands Ordinance, which provides: " Nothing in the last two preceding sections [which includes " section 127] shall apply to— . . . (*e*) any document not itself " creating . . . any right, title or interest to or in land registered " under this Part, but merely creating a right to obtain another " document, which will, when executed, create . . . any such " right, title or interest."

If the agreement is not void, it was inadmissible as evidence under section 127 (2) of the Crown Lands Ordinance. The instrument created a charge in favour of the purchasers and when it is tendered in evidence it is evidence of everything in it, including that charge. By section 55 (6) (*b*) of the Indian Transfer of Property Act, 1882, a charge by operation of law arises on the basis of the agreement, and the instrument not having been registered it is not admissible in evidence owing to the provisions of section 127 (2) of the Crown Lands Ordinance. The agreement not being admissible in evidence, the claim for specific performance being founded on it, must fail. It is conceded that the trial judge's view that *Dayal Singh* v. *Indar Singh*[3] completely covers this case cannot be supported.

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[1] [1953] A.C. 530; [1953] 3 W.L.R. 212, P.C.

[2] [1901] 2 Ch. 86.

[3] (1926) L.R. 53 I.A. 214.

S. P. Khambatta Q.C., *H. Lester* and *G. Chakravarti* for the respondents. Assuming that all that has been said is accepted by the Board, a crucial point, with which Mr. Millner did not deal, was stated by Briggs V.-P. in his judgment as follows: "It "is clear from the wording of section 88 (3) that an instrument "may be avoided in part and remain valid in part. It is avoided "to the extent that were it not for the provisions of the sub-"section, it would effect one of the 'transactions' (in the special "sense) governed by the first part of section 88 (1). In so far as "it would not have that effect, it remains in full force. This "agreement is, I think, typical of such severable instruments. "The statutory charge is avoided, but otherwise the agreement "stands. It is then a document precisely within the terms of "section 129 (*e*), and is exempted from registration." It is, indeed, quite clear that this agreement is typical of such severable instruments, and the view of Briggs V.-P. is a sufficient answer to the case put for the appellant. [*Mattongeney Dossee* v. *Ramnarain Sadkhan*[4] was referred to.]

Assuming, next, that section 129 (*e*) does not assist to take this case out of the provisions of section 127, it is quite clear that section 88 (3) expressly excludes from its ambit any of the transactions in subsection (1); so the last three lines of subsection (1), which refer to "any agreement for any of the trans-"actions referred to" in subsection (1), are not touched by the provisions of subsection (3); that is supported by the proviso to subsection (3) which enacts that "where the Governor refuses his "consent and any money has been paid by either party in "respect of any such transaction, such money shall be recover-"able as a civil debt." Agreements for transactions do require the consent of the Governor, but it does not go on to say that in its absence they shall be void.

The agreement here falls out of line with the provisions of the Ordinance. Evidence of the transactions specified in section 127, i.e., of the sale, etc., of land, is not admissible unless such transaction is effected or created by an instrument in writing and registered. The agreement here is not evidence of a "sale" under section 127 (1) of the Ordinance and is, accordingly, not registrable. No charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit. The agreement was not therefore excluded by section 127 (2). The Court of Appeal was correct in law in holding to the above effect. *Dayal Singh* v. *Indar Singh* [5] is inapplicable to the present case.

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[4] (1879) I.L.R. 4 Cal. 83.

Millner replied.

Oct. 10. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: It was argued by the respondents that by reason of certain other provisions of the Crown Lands Ordinance the charge could not be regarded as existing. Their Lordships find it unnecessary to decide this question, because their Lordships are of opinion that, assuming that a charge exists, the agreement is nevertheless admissible for reasons which follow.

Dealing with the point the President of the Court of Appeal (who wrote the principal judgment) said of section 127: "what "is rejected in Kenya is evidence of specified transactions—of "the sale, lease, transfer or charge, etc. of registered land. The "agreement in this case was not tendered as evidence of a "charge. No charge was sought to be proved, and the existence "or otherwise of a charge was irrelevant to any issue in the suit. "I am of opinion that the agreement was not excluded by section "127 (2) from being received as evidence in this suit."

Their Lordships are of the same opinion. The section says "no evidence shall be receivable" "of a charge" unless "the "instrument is registered." When the sole object of using the instrument has nothing whatever to do with a charge the court is not receiving evidence of a charge within the meaning of the section. To be "evidence" within that meaning it must be evidence for the purposes of the case.

The trial judge in dismissing the action was of opinion that the decision of the Board in *Dayal Singh* v. *Indar Singh* [1] "com-"pletely governed" the present case. The Court of Appeal held that there were significant differences between the statutory provisions in India referred to in that case and the corresponding statutory provision in Kenya which made the decision inapplicable. Their Lordships agree. They will refer to one such difference. In the Indian case, as in the present case, under an agreement for the sale of immovable property the buyer became entitled to a charge under section 55 (6) (*b*) of the Transfer of Property Act, 1882, upon the property in respect of a sum of money that had passed, with the result that section 17 of the Indian Registration Act, 1908, required the document to be registered. It was not registered. The effect of non-registration is stated in section 49

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[5] L.R. 53 I.A. 214.

[1] (1926) L.R. 53 I.A. 214.

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of the Indian Registration Act thus: " 49. No document required "by section 17 to be registered shall . . . (*c*) be received as "evidence of any transaction affecting such property . . . unless "it has been registered."

The words of the section which have been omitted have no bearing on this appeal.

It will be seen that the Indian Act, unlike the Kenya Ordinance, makes inadmissible the document itself. The President said: " Section 49 of the Indian Registration Act makes " ' documents ' required by section 17 to be registered not receivable as evidence of any transaction affecting immovable property "unless registered. This disqualifies the instrument per se in so "far as it is to be received as evidence of any transaction affecting "immovable property. On the other hand, section 127 of the "Kenya Crown Lands Ordinance says: ' No evidence shall be " ' receivable in any civil court . . . of a sale, lease . . . charges " ' etc.' What is rejected by section 127 is not the unregistered "instrument per se in so far as it is to be received as evidence of "any transaction affecting immovable property, but evidence of "certain specified transactions, and of those only."

With this view their Lordships agree, and they are of opinion that the President's view that the agreement for sale was admissible is correct.

It is also contended that the agreement is void by reason of the provisions of section 88 of the Crown Lands Ordinance which says: " 88.—(1) No person shall, except with the written consent "of the Governor, sell, lease, sub-lease, assign, mortgage or "otherwise by any means whatsoever, whether of the like kind "to the foregoing or not, alienate, encumber, charge or part with "the possession of any land which is situate in the Highlands, "or any right, title or interest whether vested or contingent, in "or over any such land to any other person, nor, except with the "written consent of the Governor shall any person acquire any "right, title or interest in any such land for or on behalf of any "person or any company registered under the Companies "Ordinance; nor shall any person enter into any agreement for "any of the transactions referred to in this subsection without "the written consent of the Governor:

" (3) Any instrument, in so far as it purports to effect any of "the transactions referred to in subsection (1) of this section shall "be void unless the terms and conditions of such transactions "have received the consent of the Governor which shall be "endorsed on the instrument:"

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Subsection (2) has no bearing on the case.

It is argued that the agreement to sell is void by reason of the provisions of subsection (3). There was an admission in the course of the proceedings in Kenya that the Governor's consent to the agreement has been obtained subsequent to execution by the parties. It is argued by the appellant that the consent should have been obtained prior to execution and that in any case it should be endorsed on the instrument before it can be regarded as valid.

Subsection (3) is applicable only to an instrument which "purports to effect any of the transactions referred to in sub-"section (1)," for instance, a conveyance which makes a sale effective. Their Lordships are of opinion that an agreement to sell does not "effect a transaction" and that therefore subsection (3) is not applicable to the agreement in question.

The view that subsection (3) is applicable to an agreement to sell necessarily involves the view that an "agreement for any of "the transactions referred to in this subsection," namely, subsection (1), is also a "transaction" within the meaning of subsection (1). Their Lordships are unable to take this view and are of opinion that subsection (3), applicable to the transactions mentioned in subsection (1), is not applicable to agreements for such transactions.

It has been urged that if subsection (3) is held to be inapplicable to the provision "nor shall any person enter into an agree-"ment for any of the transactions referred to in this subsection "without the written consent of the Governor" in subsection (1) the provision is left without a sanction in express terms such as is to be found in subsection (3). There is force in this argument, but their Lordships are of opinion that what they have said earlier outweighs the considerations that arise from the argument. As subsection (3) is inapplicable the consent of the Governor need not be endorsed on the agreement.

Subsection (1) requires the written consent of the Governor to an "agreement for any of the transactions" set out in the subsection. They include a transaction of sale. It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective.

It is to be observed that in clause 4 of the agreement the parties provided that "The purchase and sale hereby effected is "expressly made subject to the consent thereto of the Land "Control Board and the Governor of the said Colony. In the "event of such consents being refused then this agreement shall "become null and void and any payment made by the purchasers "shall thereupon be refunded to them but without interest." Thus the parties had every regard for the provisions of subsection (1) of section 88 and it would be remarkable if they could not negotiate in the manner in which they did.

An argument was addressed to their Lordships based upon section 129 of the Crown Lands Ordinance which says: "129. "Nothing in the last two preceding sections shall apply to— . . . "(*e*) any document not itself creating, declaring, assigning, "limiting or extinguishing any right, title or interest to or in "land registered under this Part, but merely creating a right to "obtain another document, which will, when executed, create, "declare, assign, limit or extinguish any such right, title or "interest;"

The other subsections are not relevant.

It was submitted that the agreement to sell came within the class of documents specified in subsection (*e*) and that therefore section 127 was inapplicable. On the view which their Lordships have taken of section 127 it is not necessary for them to consider the submission.

For the reasons which they have given their Lordships are of opinion that the agreement to sell was not void and that it was admissible in evidence. They agree with the Court of Appeal that the case should be remitted to the Supreme Court for further hearing. They will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondents the costs of the appeal.

Solicitors: *Goodman, Derrick & Co.; Field, Roscoe & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1960
April 4, 5,
6, 7, 11;
May 19.

ADAMS AND OTHERS . . . . . . APPELLANTS;
AND
NATIONAL BANK OF GREECE S.A. . . RESPONDENTS.

DARLING AND OTHERS . . . . . APPELLANTS;
AND
NATIONAL BANK OF GREECE S.A. . . RESPONDENTS.

ADAMS AND OTHERS . . . . . . APPELLANTS;
AND
NATIONAL BANK OF GREECE S.A. . RESPONDENTS.

[CONSOLIDATED APPEALS.]

Conflict of Laws—Foreign legislation—Foreign bank liable on English debt—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank "universal "successor" to rights and liabilities of former banks—Creditors' rights vested in English law—Subsequent foreign amending legislation retrospectively excepting obligation on English debt from universal succession—Whether a law governing succession or status —Whether confiscatory or discriminatory—Right of creditor to sue new bank.

Conflict of Laws—Succession—Corporation—Retrospective foreign legislation—Conflict of Laws—Confiscatory or political legislation.

Conflict of Laws—Foreign legislation—Comity.

In 1927 a Greek mortgage bank issued sterling mortgage bonds repayable as to principal in 1957 with interest thereon meanwhile. The bonds were unconditionally guaranteed as to principal and interest by another Greek bank, and the proper law of the bonds and of the ancillary contract of guarantee was English law. In 1953 by an Act of the Government of Greece and by royal decree the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, the respondent company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies. In *National Bank of Greece and Athens S.A.* v. *Metliss* (infra) (proceedings instituted in December, 1955, by a bondholder claiming arrears of interest against the respondents), it was held that the English courts would give effect to that decree as transferring to the defendants the liabilities of the guarantor bank. On July 16, 1956, the Greek Government passed a legislative decree amending the law and decree of 1953 so that the respondent company, as from the time of its creation, became the universal successor to the rights and obligations of the companies amalgamated "except for the obligation to which such companies were liable "whether as principal or guarantor . . . under bonds payable . . . "in gold or foreign currency, issued by limited liability companies." Under Greek law that decree had a retrospective effect and the respondents ceased to be liable on the obligations of the original guarantor bank in respect of the bonds.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD DENNING.

On dates subsequent to July 16, 1956, a number of bondholders presented for payment coupons covering certain arrears of interest due under the bonds. Payment was refused by the mortgage bank and by the respondents. In an action by the bondholders against the respondents as guarantors under the bonds in which the respondents relied on the Greek decree of 1956 as a decree governing status which the English courts would recognise:—

Held, that the proper law of the bondholders' contract was English law, and that, accordingly, the bondholders were entitled to succeed since (*per* Viscount Simonds and Lord Radcliffe) from the moment that the Act of 1953 became operative the respondents, by virtue of the universal succession created thereby, were under an obligation to the bondholders which no subsequent Greek legislation could, retrospectively or otherwise, alter or discharge (post, pp. 275, 283–284); (*per* Lord Reid) the decree of 1956 was a law which sought to discharge English liabilities and was therefore ineffective in England, albeit it was framed in retrospective form so as to deem that these liabilities never existed, for English law looked at the substance and effect of the foreign law and that was a question of fact, and a foreign legislature could not compel an English court to shut its eyes to proved facts, namely, in the present case, that between the enactment of the Act of 1953 and the decree of 1956, the respondents were bound to fulfil English contractual obligations (post, p. 283); (*per* Viscount Simonds, Lord Radcliffe and Lord Tucker) applying the observations of Lord Penzance in *Lynch* v. *Provisional Government of Paraguay* (1871) L.R. 2 P. & M. 268, 271, to negotiable instruments, it would be neither just nor convenient that an English court, once the validity and consequences of a succession created by foreign law had become established by its rules, should recognise retrospective alterations of that succession which might be propounded by the foreign law (post, pp. 275–276, 284, 285); (*per* Lord Denning) the English courts were not called upon to recognise the Act of 1953 in the form it had now retrospectively assumed, for the Greek legislature had presumed to vest all the assets in the new amalgamated company but some only of the liabilities, and the exclusion of liability on bonds payable in gold or foreign currency was such an unusual provision in an amalgamation, and was so inconsistent with the essence of the transaction, that there was no comity of nations which required the English courts to recognise it (post, p. 290).

National Bank of Greece and Athens S.A. v. *Metliss* [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L. considered.

Per Viscount Simonds. The principle of private international law in regard to discharge or alteration of a contract is applicable whatever device of nomenclature is used, if the effect of the challenged decree is the discharge or alteration of contractual rights (post, p. 274).

Decision of the Court of Appeal sub nom. *Adams* v. *National Bank of Greece and Athens S.A.* [1960] 1 Q.B. 64; [1959] 2 W.L.R. 800; [1959] 2 All E.R. 362, C.A. reversed.

APPEAL from the Court of Appeal (Jenkins, Morris and Ormerod L.JJ.).

These were consolidated appeals by leave of the Court of Appeal from judgments of that court dated April 29, 1959, in three various actions, allowing appeals by the respondents, formerly known as the National Bank of Greece and Athens S.A. (the defendants in the actions) from orders of Diplock J. dated March 13, 1958, whereby judgment was entered for the appellants in these actions (the plaintiffs in each respective action) for the several sums set out in each action with costs, and ordering that the first, second and third appellants (collectively hereinafter referred to as " the appellants ") should pay to the respondents the costs of the hearings before Diplock J. and the said appeals.

The main question raised by this appeal was whether the respondent bank which had been formed under Greek law by the amalgamation of two other Greek banks and which, under that law, had succeeded to all the rights and liabilities of the amalgamated banks as their universal successor, including the liability of one of those banks as guarantor of bonds held by the appellants, had been discharged from that liability by the passing, over three years after the decree of amalgamation, of a new Greek law which, whilst leaving the assets unaffected, purported to relieve the respondents from such liability by modifying retrospectively the terms of the decree of amalgamation.

The following statement of facts is taken from the opinion of Viscount Simonds: The appellants were the holders of sterling bearer bonds, part of an issue made in or about the year 1927 by a Greek corporation, the National Mortgage Bank of Greece (" the " mortgage bank "). These bonds were guaranteed by a Greek corporation also known as the National Bank of Greece (the " old " bank "), which was dissolved in 1953. They provided for payment of principal on presentation on or after December 1, 1957, and in the meantime for payment of interest at 7 per cent. per annum on presentation of the appropriate coupons. The rate of interest was in December, 1935, changed from 7 per cent. to $4\frac{3}{4}$ per cent.

In April, 1941, Greece was occupied by the enemy and payment of the sums falling due under the bonds ceased and, so far as is relevant to this case, had not been resumed. In November, 1949, and at subsequent dates, the suspension of payments under Greek bonds payable in foreign currency was regularised so far as Greek law was concerned by emergency laws imposing a moratorium which still continued. They did not, however, affect the present case.

In February, 1953, the Greek Government passed a law known as Act 2292 which related to the amalgamation of banking corporations with limited liability by shares, of which the material provisions were as follows:

Article 4 (2): "The company which absorbs by merger another "company or the new company formed by the amalgamation "becomes the universal successor of the rights and obligations in "general of the amalgamated companies without any formality or "act whatsoever."

Article 8: "All provisions in force of laws, decrees, and/or "ministerial decisions in favour of one of the amalgamated com"panies are considered as being in favour of the new company "as from its formation."

Article 10: "The amalgamation of such companies may be "effected by decree promulgated on the proposal of the Council of "Ministers."

On February 27, 1953, a decree was promulgated under the powers conferred by article 10 of Act 2292 amalgamating the old bank and another company known as the Bank of Athens to form a new company which was called the National Bank of Greece and Athens and was the respondent company. Paragraph 5 of this decree provided that the old bank and the Bank of Athens should cease to exist, and that their property should be considered as automatically contributed to the respondent bank, who should be substituted ipso jure and without any other formality in all assets and liabilities of the amalgamated banks as their universal successor.

It is not necessary to refer to certain proposals thereafter made by the mortgage bank and the new bank (the respondent bank) as guarantors of the bonds. They were not accepted by the appellants, nor by another bondholder, one Cyril Metliss, who in

December, 1955, commenced an action against the respondent bank claiming the interest that was in arrear on his bonds. Judgment was given in his favour by Sellers J. on July 12, 1956, and this judgment was affirmed by the Court of Appeal and by the House of Lords.

Four days after the judgment of Sellers J. was given the Greek law was altered by Legislative Decree No. 3504. This decree (hereinafter called " Act 3504 "), substituted for paragraph 2 of article 4 of Act 2292 as from the time it came into force the following clause:

" The company which has absorbed another company by amalgamation or the new company created by amalgamation becomes the universal successor to the rights and obligations of the companies amalgamated without the necessity of any other formality or action, with the exception of the obligations of these companies as principal debtors, guarantors or for any other cause deriving from bonds, securities in general or contracts or any other cause and relating to loans in gold or foreign currency by bonds or otherwise payable to the bearer issued by the limited liability companies, juridical persons of public law, municipalities and communes etc.

" The company which has absorbed another company or is newly created by amalgamation does not acquire nor is it considered as having acquired by virtue of this present or other statute or decree or articles of association published in pursuance of this present law or in any other manner the above obligations deriving from loans in gold or foreign currency until a law is passed providing the extent and the manner in which they will become subject to these obligations," and further provided as follows:

" Paragraph 5 of Article Sole of the Royal Decree dated 26-27th February, 1953, ' on the amalgamation of the National ' Bank of Greece and the Bank of Athens by the creation of a ' new limited liability banking company ' is abolished as from the time of its publication. The rights and obligations of the new limited liability banking company created by the said decree under the name of ' National Bank of Greece and Athens ' S.A.' are governed as from the time the company was created by the relative provisions of Statute 2292/1953 as amended by the present law."

On September 17, the first appellants commenced their action against the respondent bank in respect of interest payments on coupons duly presented which became due at various dates between July 28, 1956, and August 22, 1956. On June 4, 1957, the second appellants commenced their action for like interest payments which became due at various dates between August 8, 1956, and May 21, 1957, and on January 17, 1958, the third appellants commenced their action for like interest payments which fell due at various dates between December 1, 1950, and January 9, 1958, and for repayment of principal which fell due on December 1, 1957. In no case was the relevant coupon presented for payment before the passing of Act 3504.

The respondent bank resisted the claims on the single ground that, whatever might be the case if Act 2292 stood alone, Act 3504 relieved them from liability under the bonds. They did not seek to challenge the findings of fact as to Greek law in the *Metliss* case. Diplock J. decided in favour of the appellants: the Court of Appeal unanimously reversed his decision, holding that by virtue of Act 3504 the respondent bank were absolved from the liability to which they were previously subject.

John Foster Q.C., *Mark Littman* and *L. J. Blom-Cooper* for the appellants. The main question is whether the respondent bank, having succeeded to all the rights and liabilities of the old bank as universal successor, was discharged from its liability as guarantor of the bonds in question, both as to principal and interest, by the passing on July 16, 1956, of Act 3504.

It is submitted that: (1) (a) the appellants' claim is in respect of a contractual liability governed by English law; and (b) Act 3504 is a law of discharge and therefore does not apply to the contract of guarantee, the proper law of which is admittedly English law. (2) (a) Even if, as the Court of Appeal decided and the respondents contend, the appellants' claim is not contractual but is founded on the right arising out of the Greek statute of succession, namely, Act 3504, nevertheless retrospective changes of status by foreign law are not recognised in English law as affecting the liabilities under an English contract. The material date at which Greek law is to be recognised as to the status of the respondents is the date on which the amalgamation took place. (b) Even if, contrary to the preceding contention, Act 3504 *is* a law of status and even if the retrospective changes in Act 2292 were recognised as discharging the respondents from their liabilities, Act 3504 would not be given effect to in the English courts on the grounds that it was discriminatory and contrary to public policy in that it was contrary to rational justice.

Seller J.'s judgment in *Metliss* v. *National Bank of Greece and Athens S.A.*[1] makes it plain that the plaintiff based his case on a contractual claim and that one of the questions raised was whether the proper law applicable was English or Greek law. It is also plain from the reports [2] of that decision in the Court of Appeal and the House of Lords that some of the arguments there raised by the present respondents and rejected, are still subsisting in the present appeal.

(1) (a) The Court of Appeal in the present case [3] held that no contractual liability fell on the respondents, but the *Metliss* case [4] shows that the respondent bank has been substituted as a party to the contract of guarantee. It is submitted that the function of Greek law here is confined to identifying the debtor. On the assignment of a debt all the contractual defences are open to the new debtor: *Read* v. *Brown*.[5] The present is an a fortiori case, because here there was merely a change of persona; there was not even an assignment, but by statute the old debtor was merged in the new. The Court of Appeal's decision is stated in general terms and would have the odd result that the English courts would be bound to recognise a Greek statute which provided that a Greek company from the moment of its incorporation should be deemed not to be liable on its foreign debts albeit that such a provision altered retrospectively the status of the company.

The position of the respondent bank is analogous to that of an executor who, in so far as he takes on the personality of the testator, is liable on the testator's contracts: *per* Lord Mansfield in *Hambly* v. *Trott* [6]; see also section 26 (1) of the Administration of Estates Act, 1925. As to the survival of actions in tort, see section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934.

The fallacy in the Court of Appeal's decision can be demonstrated by reference to the *Metliss* case,[7] for if Metliss had claimed not under a contract but under a Greek statutory right the moratorium laws would have applied and the plaintiff's claim been defeated. [Reference was made to section 9 of the Atomic Energy Act, 1946; *O'Meara* v. *South-Eastern Gas Board*.[8]]

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[1] Unreported.

[2] [1957] 2 Q.B. 33, 37, 38, 40 et seq.; [1957] 2 W.L.R. 570; [1957] 2 All E.R. 1; affirmed sub nom. *National Bank of Greece and Athens S.A.* v. *Metliss* [1958] A.C. 509, 513–517, 520, 521 et seq.

[3] [1960] 1 Q.B. 64, 83.

[4] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L.

[5] (1888) 22 Q.B.D. 128, 132; 5 T.L.R. 97, C.A.

[6] (1776) 1 Cowp. 371, 375.

[7] [1958] A.C. 509.

[8] [1951] 1 K.B. 307, 311; 66 T.L.R. (Pt. 2) 296; [1950] 2 All E.R. 481, C.A.

For a résumé of the history of succession and assignment, see Holmes, The Common Law, chapters 10 and 11, in particular pp. 340, 344, 345, 353, 372, 376, 379, 380. The old bank did not lose its identity by virtue of the amalgamation and the advent of the respondent bank as its successor: see *Capital and Counties Bank* v. *Governor and Company of the Bank of England.*[9]

(1) (b). Act 3504 is a law of discharge. The Court of Appeal's [10] approach to this question is different from the principle enunciated by Denning L.J. in the *Metliss* case.[11] The Court of Appeal's reference [12] to the "selectiveness" of the appellants' approach to the problem appears to imply that the appellants are trying to both approbate and reprobate and that such an approach is illegitimate. But there is no such general rule or maxim in English law: see *Lissenden* v. *C. A. V. Bosch Ltd.*[13] Further, and more important, the whole of private international law is concerned with selectiveness, for in every case with a foreign element there is a preliminary question of characterisation to determine which "compartment" of private international law governs the instant case.

The action of the Greek Government in passing Act 3504 is contrary to the comity of nations because it deprives the creditors of the opportunity of bringing winding-up proceedings; it is a form of confiscation in that it deprives the creditor of rights under his contract. [Reference was made to rule 155 of Dicey's Conflict of Laws, 17th ed., p. 804.] The effect of Act 3504 is that it operates as a law of discharge. The "label" given to it by Greek law is irrelevant. The question whether or not it is a law of discharge is governed by the rules of English private international law. The principle of *Huntington* v. *Attrill* [14] should be applied by analogy. In this connection it is relevant to consider the substance and effect of the foreign law. If in the "lifetime" of a foreign corporation the foreign legislature enacts that the corporation shall not have capacity to pay its debts under certain contracts, such an enactment is a law of discharge in English private international law and not a law affecting capacity or status. If the respondents' contentions were correct *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* [15] would have been decided differently: see also *New Zealand Loan and*

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[9] (1889) 61 L.T. 516, 518; 5 T.L.R. 738.

[10] [1960] 1 Q.B. 64, 81, 82.

[11] [1957] 2 Q.B. 33, 46.

[12] [1960] 1 Q.B. 64, 81.

[13] [1940] A.C. 412, 435, 436; 56 T.L.R. 347; [1940] 1 All E.R. 425.

[14] [1893] A.C. 150, 155, 161; 8 T.L.R. 341, P.C.

[15] (1890) 25 Q.B.D. 399.

Mercantile Agency Co. v. *Morrison.*[16] Reliance is also placed on the observations of MacKinnon L.J. in *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft.*[17]

(2) (a). On the assumption that Act 3504 was a law relating to status, the Court of Appeal was wrong in holding that the fact that Act 3504 was made retrospective was of no consequence. It is only by treating Act 3504 as retrospective that it could ever be made to appear as a law of status or succession. In English private international law the law governing the succession to the assets and liabilities of the deceased is the law of the deceased's domicile as at the date of death: *Lynch* v. *Provisional Government of Paraguay*[18]: see also *In re Aganoor's Trusts.*[19] That principle has been extended to include the proposition that the incidence of status cannot be changed retrospectively: *In re Marshall, decd.*[20] The principles enunciated by Lord Penzance in *Lynch's* case[21] are just as cogent in their application to fictitious, that is, juristic, persons, namely, corporations, as they are to natural persons, and, therefore, they should be applied to the present case by analogy. Accordingly, the material time for determining the extent of the respondent bank's succession under Greek law is the date of the amalgamation. In general, English courts will not recognise retrospective changes of status by a foreign law which affect the liabilities of a foreign company under an English contract. *Starkowski* v. *Attorney-General*[22] is plainly distinguishable on its facts, for that case related to the status of marriage.

(2) (b). Diplock J.[23] was correct in inferring that Act 3504 was directed against the present bondholders. It does not affect bondholders in Greece because the moratorium laws protect the respondents under Greek law. Act 3504 is discriminatory since it only affects foreign bondholders whose contractual rights are governed by a proper law which is not Greek. Its area is small because it only applies to banks which have been amalgamated and who are liable as principal debtors or guarantors of bearer bonds in foreign currency. It is equivalent to confiscation. The principle whereby English courts do not recognise confiscation of property situate outside the jurisdiction of the confiscatory state

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[16] [1898] A.C. 349, 359; 14 T.L.R. 141, P.C.

[17] [1939] 2 K.B. 678, 694; 55 T.L.R. 814; [1939] 3 All E.R. 38, C.A.

[18] (1871) L.R. 2 P. & M. 268, 271, 272.

[19] (1895) 64 L.J.Ch. 521.

[20] [1957] Ch. 507, 525; [1957] 3 W.L.R. 538; [1957] 3 All E.R. 172.

[21] L.R. 2 P. & M. 268, 271, 272.

[22] [1958] A.C. 155; [1953] 3 W.L.R. 942; [1953] 2 All E.R. 1272.

[23] [1958] 2 Q.B. 59, 75.

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is equally applicable where a foreign state passes legislation purporting to exempt its nationals from liability to their English creditors under an English contract. This is a fortiori in favour of the appellants than the *Metliss* case,[24] and the observations therein of Viscount Simonds are equally apt. Further, it would be contrary to the policy of English law to recognise an amalgamation purporting to transfer all the assets of the old companies and not all their liabilities: *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[25]—"otherwise the transfer of the assets "would very much resemble a fraudulent conveyance," *per* Lord Atkin,[26] and see also the observations of Lord Porter.[27] Moreover, Act 3504 is not a genuine foreign exchange control law and, accordingly, it will not be recognised as such by English courts: see *per* Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.*[28] Act 3504 is contrary to commercial morality and operates unfairly against the appellants, and in the circumstances an English court may in its discretion refuse to recognise it. [Reference was also made to *In re Consolidated South Rand Mines Deep Ltd.*[29]] It is true that English law recognises the right of Greek law to terminate the liability of the old bank, for at that date the English creditors would have the right of winding up. But what English courts will not recognise is a law passed at a subsequent date which operates retrospectively to defeat the claims of the creditors, since by that date the assets will have passed from the old bank and, consequently, no order for winding up could be obtained.

Littman following. The Court of Appeal took the view that recognition of Act 2292 in the *Metliss* case [30] involved the recognition in the present case of Act 3504. The following are three reasons why that view is incorrect: (1) Act 2292 was of a wholly different general character from Act 3504, whether the difference be considered as one between status and contract or personality and contract. Act 2292 effected a profound change in the personality of the debtor—it effected the amalgamation of two banks. But in a real sense the old bank still continued in existence in the new amalgamation (compare *Capital and Counties Bank* v. *Governor and Company of the Bank of England* [31])—the shareholders of the old bank were shareholders of the new. The fact that the respondent bank was made the universal successor of the old bank shows that it was identified with the old bank—a fictitious identification of the old and the new: see Holmes, the Common Law, p. 361. The *Metliss* case [32] decided that the transfer of assets and liabilities was to be recognised because it would be meaningless merely to recognise the new bank without also recognising the transfer: see *per* Lord Tucker [33] and also *per* Viscount Simonds.[34] A comparison of Act 3504 with Act 2292 shows that in July, 1956, however, there was no change in the persona—the personality or status—of any of the companies in question. The new company was the same creature after July 16, 1956, as it was before. The logical fallacy lies in assuming that since in the particular context of Act 2292 the transfer of assets and liabilities is to be considered as a question of status, therefore, all matters relating to assets and liabilities must be considered as relating to status.

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[24] [1958] A.C. 509, 522.

[25] [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549.

[26] [1940] A.C. 1014, 1029.

[27] Ibid. 1050.

[28] [1956] Ch. 323, 351; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.

[29] [1909] 1 Ch. 491, 498.

[30] [1958] A.C. 509.

[31] 61 L.T. 516.

(2) It was said that Act 3504 merely undoes what was done by Act 2292. This is not so; Law 3504 does not abolish the new corporation or resurrect the old, but it does affect this particular liability. The object of Act 2292 was to transfer liability from "A" to "B," and Act 3504 does not and cannot transfer back liability from "B" to "A" since "A" no longer exists.

(3) In the *Metliss* case [35] the court did not have to consider the question of the possible prejudice of the rights of foreign (that is non-Greek) creditors by reason of the recognition of Greek law, and this question was reserved: see the judgment of the Court of Appeal.[36] In the present case the remedy for such prejudice is simple. Act 3504 was passed some three and a half years after Act 2292 and the appropriate remedy is for English courts not to recognise it.

T. G. Roche Q.C. and *N. H. Lever* for the respondents. It is important to start from the position that English courts do not *create* rights but *enforce existing* rights. Thus here the appellants have to refer to the bonds as the basis of their claim. They prove that after August/September, 1956, and in the third action after December, 1957, they presented coupons and were not paid. So far they have not established any liability. The next stage is an essential link in their cause of action. They rely on Greek law to establish the respondents' liability. They have to show that after July 16, 1956, the respondents were liable on the contract. This they fail to do. The appellants' contention in brief is: no cognisance should be taken of Act 3504 because (a) it is a law of discharge; (b) it is discriminating. If, however, say the appellants, Act 3504 has to be afforded recognition, then the relevant date to determine the liability of the respondents is, by analogy with *Lynch's* case,[37] the date of the amalgamation and not the dates of presentation of the coupons for payment.

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[32] [1958] A.C. 509.

[33] Ibid. 529.

[34] Ibid. 525.

[35] [1958] A.C. 509.

[36] [1957] 2 Q.B. 33, 45, 49, 50, 52, 53.

It is the duty of the English court to ascertain the effect of Act 3504 in Greek law. If in Greek law it affects the status of the respondent bank, that is a most material consideration under English private international law in determining whether or not it is a law relating to status. The only authority which is of assistance is the *Metliss* case.[38] That case decided: (1) the proper law to determine the status of a Greek company is Greek law. (2) " Status " includes attributes, that is, the rights and duties attributable to the status in question. (3) At the date of the appeal the new company was under Greek law the successor to the old company in relation to the bonds, and its attributes as successor included the liability to pay the sum in question. The House of Lords did *not* hold that Greek law had made the new company a party to the contract in place of the old company, but held by reason of its status as successor it was answerable for the obligations of the old company under the contract. English law does not recognise the assignment of liabilities under a contract except by way of novation.

The appellants seek to limit the ambit of *Metliss* [38] to cases of universal succession, but it cannot be so limited; succession is part only of the law of status, and status was the foundation of the decision [39] in both the Court of Appeal and the House of Lords. A law relating to status will be recognised for reasons of comity.

Act 3504 *is* a law of succession, since it concerns any amalgamation of banking corporations which might take place subsequent to its passing. It regulates and redefines the attributes of the succession. Any enactment which varies an original status is an amendment of that status.

Let it be supposed that Act 2292 had originally been enacted in the form in which it now is, so that (1) the old bank was dissolved; (2) the new bank created; and (3) the new bank did not succeed to liability on bonds in foreign currency. It is plain that English courts would recognise (1) and (2), and it is submitted that (3) would be recognised because it is the appellants who have to rely on Greek law: see *per* Diplock J.[40] The respondents do not have to rely on the retrospective effect of Act 3504 since in their submission the liability in question arose after July 16, 1956, though they concede that Act 3504 is in fact a retrospective enactment. But, in any event, there is no rule of English private international law that requires English courts to refuse recognition to foreign legislation which is retrospective in character: see *Phillips* v. *Eyre*.[41] [Reference was also made to *Starkowski* v. *Attorney-General*.[42]]

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[37] L.R. 2 P. & M. 268, 271.

[38] [1958] A.C. 509.

[39] [1957] 2 Q.B. 33, 45, 48, 50, 52; [1958] A.C. 509, 521–523, 525, 527–530.

The appellants have to rely on Greek law and, accordingly, it is the duty of the English court to ascertain the whole of the relevant Greek law applicable after July 16, 1956. [Reference was made to *Buerger* v. *New York Life Assurance Co.*[43]] The relevant law is to be found in Act 2292 as amended by Act 3504. The next stage in the argument is of great importance: it was suggested by the appellants that if the coupons in question had been presented for payment and dishonoured before July 16, 1956, there would have been two debtors, namely, the mortgage bank and the new bank. The respondents' case is that because Greek law was changed before the coupons were presented there is only one debtor and, therefore, the appellants contend that Greek law has the effect of altering an English contract and rely on the decision in *Gibbs'* case.[44] But the word "effect" has two meanings: (a) it may mean "legal effect"; or (b) in common parlance it may mean "result." *Gibbs'* case [44] posed the question: under a contract the proper law of which is English law what are the cardinal principles governing the discharge or alteration of such a contract? The answer, it is submitted, is threefold: (1) An English contract may be altered or discharged by agreement between the parties, and this includes a novation. (2) It may be altered or discharged by English legislation. (3) It may be discharged, but not modified, by supervening events. The question whether foreign legislation produces a frustrating result depends on the circumstances. If there was an Act of the Greek Parliament which purported to discharge an English contract or forbade its performance in England an English court

[40] [1958] 2 Q.B. 59, 72, 73.

[41] (1870) L.R. 6 Q.B. 1, 23–27.

[42] [1954] A.C. 155.

[43] (1927) 43 T.L.R. 601, 606, 607, C.A.

[44] 25 Q.B.D. 399.

would not take cognisance of it. But if the performance of the contract was forbidden in Greece then the English court would take cognisance of a frustrating event of this nature—for example, an English contract to build a brewery in Greece, and subsequent Greek legislation forbidding the erection of such a building.

There are two ways in which a stranger might look at the decision in *Metliss*[45]: (1) the terms of the contract had been altered by making the new bank the guarantor; (2) the courts had added to the category of persons who could succeed to another's liabilities without consensus, namely, successors to a company. As to (1), it is impossible to sustain the argument that the contract has been altered, for English courts have no power to alter a contract. Neither the power of rectification nor the doctrine of frustration affects this proposition. There is no rule of construction which would make the new bank liable. It is submitted that *Metliss*[46] could only have been decided on basis (2)—that there was a new category of persons who could be liable, namely, companies whose status made them liable. If that be correct, then " those who need recourse to Greek law must take " it as they find it. If they assert that Greek law can endow, " they must recognise that Greek law can disendow."[47]

The appellants allege that the material date for determining the extent of the respondent bank's liability under Greek law is not the date at which the cause of action arose but the date of the amalgamation. That involves the contention that whilst English law recognises a status created under Greek law, a subsequent change in that status enacted by Greek law is to be ignored. The appellants rely on three authorities: *Lynch* v. *Provisional Government of Paraguay*,[48] *In re Aganoor's Trusts*[49] and *In re Marshall, decd.*[50]

In *Lynch's* case[51] the subject-matter was personal property situate in England of a person domiciled abroad. There are two stages to be considered: (1) the administration of the estate; (2) succession to the net estate. As regards (1)—administration—which consists in getting in all the assets and the payment of all debts and liabilities, that is governed by English law. It is (2)—succession to the net estate—which in English law is governed by the law of the deceased's domicile at the date of death, and changes in the law of the domicile after death are disregarded.

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[45] [1958] A.C. 509.

[46] Ibid.

[47] [1960] 1 Q.B. 64, 81, 82.

[48] L.R. 2 P. & M. 268.

[49] 64 L.J.Ch. 521.

[50] [1957] Ch. 507.

[51] L.R. 2 P. & M. 268.

[Reference was made to Dicey's Conflict of Laws, 7th ed., rr. 101, 113, 93, pp. 577, 561, 562.] *Lynch's* case[51] is authority for proposition (2) above, and has no bearing on the question who is to pay the debts of a dissolved company, for in English law debts cannot be assigned without a novation. English courts do not recognise the doctrine that liabilities are to be governed by the law of domicile, and there is no case where a creditor has in fact sued the heir under foreign law.

In re Aganoor's Trusts[52] does not assist, for it concerned succession to the net estate of the deceased and not the question of the liability for the payment of debts. *In re Marshall decd.*[53] is also distinguishable, for it concerned the construction of the word " child " in an English will for the purpose of determining succession to the net estate of the deceased. In the present case it is a foreign law which has to be applied, and foreign law is a question of facts, and on the question whether the respondents failed to discharge their obligations under Greek law the evidence shows that there was no such obligation or breach.

Act 3504 is neither confiscatory nor discriminatory in its nature. There is no rule of law that English courts will not enforce a foreign law merely because it is confiscatory. Further, it is not contrary to rational justice to recognise Act 3504.

Act 3504 is not discriminatory since: (1) it was general in its application and applied to all banks amalgamated under Act 2292. (2) It applied to all bonds in gold or foreign currency issued by any such bank. (3) There was no discrimination between holders because of their race, nationality or religion. Further, it is not confiscatory. The Greek legislature killed the old company and then provided a substitute which was to carry out the old company's obligations. Subsequently, by virtue of the repeal of paragraph 5 of article sole of the royal decree and section 4 of Act 2292, the rights of the creditors ceased to exist. But the mere fact that a legislature bestows rights and then subsequently takes them away does not entail that the enactment destroying the rights is confiscatory. The appellants' rights have to be determined by posing the question: what was the state of Greek law at the date when the cause of action arose? If, contrary to the above submission, it is held that Act 3504 is confiscatory, then it is submitted that nevertheless it will be recognised here under the principles enunciated by Scrutton L.J. in *Aksionairnoye*

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[51] L.R. 2 P. & M. 268.

[52] 64 L.J.Ch. 521.

[53] [1957] Ch. 507.

Obschestvo A.M. Luther v. *James Sagor & Co.*[54] [Reference was made to the Petroleum Act, 1934.]

In conclusion, the whole basis of the *Metliss* case[55] was the enforcement of a right under a Greek statute. Act 3504 is a perfectly general law of succession and in so far as it concerns the present case it deals with the attributes of succession. But it is not so much a question whether it falls into the category of a law of succession as whether it deals with the status of a Greek corporation. The *Metliss* case[55] held that Act 2292 was an Act concerning status, and, therefore, it follows, that since part of that Act was repealed by Act 3504, Act 3504 is itself a law of status. The judgment of the Court of Appeal[56] is adopted and should be affirmed [Reference was also made to *Russian and English Bank* v. *Baring Bros. & Co.*[57] and *Wolff* v. *Oxholm.*[58]]

Lever following. The appellants claimed that the respondents' liability arose in 1953. It is necessary, however, to consider what has happened since that date. By Act 2292 the respondents took upon themselves liability as successors; by a fiction they took on the identity of the old bank. The concept of universal succession *is a fiction* and always depends for its effect on the creator of the fiction. *Metliss*[59] recognised Act 2292 as one pertaining to status and, accordingly, since the Greek legislature had passed a law that the respondents were to be deemed to be a party to the contract as a " person " who signed the contract, effect was given to it. English courts recognised the Greek statutory lie. The appellants now have to assert (1) that the contract debt is due—this is not disputed; (2) that though the respondents did not themselves agree to pay they are in fact liable to pay. The right in question does not arise from anything that the appellants have done but depends solely on the attributes given to it by a Greek statute. The Greek statute created a fiction and therefore it can also destroy that fiction or part of that fiction, namely, that the respondents signed the contract of guarantee. The House must take cognisance of this, for the appellants have to rely on the fiction in the first place. English courts will always *recognise* all the fictitious aspects of a corporation but they will not necessarily *enforce* all its aspects, such as a change of capacity. The appellants' case rests on the confusion of the difference between capacity to enter into a contract and answerability for liability under a contract.

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[54] [1921] 3 K.B. 532, 557–559.

[55] [1958] A.C. 509.

[56] [1960] 1 Q.B. 64.

[57] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505, H.L.

[58] (1817) 6 M. & S. 92.

[59] [1958] A.C. 509.

It was contended that Act 3504 was not a true law of succession but was a law of discharge. The appellants have invented two terms: "law of succession," "law of discharge." There are no such categories. The real question is: Is Act 3504 a law which it was within the competence of the Greek Sovereign to enact?

In the Estate of Maldonado [60] refutes any suggestion that English law determines the extent of a succession under a Greek statute. It is not the *consequences* of the foreign law which is the criterion but what the foreign law states itself to be. [Reference was made to Cheshire's Private International Law, 5th ed., pp. 60, 156.]

Lynch's case [61] is distinguishable. There is no true analogy between the death of a natural person and the devolution of a company. To apply that case here would be contrary to the principle of comity.

On the question of rational justice, it is true that the respondents were debtors, but there is no evidence that they have done anything which amounts to a fraud on the bondholders. The House is not entitled to assume that the respondents took over the assets under Act 2292 and then repudiated their liabilities. But the House is entitled to infer that the amalgamation in question took place pursuant to Greek public statutes.

In fine, the respondents are not liable under the guarantee because they were not a party to and did not sign the contract. They were only liable whilst there was a fictitious identification with the original signing party. Once that identification was withdrawn the respondents ceased to be liable.

Foster Q.C. in reply. The respondents seek to say that Act 3504 is applicable because the respondent bank's status changes when its attributes change. But a law that does no more than discharge a debt is a law of discharge. It cannot be a law relating to status. Further, as Diplock J.[62] observed: "a law which "alters the rights and liabilities of persons who are already successors, although it may be a law relating to 'successors,' is not a "law of 'succession' at all." The fact that a statute provides that the respondents are no longer to be liable on these bonds does not alter the respondents' status any more than a person's

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[60] [1954] P. 223; [1954] 2 W.L.R. 64; [1953] 2 All E.R. 1579.

[61] L.R. 2 P. & M. 268.

[62] [1960] 2 Q.B. 59, 75.

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domicile would be changed by a law which provided that he was no longer liable on his hotel bills.

If the provisions of Act 3504 had originally been contained in Act 2292, the abolition of the old bank would have been recognised as would the creation of the new bank, but the succession would not have been recognised by English courts for it would not have been a universal succession. Further, it would be contrary to rational justice to recognise Act 3504 for by so doing the English creditors would be deprived of the opportunity of recovering their debt.

On the question of public policy, *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.*[63] is distinguishable, for there the property was within the jurisdiction of the foreign sovereign. A confiscatory law which purports to apply outside the jurisdiction of the foreign sovereign will not be recognised by English courts. Accordingly, a law of situs purporting to operate outside the jurisdiction of the Greek sovereign will not be recognised here. [Reference was also made to *Phillips* v. *Eyre*[64] and *Wolff* v. *Oxholm*.[65]]

Their Lordships took time for consideration.

May 19. VISCOUNT SIMONDS. My Lords, these consolidated appeals are a sequel to the case of the *National Bank of Greece and Athens S.A.* v. *Metliss*,[1] which was recently heard in the House. The bank, which was the appellant in that case, has changed its name to the National Bank of Greece S.A., and is respondent to these appeals. [His Lordship stated the facts set out above, and continued:]

My Lords, the argument before your Lordships ranged far and wide. That was not surprising, for neither side could claim to find precise authority for their contentions. Recourse was therefore had to analogies which were not always helpful. But I think that at least the contentions can be simply stated. The respondent bank say that at the dates when writs were issued against them (or at the dates when causes of action against them accrued) their juristic personality was created by the two Acts 2292 and 3504, not, they insist, by Act 2292 alone; therefore, in the words of Morris L.J., who delivered the judgment of the Court of Appeal,[2]

[63] [1921] 3 K.B. 532.

[64] L.R. 6 Q.B. 1.

[65] 6 M. & S. 92.

[1] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L.

[2] [1960] 1 Q.B. 64, 81, 82, C.A.

"those who need recourse to Greek law must take it as they find "it. If they assert that Greek law can endow, they must recognise that Greek law can disendow. If they aver that Greek law "can create, they must accept that Greek law can change. If "they need to have the foundation of Greek law upon which to "build a claim, they can hardly say that Greek law as it used to "be suits them far better than Greek law as it is." The respondent bank could not wish to have their case stated more cogently.

But, say the appellants, this is to approach the question in the wrong way. At all material times the old bank and, after Act 2292 came into force, the new bank were under an obligation to the bondholders to pay the interest and principal of the bonds as they became due. The obligation of the old bank became the obligation of the new bank as its universal successor and was recognised as such by the English court. The proper law of the obligation, whether of the old bank or the new, was English law, and according to the well established principle of private international law as administered in our courts, the obligation could not be altered or discharged to the detriment of the English creditor by a decree of the Greek Government. It was, they said, immaterial that the Greek court might pay regard to the new law.

This, then, is the problem, and I hope I have stated fairly the rival contentions. It is, I think, obvious that that of the respondent bank rests on the assertion, which was reiterated with no lack of vigour, that the new bank did not come into any contractual relation with the bondholders and that, therefore, the principle of international law to which I have referred could have no application. It was said that in the *Metliss* case [3] the English courts affirmed the liability of the respondent bank under Act 2292 because it recognised the status of the new bank as the "universal "successor" of the old bank: this was a question of status and, if the status was changed by Greek law, then the obligations originally imposed by Act 2292 would change also. The status (so the argument proceeded) was in fact changed by Act 3504 which purported to absolve the new bank from its former obligations: therefore the new bank was no longer liable.

My Lords, this argument is, in my opinion, unsound. It is no doubt true that in the *Metliss* case [3] the decisive reason for holding the respondent bank liable to the bondholders was that, its status being recognised as universal successor to the old bank, it would be illogical to ignore such an essential incident of its creation as its liability for the old bank's obligations. But what does that mean but that the contractual relation which had existed between the bondholders and the old company now existed between them and the new company? The new company stood, it was said, in the shoes of the old, a metaphorical expression, no doubt, and to be distrusted accordingly, but vividly expressive of the consequences of universal succession. In the *Metliss* case [4] their Lordships were not concerned with the question whether the legal relation between the parties ensuing from Act 2292 was contractual or something else for which I find no apt word. But, if I say that from that moment the new bank was bound by the old bank's obligations to the bondholders, and was at the same time entitled to all the defences which the old bank would have had by English law to their claims, I describe a relation which is indistinguishable from that which arises out of contract. There is nothing in the speeches of their Lordships in the *Metliss* case [5] which suggests a contrary view.

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[3] [1958] A.C. 509.

This being the position from February 27, 1953, to July 16, 1956, I am at a loss to understand how any Act or law of the Greek Government after that date could affect the position. Greek law was the law of the respondent bank's being: it might therefore have been dissolved by Greek decree: but it would, nonetheless, have been subject to be wound up in the courts of this country and would have met the same claims, dead as alive. However, it was not dissolved, but by Act 3504 was declared not to be subject to certain liabilities of the old bank, and, moreover, retrospectively declared never to have been so liable. I think that it was admitted, at any rate I am clear that it could not be denied, that, if the obligation of the new bank under Act 2292 was contractual, no alteration of it by Greek law would be effective in our court. It is upon the reiteration of the blessed word "status" that the respondents rely. The obligation rested on status: the status was altered: the obligation disappeared—in fact was never there. My Lords, I doubt whether anything is to be gained by debating whether Act 3504 should be described as an Act affecting status or an Act discharging contracts. Give it what label you will, its effect is that it purports to relieve the respondent bank of a liability theretofore enforceable against it, and, for my part, I should not hesitate to say that the principle of private international law in regard to discharge or alteration of a contract is applicable whatever device of nomenclature is used, if the effect of the challenged decree is the discharge or alteration of contractual rights.

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[4] [1958] A.C. 509.

[5] Ibid.

My Lords, I must notice at this point what appears to be a conspicuous fallacy of the respondents' argument. It assumes that the relation between the parties commenced when the cause of action accrued, and that at that moment the appellants, having recourse to Greek law, must take it as it is in the whole, that is Act 2292 as amended by Act 3504. But this is a wrong assumption. From the moment that Act 2292 became operative the respondent bank was under an obligation to the bondholders, inchoate perhaps, but inescapable, when according to its terms it became enforceable. It was to that Act alone that the bondholders were entitled and bound to look. It is true enough that their right and duty arose because the English court recognised the new bank as having the status of universal successor of the old bank—a thing, I parenthetically observe, it surely would not have done if the Act had purported to vest assets but not liabilities—but it is not crucial or, strictly speaking, relevant to ask how or why such recognition was given or how or why the obligation arose. The fact, and the only material fact, was that it did arise, and, having arisen, it was not to be displaced by Greek law.

I do not think, my Lords, that much assistance is to be got from authorities. But such cases as *Lynch* v. *Provisional Government of Paraguay*[6] and *In re Aganoor's Trusts*[7] offer a useful analogy. It is sufficient to refer to the former case.[8] The facts are sufficiently stated in the headnote. A domiciled Paraguayan died in Paraguay leaving personal property in England. After his death but before a grant was made in England the Government of Paraguay declared that all the property of the deceased wherever situate was the property of the nation of Paraguay. The English court nevertheless held that the right to the grant of probate and the succession to the property must be governed by the law of Paraguay as it existed at the time of the death and therefore the Government of Paraguay had no locus standi to contest the validity of the will. Lord Penzance,[9] after citing from Story's Conflict of Laws (section 481): "The universal doctrine now "'recognised by the common law, although formerly much con-"'tested, is, that the succession to personal property is governed "'exclusively by the law of the actual domicile of the intestate "'at the time of his death,'" referred to the argument that the

[6] (1871) L.R. 2 P. & M. 268.
[7] (1895) 64 L.J.Ch. 521.
[8] L.R. 2 P. & M. 268.
[9] Ibid. 271.

relevant Paraguayan decree had a retrospective operation and had by the law of Paraguay become part of that law at the time of the death, and that a Paraguayan court would be bound by the decree and proceeded: "This may be so; but the question is, "whether the English courts are bound in like manner; or, more "properly speaking, the question is, in what sense does the "English law adopt the law of the domicile? Does it adopt the "law as it stands at the time of the death, or does it undertake "to adopt and give effect to all retrospective changes that the "legislative authority of the foreign country may make in that "law? No authority has been cited for this latter proposition, and "in principle it appears both inconvenient and unjust." The same principle was asserted and applied in *In re Aganoor's Trusts*,[10] and more recently in *In re Marshall, decd.*[11] It can be applied here. The bearer bonds have been held, perhaps changed hands, I know not, since 1953 upon the footing that the recognition by the English court of the new bank as the universal successor of the old laid the new bank by English law under the old bank's obligations in regard to them. It would be neither convenient nor just that subsequent legislation in Greece should, retrospectively or otherwise, alter or discharge that obligation.

In my opinion this appeal should be allowed and the judgment of Diplock J. restored. The respondents must pay the costs here and below.

LORD REID. My Lords, this case is a sequel to a case recently decided in this House, *National Bank of Greece and Athens* v. *Metliss*.[12] Both are concerned with the rights of holders of parts of an issue in 1927 of £2,000,000 7 per cent. sterling mortgage bonds. The debtor was the National Mortgage Bank of Greece and the bonds were guaranteed by the National Bank of Greece (which I shall call " the old bank "). It is not disputed that the proper law of the bonds is English law. Payment of interest ceased when Greece was occupied by the enemy in 1941, and since the war a Greek moratorium had been in force which admittedly would have been a good defence if *Metliss's* action or an action like that now before your Lordships had been raised in Greece.

In 1953 by virtue of the Greek Act No. 2292 the old bank was compulsorily amalgamated with the Bank of Athens to form the present respondent (which I shall call " the new bank "). The new bank was also the defendant in *Metliss's* case.[13] Act 2292 provided by article 4 "the company which absorbs another company by merger, or a new company formed by the amalgamation, "becomes the universal successor to the rights and obligations "in general of the amalgamated companies, without any further "formality or act whatsoever," and a royal decree made in pursuance of that Act provided "as from the publication of the "present decree, the National Bank of Greece Limited and the "National Bank of Athens Limited, shall cease to exist and "the entire property of each of them in its whole (assets and "liabilities) on the day of publication is considered as being "automatically contributed to the new Limited Liability Banking "Company (the National Bank of Greece and Athens Company) "constituted by virtue of these presents, which is substituted, "ipso jure, and without any other formality in all rights and "obligations of the said amalgamated bank, as their universal "successor."

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[10] 64 L.J.Ch. 521.

[11] [1957] Ch. 507; [1957] 3 W.L.R. 538; [1957] 3 All E.R. 172, C.A.

[12] [1958] A.C. 509.

Metliss successfully sued the new bank for money due under his bonds. Some days after Sellers J. had decided in his favour a new Greek law No. 3504 of 1956 was enacted. It could not affect the decision of *Metliss's* case [14] but the respondent maintains that it enables the respondent to succeed in the present case. It provides (again I take the agreed translation): "1. Paragraph 2 of Article 4 "of Statute 2292/53 on the amalgamation of limited liability "banking companies is replaced as from the time it came into "force with the following:—

"The company which has absorbed another company by "amalgamation or the new company created by amalgamation "becomes the universal successor to the rights and obligations of "the companies amalgamated without the necessity of any other "formality or action, with the exception of the obligations of these "companies as principal debtors, guarantors or for any other "cause deriving from bonds, securities in general or contracts or "any other cause and relating to loans in gold or foreign currency "by bonds or otherwise payable to the bearer issued by the "limited liability companies, juridical persons of public law, "municipalities and communes, etc. The company which has "absorbed another company or is newly created by amalgamation "does not acquire nor is it considered as having acquired by virtue "of this present or other statute or decree or articles of association published in pursuance of this present law or in any other

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[13] [1958] A.C. 509.

[14] Ibid.

"manner the above obligations deriving from loans in gold or "foreign currency until a law is passed providing the extent and "the manner in which they will become subject to these "obligations.

"Paragraph 5 of Article sole of the Royal Decree dated the "27th February, 1953, is abolished as from the time of its publication. The rights and obligations of the new limited liability "banking company created by the said decree under the name "of 'National Bank of Greece and Athens S.A.' are governed as "from the time the company was created by the relative provisions of Statute 2292/1953 as amended by the present law."

The purpose and intention of this new law No. 3504 are clear. The new bank is to retain the whole assets of the old bank which it took as universal successor under law No. 2292, and it is to remain liable for all the obligations of the old bank except those specified in the new law, which include the obligations to these bondholders: no one is to be liable in respect of these obligations until a new law is passed. There may or may not have been good reason for making this exception; we are not concerned with that, and it is not for us to judge the policy of the Greek legislature. What we are concerned with is whether by English law the provisions of law No. 3504 prevent the appellants from succeeding as Metliss succeeded. There is no doubt that the new law is valid in Greece, but how far can it receive effect here according to the principles of private international law as recognised by the English courts? The answer to that question appears to me to depend on a correct appreciation of what was decided by this House in the *Metliss* case.[15]

The argument for the respondent was that Metliss succeeded because at the time when he claimed his money Greek law made the respondent, the new bank, liable to meet the guarantee obligations of the old bank; but that the appellants cannot succeed because, at the time when they claimed their money and the principal debtor failed to pay, Greek law provided that the respondent was not liable to meet the old bank's guarantee obligation. One must look at Greek law at the relevant time, and the relevant time was the date when the principal debtor failed to pay its debt; the respondent had then ceased to be a guarantor. But for Greek law No. 2292 no one would have had any right to sue the respondent in respect of the old bank's obligations. What Greek law gave, Greek law can take away, and law No. 3504 has taken

[15] [1958] A.C. 509.

away from the appellants what law No. 2292 give. When Metliss's cause of action arose the respondent stood in the shoes of the old bank because it had been directed by Greek law to do so; when the appellants' cause of action arose the respondent did not because it was then directed by Greek law not to do so.

If the appellants' right against the respondent was a Greek right, if it arose under Greek law and not under English law, I would regard that argument as unanswerable. But, in my judgment, the decision in *Metliss's* case [16] establishes that the appellants' right is an English right. There were two questions in *Metliss's* case.[17] First, do we recognise the status of universal successor created by Greek law so as to make it possible to sue the universal successor in England in respect of obligations to which he has succeeded by Greek law? The answer was "yes." But that does not touch the question in the present case. The answer might be "yes" because we simply allow a creditor to enforce in this country a Greek right; if that were the case then any defence good in Greece would be good here. Or the answer might be "yes" because the effect in English law of recognising the status of the universal successor is to put him in the shoes of the person whom he has succeeded as a party, or as if he were a party, to that person's English contracts; if that is the true view then the universal successor, by reason of his capacity as such, acquires English rights and becomes bound by English obligations which are independent of Greek law. In my judgment, the decision of the second point in the *Metliss* case [18] shows that the latter is the true view. It is true that noble and learned Lords who took part in the *Metliss* case [19] do not say so in so many words; there was no need for them to do so. But that seems to me to be necessarily implicit in the decision and it is the decision that matters.

The second point decided in *Metliss's* case [20] was that, although Greek law would have prevented him from succeeding by reason of the Greek moratorium, the nature of his right in England was such that Greek law did not affect it and the moratorium was no defence. We do not refuse in all cases to recognise a moratorium in force in a foreign country: when an action is brought here for money payable in England we recognise it as affecting rights of which the proper law is the law of that country but we do not recognise it as affecting rights of which the proper law is English law. So I think that the decision that the moratorium did not apply, necessarily implied that Metliss had acquired an English right. And he could only acquire an English right by operation of English law. Greek law cannot create an English right or obligation any more than it can annul an English right or discharge an English obligation. Metliss succeeded because the respondent had somehow been made liable to be sued on an English contract as a party, or as if he were a party, to that contract. English law can do that but I do not see how Greek law can. Let me suppose that a Greek statute simply required X, a stranger, as a condition of the granting of some concession, to pay A's debt to B under an English contract and that that gave B a right to sue X in Greece. We might recognise that Greek right by allowing B to sue X here. But the ground of liability would not be that Greek law had made X a party to A's contract with B or had made him liable to be sued in England as if he were a party. It would simply be that B had a Greek statutory right to be paid a certain sum by X, the amount being measured in a certain way. That would be a Greek right and I can see no reason why a Greek moratorium should not affect it. And if a later Greek statute repealed the earlier one I do not see on what possible ground B could thereafter maintain an action against X. No doubt the Greek statute could say expressly or by implication that X was to pay notwithstanding the moratorium, but it is clear that law No. 2292 did not say that because admittedly the rights and obligations of universal successors were by Greek law subject to the moratorium. So in order to avoid the moratorium Metliss must have acquired some right not given to him by law No. 2292. How did he acquire that right? That question brings one back to the first point decided in *Metliss's* case.[21]

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[16] [1958] A.C. 509.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

It was decided in that case that English law can and should as a matter of rational justice recognise the Greek status of universal successor, with the result that the respondent having that status was by English law made liable to be sued here on the contracts of the defunct old bank as standing in place of the old bank. One can say that the respondent as representing the old bank has become a party to its contracts, or that it is to be treated as if it were a party. If a party is defined as a person who made an agreement with the other party then it is self-evident that the law cannot add a party to a contract. But the law can and does permit persons to sue and be sued on contracts to which they were not parties in that sense. An executor can sue or, with limited liability, be sued on the deceased's contracts, and the holder of a bearer bond can sue although he made no kind of agreement with the debtor. What matters is not the name which one attaches to a person representing the original party, but the fact that he can sue or be sued so that all the incidents of the contract attach to him. Here all the incidents of the old bank's contracts did attach to the respondent. The old bank could not have pleaded the Greek moratorium so neither could the respondent: its obligation was measured by English law because that was the proper law of the old bank's contracts. Whether or not the respondent became a party to those contracts it was, by English law, made liable to the contractual obligations in its capacity as universal successor of the old bank.

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[21] [1958] A.C. 509.

It follows that before the enactment of law No. 3504 the respondent had become subject to the old bank's obligations to the appellants and the question is, therefore, what effect that law had on that position. If that law had simply purported to discharge the respondent from its obligations to the appellants it could not have received effect in England, because it is well established that the English courts cannot give effect to a foreign law as discharging an English obligation to pay money in England. But the case for the respondent can be put in a more favourable light than that. We hold that the respondent can be required to pay the old bank's debts only because of its status or capacity as universal successor. That status is a Greek status created by Greek law, and the law which confers or imposes a status can abolish it. What Greek law can do, Greek law can undo. So, to be consistent, if we say that certain consequences attach to a person by reason of his Greek status, we should say that those consequences cease to operate on the destruction of that Greek status by Greek law. Greek law has destroyed the respondent's status as regards these appellants, so we ought to recognise that fact by holding that it can no longer be sued in its capacity of universal successor and is, therefore, no longer liable on the contracts of the old bank.

To that the appellants make two answers. In the first place, they say, on the analogy of *Lynch* v. *Provisional Government of Paraguay*,[22] that the position of the respondent as universal successor became fixed at the time of the dissolution of the old bank, and that English law will not recognise any subsequent change of status by foreign law. *Lynch's* case [23] arose out of the death of President Lopez of Paraguay and the assumption of power by the Provisional Government which then confiscated his property. It was held that, nevertheless, the universal legatee under his will was entitled to probate here. Lord Penzance based his decision not on our refusal to recognise foreign confiscatory legislation but on the ground that we only recognise the law of the deceased's domicile at his death as governing his succession, and do not give effect to any subsequent changes. I do not at all question the authority of that decision, but I am not satisfied that it should be applied to a case like the present. I doubt whether that case would entitle an English creditor to sue a foreign heir residing in this country, who had taken no steps to deal with property of the deceased in England, and who had been disinherited by a later foreign law and deprived of the property to which he had succeeded, merely because he had been heir and universal successor at the time of the death of the deceased. If law No. 2292 had been repealed and the whole assets and liabilities of the old bank had been vested in and transferred to another corporation so that the respondent ceased in any way to represent the old bank, I am not satisfied that English law must thereafter continue to regard the new bank as the universal successor of the old bank. But what was actually done by law No. 3504 was something very different from that. So I prefer to base my decision on the next ground.

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[22] L.R. 2 P. & M. 268.

The effect of law No. 3504 was to leave things exactly as they were with one exception. The new bank continued to hold all the assets of the old bank, it was still referred to as the universal successor of the old bank, and it was still subject to all the liabilities of the old bank with the sole exception of a class of liabilities which included the liabilities of the old bank to these bondholders and may have included some others. No one was to be liable for these obligations. The effect of law No. 3504, leaving aside for the moment its retrospective character, was the same as if it had merely discharged these liabilities. As I have already said, it is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England and the appellants' contracts were English contracts under which they were to be paid in England. So, unless the form of a foreign law is more important than its substance and effect, law No. 3504 must be treated as a law which seeks to discharge English liabilities and it cannot, therefore, be effective in England. In my judgment, we must look at the substance and effect of a foreign law and that is a question of fact. I have found nothing in the evidence to show that its effect was anything other than I have stated.

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[23] L.R. 2 P. & M. 268.

But law No. 3504 purports to be retrospective and it was said that its effect was therefore not to discharge these obligations, but to deem that they never existed. There is no general rule that English law will never give effect to foreign retrospective legislation, but that does not mean that a foreign legislature can compel an English court to shut its eyes to proved facts. The British Parliament being legally omnipotent in this country can require us to do that: it can require our courts not only to deem that black is white but to deem that black always has been white. But I know of no principle, reason or authority which would entitle a foreign legislature to do that. We must recognise the fact that, for three years between the enactment of law No. 2292 and that of law No. 3504, the respondent was bound to fulfil English contractual obligations; and if a Greek law could not discharge those obligations by direct enactment it cannot do so by being framed in retrospective form.

Finally, it was said that if law No. 2292 had originally contained the provision which has now been inserted in it by law No. 3504 we could not have held the respondent liable to the appellants, and why should it make a difference that the present law was enacted in two stages. It is quite true that in that case the respondent could not have been held liable. A different and perhaps difficult question would have arisen. What effect, if any, could we give to a selective law which, though purporting to make the new bank the universal successor, imposed on it some but not all of the obligations of the old bank? I will not attempt to answer that question. In this case the fact is that before law No. 3504 was passed the respondent had become bound to fulfil the obligations in the old bank's English contracts, and for the reasons which I have given those obligations have not been affected or discharged by the enactment of the new law. I am therefore of opinion that this appeal should be allowed.

LORD RADCLIFFE. My Lords, I agree that this appeal must be allowed.

Having regard to what has been said already, I confine my reasons to four sentences. I think that the Court of Appeal were in error in treating the appellants' rights against the respondents as being derived from the law of Greece. I think that, on the contrary, their rights were based upon the law of England, and that as part of that law the universal succession created by Act 2292 of the Greek legislative authority and the decree of February 27, 1953, made thereunder, rendered the respondents liable upon the guarantee of their predecessors. I do not think that, once they had become so liable, they could be discharged from liability by any subsequent legislative act of the Greek Government, such as decree 3504. I think also that Lord Penzance was correct when he said that it would be neither just nor convenient (see *Lynch* v. *Provisional Government of Paraguay* [24]) that an English court, once the validity and consequences of a succession created by foreign law have become established by its rules, should recognise retrospective alterations of that succession which may be propounded by the foreign law.

LORD TUCKER. My Lords, the arguments in this appeal ranged over a very wide field, but the question for decision can be shortly stated, i.e., whether the courts of this country will recognise and give effect to the Greek decree No. 3504 as operating retrospectively to relieve the respondent bank from its obligations as guarantor of the bonds upon which the appellants are now suing. Your Lordships have already held in *National Bank of Greece and Athens S.A.* v. *Metliss* [25] that the respondent bank was, prior to July 16, 1956, liable to holders of these bonds as guarantor by virtue of the Greek law No. 2292 of February 18, 1953, and the decree of February 27 of that year by which the National Bank of Greece (the original guarantor) was amalgamated with the National Bank of Athens S.A. to form a new company, the present respondent, which became the universal successor "in "all rights and obligations of the said amalgamated bank."

On July 16, 1956, legislative decree No. 3504 was passed. Its terms have already been stated and need not be repeated. Its effect in Greek law was admittedly to absolve the respondent bank from any liability as guarantor of the bonds now sued on, but the question is whether the English courts will so regard it. Much discussion has taken place as to whether this decree should be regarded as a law of status or discharge. My Lords, I cannot think that the decision of this case should turn upon a matter of words of this kind. In one sense the law clearly operated to discharge the respondents from part of the obligations to which it had originally succeeded by enacting retrospectively in effect that such obligations should be deemed never to have been incurred. On the other hand, the law did vary one of the attributes of the universal successor. I think, however, that the principle which your Lordships should apply in the present case is that which is to be found in the case of *Lynch* v. *Provisional Government of Paraguay*,[26] namely, that the English courts will only recognise the laws of succession in force in the country of the deceased's domicile at the date of his death. It is, of course, true that that case was dealing with a claim to a grant of probate of a will made by a domiciled Paraguayan in respect of personal property in England, but the decision was not based on the necessity of ascertaining the intentions of the testator, as contended by counsel for the respondent, the principle applied is equally applicable to an intestacy. The present case is not covered by the actual decision in *Lynch's* case,[27] but in the absence of express authority it would seem to me that the principle there enunciated is the one which your Lordships should apply to a case such as the present, where foreign law has destroyed one legal entity and created another as the universal successor to all the assets and obligations of the former, and subsequently seeks by retrospective legislation to exclude obligations incurred under contracts governed by English law. To quote the words of Lord Penzance in *Lynch's* case[28]: "In illustration of this view it was suggested, that if the question "were to arise in a court of Paraguay such court would be bound "by the decree, and therefore bound to declare the provisions of "the decree to be effective at and from the time of death. This "may be so; but the question is, whether the English courts are "bound in like manner; or, more properly speaking, the question "is, in what sense does the English law adopt the law of the "domicile? Does it adopt the law of the domicile as it stands at "the time of the death, or does it undertake to adopt and give "effect to all retrospective changes that the legislative authority "of a foreign country may make in that law? No authority has "been cited for this latter proposition, and in principle it appears "both inconvenient and unjust."

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[24] L.R. 2 P. & M. 268.

[25] [1958] A.C. 509.

My Lords, whatever may be the appropriate label to attach to law 3504, I would apply these words to it in so far as it seeks retrospectively to affect the liability of an existing legal entity in

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[26] L.R. 2 P. & M. 268.

[27] Ibid.

[28] Ibid. 271.

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respect of negotiable instruments governed by English law to which liability it had succeeded as universal successor at the date of the legal "death" of the juristic person to which it was the successor. If, however, it were necessary to decide this case by selecting the appropriate label for law No. 3504 I would prefer the label "discharge."

I would, accordingly, allow the appeal.

LORD DENNING. My Lords, on July 12, 1956, Sellers J. held that the proper law of these Greek bonds is English law and his ruling on this point has never since been challenged. It follows that the bonds must be paid according to their terms by English law. No Act of the Greek legislature can suspend the obligation to pay; nor can it discharge the debtor or the guarantor from their duty to honour the bonds.

Nevertheless, Greek law may assume an importance in the enforcement of the bonds, because the parties bound by the bonds were Greek corporations. The National Mortgage Bank of Greece was the principal debtor: and the National Bank of Greece was the guarantor. These banks were the creatures of Greek law. Each was incorporated by Greek law. Each could be dissolved by Greek law. Either could be amalgamated by Greek law with another Greek corporation. That is, indeed, what has happened. The guarantor, the National Bank of Greece, has by Greek law been amalgamated with the Bank of Athens. If the Greek legislature chooses to dissolve or amalgamate its own creatures, the English courts cannot prevent it. They must recognise it as a fact. Just as English law must recognise a dissolution: see *Lazard Bros. & Co.* v. *Midland Bank Ltd.*[29]: so also it must recognise an amalgamation. The former companies cease to exist and are merged in a new amalgamated company. Such is the fact; or rather the state of affairs which we must recognise as a fact. But the legal consequences of that fact, in relation to an English contract, are a matter for English law. Thus English law has already laid down some of the consequences which follow from the amalgamation of the National Bank of Greece with the Bank of Athens. That amalgamation, when it was originally effected in February, 1953, carried with it, as every true amalgamation should, successio in universum jus, that is to say, succession to all the assets and liabilities of the former companies. Once the new amalgamated company took unchallenged possession of the assets, the bondholders were entitled to treat the new amalgamated company as the successor to the former companies, succeeding to all their obligations, and thus responsible as guarantor of the bonds: see *National Bank of Greece and Athens S.A.* v. *Metliss.*[30]

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[29] [1933] A.C. 289; 49 T.L.R. 94, H.L.

But your Lordships are faced with a new problem, because the Greek legislature has now amended the original law (2292 of 1953) as to amalgamation. On July 16, 1956, four days after the decision of Sellers J. in the *Metliss* case,[31] the Greek legislature (by law 3504 of 1956) declared that, upon an amalgamation of banking companies, there was not to be a complete successio in universum jus. The new amalgamated company was to take over all of the assets. But not all of the liabilities. It was not to be responsible for liabilities on bonds such as these. This law was made retrospective to the original law of 1953.

What is the effect of this amendment? How does it affect the liability of the new amalgamated company to the bondholders? There are three ways of looking at Greek law 3504 of 1956. It can be regarded as either (1) a law relating to discharge, or (2) a law relating to succession, or (3) a law relating to status.

1. *As a law relating to discharge.* This way of looking at it arises from the fact that the new amalgamated company was formed in 1953 and that nothing happened to it in 1956 which affected its status. It did not die. It continued in existence just as before. All that happened in 1956 was that the Greek legislature by law 3504 attempted to discharge it from some of the liabilities it had assumed. But this could have no effect on these bonds. They were governed by English law; and the liabilities under them cannot be discharged by foreign legislation: see *Anthony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux.*[32]

2. *As a law relating to succession.* This way of looking at it arises from the fact that in 1953 the new amalgamated company succeeded to all the assets and liabilities of the former companies. It was as if they had died and it had succeeded them. Afterwards, on July 16, 1956, the Greek legislature by law 3504 attempted retrospectively to alter the succession by providing that the new amalgamated company should be exempt from some of the liabilities. But this could have no effect on the bonds. English law does not recognise foreign legislation which retrospectively alters rights of succession: see *Lynch* v. *Provisional Government of Paraguay.*[33]

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[30] [1958] A.C. 509.

[31] Unreported at first instance.

[32] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[33] L.R. 2 P. & M. 268.

3. *As a law relating to status.* This way of looking at it arises from the fact that the original law 2292 of 1953 was a law of status. It dissolved the two former companies and merged them into a new amalgamated company. It defined the attributes of this amalgamation by providing for successio in universum jus. This was an essential part of a law of status. The amending law 3504 of 1956 amended this law by redefining the attributes of the amalgamation. By amending a law of status, it must itself be regarded as a law of status. On this view it can be said that law 3504 does affect the liability on the bonds, because the status of a Greek company is governed by Greek law. It exempts, therefore, the new amalgamated company from liability.

My Lords, it is no doubt necessary to put law 3504 into its proper category: and of the three ways, I propose to consider it in the category in which the Greek legislation put it, namely, as a law relating to status, in that it is a law which defines the attributes of amalgamation, and I will see what effect should be given to it.

I put on one side the liabilities which arose between February, 1953, and July 16, 1956. During this period the principal debtor failed to pay interest due on the bonds and the new amalgamated company became liable as guarantor to pay that interest. Once this liability arose, I do not think that Greek law could take it away. The principles in *Gibbs'* case [34] would apply.

We are here concerned with the liabilities which arose after July 16, 1956. The bondholders claim the principal and interest which accrued due on the bonds after July 16, 1956. They do not sue the principal debtor. They sue the guarantor. And it is quite clear that the liability of the guarantor only arose after July 16, 1956: for he did not become liable until the principal debtor made default. Who was the guarantor at that time? The bondholders say it was the new amalgamated company. But how can they make this good? They must rely on the Greek law of amalgamation for the purpose: but they cannot rely on law 2292 as it was passed initially in 1953, because it was amended on July 16, 1956. They have to rely on Greek law 2292 in the amended form which it has assumed since July 16, 1956.

Now here comes the point. The Court of Appeal say that "Those who need recourse to Greek law must take it as they find "it." The bondholders must take the Greek law as it is, not as it used to be. They must take the new amalgamated company

[34] 25 Q.B.D. 399.

with the attributes now given to it by Greek law. And by Greek law it is expressly exempt from liability on bonds such as these.

This is a formidable argument, as indeed one would expect, seeing the quarter from which it comes. It raises at once the question: What effect does English law give to an amalgamation which does not carry with it the attribute of successio in universum jus? To take an extreme case. Suppose that a foreign law of amalgamation provides that the new amalgamated company is to take over all the assets of the former companies but is to bear none of the liabilities. That would very much resemble a fraudulent conveyance, as Lord Atkin once had occasion to observe: see *Nokes* v. *Doncaster Amalgamated Collieries.*[35] It would be contrary to all notions of what a true amalgamation should be: for it is of the very essence of the transaction that the liabilities and assets of the former companies should attach to the new company. That was pointed out by my noble and learned friend, Lord Tucker, in *National Bank of Greece and Athens S.A.* v. *Metliss.*[36]

Faced with such a situation, I would recall that Lord Atkin once said that the municipal law of this country, as of other countries, " may in defined conditions refuse to accept, or may " accept only under conditions, either the creation or destruction " of a foreign juristic person ": see *Russian and English Bank* v. *Baring Brothers.*[37] Now an amalgamation involves the destruction of two foreign juristic persons and the creation of a new one. Applying, as I think one may, Lord Atkin's words to this situation, it means that English law may in certain circumstances refuse to accept the foreign amalgamation, or may accept it only under conditions. One such circumstance is when it does not provide for successio in universum jus. English law may refuse to accept the amalgamation and wind up the former companies as though they had not been destroyed: or it may accept the amalgamation subject to the condition that, if the new amalgamated company takes possession of the assets, it must be responsible for the liabilities: for that is of the very essence of the process of amalgamation.

Applying these principles, it seems to me that the English courts are not called upon to recognise Greek law 2292 in the form it has now retrospectively assumed. By the amendment made on July 16, 1956, the Greek legislature has presumed to vest all the

[35] [1940] A.C. 1014, 1029; 56 T.L.R. 988; [1940] 3 All E.R. 549.

[36] [1958] A.C. 509, 529.

[37] [1936] A.C. 405, 428; 52 T.L.R. 393; [1936] 1 All E.R. 505.

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assets in the new amalgamated company but some only of the liabilities. It has excluded the liabilities on bonds payable in gold or foreign currency. This exclusion is such an unusual provision in an amalgamation, and is so inconsistent with the essence of the transaction, that there is no comity of nations which requires the English courts to recognise it. Seeing that the assets have become irretrievably vested in the new amalgamated company, the English courts are entitled, I think, to accept the amalgamation as effective to create a successio in universum jus and to reject the attempt to detract from it. The bondholders are therefore entitled to treat the new amalgamated company as the guarantor of the bonds, even in respect of liabilities arising after July 16, 1956, as well as those before.

I would allow the appeal accordingly.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Stibbard, Gibson & Co.*

J. A. G.

[HOUSE OF LORDS.]

DIRECTOR OF PUBLIC PROSECUTIONS . APPELLANT;

AND

SMITH . . . . RESPONDENT.

C. C. A.

1960
May 9, 10, 18.

Byrne, Sachs and Winn JJ.

H. L. (E.)*

1960
June 27, 28, 29, 30;
July 1, 28.

Crime—Homicide—Intention to kill or cause grievous bodily harm—Presumption of intention—Extent of application—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *ss.* 1 (1), 5.

Presumption—Intention—Natural and probable consequence of acts—Homicide.

The respondent was driving a car in the back of which were some sacks of scaffolding clips which had been stolen. A police constable, noticing the sacks, told him to draw in to the kerb, but instead the respondent accelerated. The constable clung on to the side of the car, which pursued an erratic course, but he was finally shaken off and fell in front of another car, receiving fatal injuries. The respondent did not stop but drove on some 200 yards and dumped the stolen property. He then returned, and there was evidence that on being told that the constable was dead he said that he knew the constable personally but had become frightened at the constable's actions and "didn't want him to find the gear." The respondent was charged with capital murder. In his summing-up the judge said to the jury: "If you are satisfied that . . . he "must as a reasonable man have contemplated that grievous bodily "harm was likely to result to that officer . . . and that such harm "did happen and the officer died in consequence, then the accused "is guilty of capital murder. . . . On the other hand, if you are "not satisfied that he intended to inflict grievous bodily harm "upon the officer—in other words, if you think he could not as a "reasonable man have contemplated that grievous bodily harm "would result to the officer in consequence of his actions—well, then, "the verdict would be guilty of manslaughter." The respondent was convicted of murder:—

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* *Present*: VISCOUNT KILMUIR L.C., LORD GODDARD, LORD TUCKER, LORD DENNING and LORD PARKER OF WADDINGTON.

Held, that there was no misdirection by the trial judge.

It is immaterial what the accused in fact contemplated as the probable result of his actions, provided he is in law responsible for them in that he is capable of forming an intent, is not insane within the M'Naghten Rules and cannot establish diminished responsibility. On that assumption, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result, and the only test of this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result (post, p. 327).

Once the accused's knowledge of the circumstances and nature of his acts has been ascertained, the only thing that can rebut the presumption that he intends the natural and probable consequences of those acts is proof of incapacity to form an intent, insanity or diminished responsibility (post, p. 331). The test of the reasonable man, properly understood, is a simpler criterion than that of the "presumption of law" and contains all the necessary ingredients of malice aforethought (post, p. 333).

Dictum of Lord Goddard C.J. in *Rex* v. *Steane* [1947] K.B. 997, 1004; 63 T.L.R. 403; [1947] 1 All E.R. 813; 32 Cr.App.R. 61, C.C.A. explained.

Reg. v. *Ward* [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565; 40 Cr.App.R. 1, C.C.A. approved.

There is no warrant for drawing any distinction between the case where serious harm is "certain" to result and that where it is "likely" to result. The true question in each case is whether there is a real probability of grievous bodily harm (post, p. 333).

The expression "grievous bodily harm" should bear its ordinary and natural meaning of "really serious" harm (post, p. 335).

Section 1 (1) of the Homicide Act, 1957, has not abolished malice constituted by a proved intention to inflict grievous bodily harm.

Reg. v. *Vickers* [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A. approved.

Decision of the Court of Criminal Appeal (sub nom. *Reg.* v. *Smith*), post, p. 297; [1960] 3 W.L.R. 92; [1960] 2 All E.R. 451 reversed.

H. L. (E.)

1960

DIRECTOR OF PUBLIC PROSECUTIONS v. SMITH.

The respondent, Jim Smith, was convicted at the Central Criminal Court on April 7, 1960, on a charge that on March 2, 1960, he murdered Leslie Edward Vincent Meehan, a police constable acting in the execution of his duty. The constable had told the respondent to pull his car in to the side of the road so that he could question him, but instead of doing so the respondent accelerated causing the death of the constable. The ground of his appeal to the Court of Criminal Appeal was that Donovan J. misdirected the jury as to the application of the rule that a person is presumed to intend the natural and probable consequences of his acts.

The facts stated by Viscount Kilmuir L.C. were as follows: At about 7.30 p.m. on March 2, 1960, the respondent, accompanied by a man named Artus, was driving a Ford Prefect motor-car through Woolwich. In the boot and the back of the car were sacks containing scaffolding clips that they had just stolen. The car was stopped in Beresford Square by the police officer on point duty in the normal course of traffic control and, while it was so stopped, P.C. Meehan, who was acquainted with the respondent, came to the driver's window and spoke to him. No doubt as a result of what P.C. Meehan saw in the back of the car he told the respondent when the traffic was released to draw in to his near-side. The respondent began to do so and P.C. Meehan walked beside the car. Suddenly, however, the respondent accelerated along Plumstead Road and P.C. Meehan began to run with the car, shouting to the officer on point duty to get on to the police station. Despite the fact that the respondent's car had no running board, P.C. Meehan succeeded in hanging on and never let go until some 130 yards up Plumstead Road when he was thrown off the car and under a bubble car coming in the opposite direction, suffering a crushed skull and other injuries from which he died.

What happened during the time the car travelled that 130 yards was the subject of considerable evidence. The police officer on traffic duty, P.C. Baker, said that he last saw the car doing what he thought was about 20 miles per hour with P.C. Meehan running and holding on to it. Mr. Doran, a bus driver, whose vehicle had also been held up in Beresford Square, said that the respondent's car suddenly accelerated with P.C. Meehan holding on to it; that it started to zig-zag, and that the police officer appeared to be thrown across the bonnet of the car. Mr. Lynch, who was standing in the centre of the square, said that the car suddenly accelerated, zig-zagging all the time, the police officer holding on, his feet hanging on the ground; that it kept on accelerating and he thought he saw the right hand of someone in the car trying to push the officer off. He thought that the car reached a speed of 30–60 miles per hour.

Four cars were coming in the opposite direction. The driver of the first car, a Mr. Gill, said that the respondent's car appeared to come at him at a fast to medium speed. There appeared to be someone on the car either falling from the driver's seat or picked up on the bonnet. He felt a slight bump on the rear of his car but sufficient to make him stop. The driver of the second car, a Mr. Mills, said that he saw the respondent's car gathering speed and swerving towards him. The side of his car was struck. The driver of the third car, a Mr. Eldridge, thought that the respondent's car was travelling at about 40–50 miles per hour; he saw what he could only describe as an object hanging on below the driver's window. His car was struck violently, the offside front mudguard being dented in. Having regard to the fact that there were no marks on the respondent's car, the inevitable conclusion was that the contact of all three cars was with P.C. Meehan. Mr. Rollingson, the driver of the fourth car, a bubble car, said that the respondent's car was going very fast and swerving. He saw something coming towards him; there was a terrific crash and he stopped and P.C. Meehan was underneath his car. The respondent's car, he said, went tearing up the road.

Mr. Heywood, a cyclist, who was ahead of the respondent's car and was passed by the car just after P.C. Meehan was thrown off, described the car as going fast. Finally, Artus, the passenger in the respondent's car, described how the officer was holding on to the door by the driver's window with his left hand and was banging the windscreen with his right hand. He said that the respondent said: "Let go, Bert."

After P.C. Meehan had been thrown off, the respondent drove his car a little further up Plumstead Road and into a side turning where he and Artus threw the sacks of clips out of the car. Artus then went off but the respondent returned to the scene. According to P.C. Weatherill the respondent first asked: "Is he dead?" and then, on being told that it was believed so, he said: "I knew "the man. I wouldn't do that for the world. I only wanted to "shake him off." The respondent, however, denied that he had spoken the last few words. The respondent was taken to the police station. On being arrested and cautioned he said: "I "didn't mean to kill him, but I didn't want him to find the gear." The respondent then made and signed a statement in which, inter alia, he said: "P.C. Meehan jumped on the side of the car and "I got frightened. I don't know what I got frightened about. "I don't think I thought of the stolen gear I had on board. I "don't know what I did next in respect of driving the car. All "I know is when he fell off he must have been hurt. I knew "he fell off, and I then took a turning off the Plumstead Road. "I drove up this turning some way and turned right down a back "street. I stopped the car in this back street, as George wanted "to get out of it. I got out too, and chucked the gear out of "the car on to the pavement. I got rid of it, because I was "scared the police would find it in my motor."

The respondent gave evidence at the trial. He said that when P.C. Meehan jumped on the side of the car his foot went down on the accelerator and he was scared. "I was scared very much. "I was very much frightened." He agreed that he did not take his foot off the accelerator. "I never thought of it, sir. I was "frightened. I was up in the traffic. I never thought of it. It "happened too quick." Asked why he did not take his foot off the accelerator he said: "I would have done, but when he "jumped on the side he took my mind off what I was doing. "When he jumped on I was frightened. I was up the road "before it happened. It happened in a matter of seconds." He further said that when going up Plumstead Road he didn't realise that the officer was still hanging on to the car. Asked about his car swerving he said: "My motor was swaying because "of the load on the back."

The hearing in the Court of Criminal Appeal (Byrne, Sachs and Winn JJ.) was on May 9 and 10, 1960.

Edward Clarke Q.C. and *Audrey Jennings* for the appellant. Donovan J.'s direction on the intent to cause grievous bodily harm was wrong. First, the intent is subjective and the mind of the accused is all important. The standard of what a reasonable man must have intended is objective and, although it has crept into the law, it is wrong. Secondly, an intent to cause grievous bodily harm resulting in death cannot be murder. To say that a man who gives another a hard punch on the nose or a black eye, with the result that the other falls back, strikes his head and dies, is guilty of murder is contrary to all the ideas of the ordinary man. The proper test of murder is malice aforethought: either the intent to kill or the intent to do a dangerous act which the accused realises is likely to kill. [Reference was made to *Reg.* v. *Vickers* [1] and to Kenny's Outlines of the Criminal Law, 16th ed., paras. 107–108, and 17th ed.]

The standard of the reasonable man is wrong. [Reference was made to *Reg.* v. *Vamplew* [2]; *Reg.* v. *Ward* [3]; *Reg.* v. *Doherty*,[4] and *Reg.* v. *Serné*.[5]] The proper test is what did the accused intend. *Rex* v. *Lumley* [6] is against this proposition, but that was a special case and is not an authority to be followed. [Reference was made to *Rex* v. *Appleby*.[7]] *Rex* v. *Hedley* [8] supports my proposition. [Reference was made to *Rex* v. *Steane* [9]; *Reg.* v. *Grant* [10]; *Reg.* v. *Lenchitsky*,[11] and Russell on Crime, 11th ed., pp. 565–566.] *Reg.* v. *Ward* [12] was wrongly decided: there the court said that the test of the reasonable man was right. But there was a contradiction in the summing-up because it was said that if death was not contemplated then the case was one of manslaughter. Further, the definition of a reasonable man is one who cannot plead insanity. Anyone charged with murder who does not plead insanity is a reasonable man and the adjective reasonable is therefore otiose. It would be simpler to say "the accused." [Reference was made to Russell on Crime, 11th ed., p. 568.] *Reg.* v. *Vickers* [13] was rightly decided on this point in contradistinction to *Reg.* v. *Ward*.[14] The standard of the reasonable man is misleading. It is only used in *Lumley's* case [15] and *Ward's* case [16] and is not to be followed. The proper direction to give to a jury would be one on the lines of *Reg.* v. *Doherty* [17] or *Lenchitsky's* case [18] or *Reg.* v. *Vickers*.[19]

[SACHS J. Assuming that *Reg.* v. *Ward* [20] was correctly decided, what do you say about the intention to cause grievous bodily harm?]

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[1] [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A.

[2] (1862) 3 F. & F. 520.

[3] [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565; 40 Cr.App.R. 1, C.C.A.

[4] (1887) 16 Cox C.C. 306.

[5] (1887) 16 Cox C.C. 311.

[6] (1911) 22 Cox C.C. 635.

[7] (1940) 28 Cr.App.R. 1, C.C.A.

[8] (1945) 31 Cr.App.R. 35, C.C.A.

[9] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813; 32 Cr.App.R. 61, C.C.A.

[10] (1954) 38 Cr.App.R. 107, C.C.A.

[11] [1954] Crim.L.R. 216, C.C.A.

[12] [1956] 1 Q.B. 351.

[13] [1957] 2 Q.B. 664.

[14] [1956] 1 Q.B. 351.

[15] 22 Cox C.C. 635.

[16] [1956] 1 Q.B. 351.

[17] 16 Cox C.C. 306.

[18] [1954] Crim.L.R. 216.

[19] [1957] 2 Q.B. 664.

[20] [1956] 1 Q.B. 351.

Section 1 (1) of the Homicide Act, 1957, has abolished malice constituted by a proved intention to do grievous bodily harm. *Reg.* v. *Vickers* [21] is wrong on this point. An intention to do grievous bodily harm is not enough. The proper test is whether the accused has done a dangerous act which he knows may cause death. [Reference was made to Russell on Crime, 11th ed., p. 572; *Reg.* v. *Cunningham* [22]; *Reg.* v. *Horsey*,[23] and [1954] Crim.L.R. 661.]

Mervyn Griffith-Jones, *Alastair Morton* and *Patrick Whelon* for the Crown. Assuming that either an intent to kill or an intent to cause grievous bodily harm is sufficient, the only way in which the question of what a reasonable man contemplates arises is to discover what the appellant in fact had in mind. With a proper direction as to the onus of proof, there is nothing wrong with that as a test. The presumption is that a man intends the natural and probable consequences of his acts. From that an intent can be inferred. Here was a man driving along a road. He was a reasonable man. He must have contemplated causing grievous bodily harm. [Reference was made to *Reg.* v. *Lenchitsky* [24]; *Rex* v. *Lumley*,[25] and *Reg.* v. *Ward*.[26]] The subjective test is only applicable where the accused is not a reasonable man and that test cannot apply. [Reference was made to *Rex* v. *Steane*.[27]]

[SACHS J. Did the summing-up deal with the question whether the defendant was in a panic at the time?]

The wording of this summing-up does not differ materially from that in *Reg.* v. *Ward*.[28] There the wording used was: "Whether the accused, when he did what he did, must have "contemplated that death or some serious injury would result "from his act. If you are satisfied with that, you will find him "guilty of murder."

[WINN J. The wording there is "must have known . . . "would result." Is it the same thing to say that a man "must "have known . . . was likely to result"?]

If by "likely" one means that something is a probable consequence, yes. Once the jury found that the appellant in this case intended to dislodge the officer, it follows that he must have known that harm was almost bound to result.

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[21] [1957] 2 Q.B. 664.

[22] [1957] 2 Q.B. 396; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412; 41 Cr.App.R. 155, C.C.A.

[23] (1862) 3 F. & F. 287.

[24] [1954] Crim.L.R. 216.

[25] 22 Cox C.C. 635.

[26] [1956] 1 Q.B. 351.

[27] [1947] K.B. 997.

[28] [1956] 1 Q.B. 351.

[Sachs J. Does not the jury need to be carefully directed as to the difference between a presumption and an inference? And the difference between "must" and "might"?]

[Byrne J. Do you agree that a man in a panic might behave differently from a man not in a panic?]

Panic is no defence. It does not go to intent.

[Sachs J. In *Lang* v. *Lang* [29] there is a citation to the effect that the presumption that a man intends the reasonable and probable consequences of his actions is not an inference that must be drawn, but which may be.]

I accept that the principle as stated would be applicable in the criminal law.

Clarke Q.C. was not called upon to reply.

May 10. The court allowed the appeal, substituting a verdict of manslaughter for that of capital murder and imposing a sentence ot 10 years' imprisonment. The court reserved its reasons.

May 18. Byrne J. read the following judgment of the court: The court has already announced its decision in this case. We now proceed to give our reasons. The appellant was convicted at the Central Criminal Court of the capital murder of P.C. Meehan. The facts were as follows: At about 7.30 p.m. on March 2, 1960, the appellant, aged 26, was driving his car, in the back of which were some sacks of scaffolding clips that he and another man, a passenger in that car, had just stolen. When they reached Beresford Square, P.C. Baker, on point duty, stopped in the normal course of traffic control the flow of vehicles in the square. and the appellant happened to be at the head of a line which came to a halt. Whilst he was thus stationary another policeman, P.C. Meehan, with whom the appellant had for some time been on quite friendly terms, came round to the driver's window and spoke to the appellant. On noticing what was in the back of the car he told the appellant to pull over slowly to the nearby kerb and also told P.C. Baker to get on to the police station.

The appellant, however, instead of drawing in to the kerb, made off at an increasing pace down Plumstead Road. P.C. Meehan got part of his arm inside the open window on the driver's side, and after first walking and then running continued bravely to hang on as the car gathered speed. Whether he was throughout clinging to the off-side of the car or whether at one stage he was actually on the bonnet, is one of the things of which witnesses gave varying accounts; but the bulk of the evidence was to the effect that he remained at all times on the off-side. As the appellant's car went up the Plumstead Road, which is 27 feet 6 inches wide, it undoubtedly pursued an erratic course; of four drivers of successive cars coming in the opposite direction three referred to the appellant's car as coming "at them," and spoke of having received what they referred to as bangs or bumps. Then P.C. Meehan was shaken off and fell in front of the fourth car, receiving fatal injuries to his head.

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[29] [1955] A.C. 402, 425; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.

There was also the evidence of a pedestrian who at the material time was behind the appellant's car. He spoke of an attempt by the appellant to push the police officer off, but did not indicate whether that was at a stage when the car was moving slowly or when it was going fast. Moreover, he appeared in any event not to be sure as to what he saw. It is thus not necessary to refer again to his testimony.

The distance from the point in Beresford Square where the appellant's car first started moving at a pace which could have swept P.C. Meehan off his feet to the spot where he was killed was about 100 yards. The time taken to cover that distance was probably of the order of 10 seconds. There was no evidence that P.C. Meehan suffered any serious—or, indeed, any specific—injury from any bump before he was run over by the fourth car.

The appellant did not stop when P.C. Meehan fell from the car, but went on for some 200 yards to a place where he dumped the stolen sacks of clips. Then he at once returned in the car to Beresford Square. Upon P.C. Baker informing him that P.C. Meehan was dead, he said: "I am the driver of the car he was "hanging on to"; and then to another police officer he said: "I "knew the man. I wouldn't do that for the world. I only "wanted to shake him off." A little later he made further statements which included reference to the fact that he got frightened at P.C. Meehan's actions.

At the trial the appellant attempted by his evidence to put forward a case that he had put his foot on the accelerator in mistake for the brake, and that he did not realise that P.C. Meehan was hanging on to his car. In addition he said several times that he was "scared" and "frightened," and, in effect, did not realise what he was doing. As regards the course of his car he laid emphasis on the weight of the sacks of clips as possibly affecting the steering, and throughout he maintained emphatically that he had no intention of either causing P.C. Meehan any severe injury or of killing him. He referred to the fact that P.C. Meehan knew him quite well and was aware of his address.

One of the defences raised by this evidence was that the death of the police officer in the above circumstances was a mere accident, and a considerable portion of the summing-up was devoted to this point. However, as was to be expected, the jury rejected the appellant's evidence in relation to his foot having got on to the wrong pedal, and as to his not knowing that the police officer was hanging on to the car. Once mere accident was excluded, there was only room for a verdict either of capital murder or of manslaughter, and the jury returned a verdict of capital murder.

On this appeal no submission has been made that there could have been in the circumstances an acquittal on the basis of there having been a mere accident. Accordingly, the sole question raised by the appeal is whether a verdict of manslaughter should be substituted for that of capital murder.

At no stage did the prosecution submit that there had been established against the appellant an actual intent to kill P.C. Meehan; and the judge, immediately after dealing with the defence of mere accident, stated that as regards the rest of his summing-up he proposed to assume that the jury would not find that the appellant deliberately intended to kill the police officer. Thus the issue for the jury upon the charge of murder was whether the prosecution had established that the appellant intended to cause the police officer grievous bodily harm: see *Reg.* v. *Vickers*.[1] On that issue the prosecution's case was that the above intention ought to be inferred from the appellant's conduct, whilst the case for the defence was that the appellant in fact had no such intent and that, in any event, the intent was not established as an inference from the facts.

In the above circumstances it fell to the judge to direct the jury on the meaning and application to the particular facts of the maxim on which the prosecution had relied and which is often stated in the following terms: "A man must be taken (or pre-"sumed) to intend the natural consequences of his acts." This is a presumption to which the judge at the outset referred in the following terms: "The intention with which a man did something

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[1] [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A.

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"can usually be determined by a jury only by inference from the "surrounding circumstances, including the presumption of law "that a man intends the natural and probable consequences of "his acts." Neither at that stage nor later was the jury given any explanation in general terms of the meaning or effect of the word "presumption" or that any such presumption may be rebutted.

Whatever may have been the position last century when prisoners could not go into the witness box and the distinction between presumptions of law and presumptions of fact was not so well defined, it is now clear, as was naturally conceded by Mr. Griffith-Jones, that the presumption embodied in the above maxim is not an irrebuttable presumption of law.

The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.

The law on this topic was particularly illuminated by the following passage in the considered judgment of this court delivered by Lord Goddard C.J., sitting with Atkinson and Cassels JJ. in *Rex* v. *Steane*.[2] Lord Goddard said[3]: "No doubt "if the prosecution prove an act the natural consequence of "which would be a certain result and no evidence or explanation "is given, then a jury may, on a proper direction, find that the "prisoner is guilty of doing the act with the intent alleged, but "if on the totality of the evidence there is room for more than "one view as to the intent of the prisoner, the jury should be "directed that it is for the prosecution to prove the intent to the "jury's satisfaction, and if, on a review of the whole evidence, "they either think that the intent did not exist or they are "left in doubt as to the intent, the prisoner is entitled to be "acquitted."

As regards the various other authorities cited by Mr. Clarke on this point, care must, of course, be taken to consider the phrases therein used in relation to the particular facts. The strength of any presumption obviously varies according to particular facts, and this may entail considerable adjustments in the practical terms of the charge to the jury. Thus, there is a class of cases where the act of the accused must obviously cause grievous bodily harm, as where a blow with a sharp and heavy hatchet is deliberately aimed at and strikes the victim. In another class are cases where a reasonable man would realise that his act might cause grievous bodily harm but the degree of the probability or possibility of that type of harm resulting varies according to the facts of the case.

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[2] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813, C.C.A.

[3] [1947] K.B. 997, 1004.

In the first class of case where the harm must obviously result from the act and there is no evidence which could be regarded as rebutting the presumption, a direction to the jury that "a man must be presumed to intend the natural consequences of his act" could be apposite, in the other cases it would not.

In the other cases the charge to the jury will, of course, vary according to the facts (including the degree of likelihood of grievous bodily harm being caused) but the essence of the matter remains that whilst the accused may be presumed to have intended the natural consequences of his act, the question is: "Did he actually intend them?"

Having regard to these considerations *Reg.* v. *Ward*[4] appears to represent the high-water mark of the application of the presumption; and indeed, in this court, Mr. Clarke submitted that the decision was inconsistent with the general stream of authority. That was a case in which the court by a judgment delivered by Lord Goddard C.J. upheld the verdict of the jury on the footing that where any sane man "must have known that "what he was doing would cause at least grievous bodily harm, "and the death is the result of that grievous bodily harm, then "that amounts to murder in law. . . ." In other words, the harm was certain, there was in the view of the court no evidence which could rebut knowledge of that certainty, and the inference of intention was inevitable. We think that the sentence which we have quoted contains the true ratio of the decision in that case; in so far as the summing-up which was thereby approved appears at any point to depart from that ratio, it is in our opinion to be regarded as justified by the particular facts of that case.

That the above judgment ought not to be regarded as deciding that an irrebuttable presumption of law arose in cases where

[4] [1956] 1 Q.B. 351, 356; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565, C.C.A.

there was no such certainty is shown by *Rex* v. *Steane* [5] in 1947. (See also *Rex* v. *Lenchitsky*,[6] in which the jury had been instructed to take into account the actual intention of a feeble-minded accused.)

The final question for the jury must always be whether on the facts as a whole an actual intent to do grievous bodily harm was established, remembering, of course, that intent and desire are different things and that once it is proved that an accused man knows that a result is certain the fact that he does not desire that result is irrelevant.

Once mere accident was excluded, the present case became one in which the degree of likelihood of serious injury to the police officer depended on which of the not always consistent versions of the facts given by witnesses for the prosecution was accepted. It was one in which it could not be said that there was a certainty that such injury would result; and it was one in which there always remained the question whether the appellant really did during the relevant ten seconds realise what was the degree of likelihood of serious injury. If the jury took the view that the appellant deliberately tried to drive the body of the police officer against oncoming cars, the obvious inference was open to them that the appellant intended serious injury to result; if, however, they concluded he merely swerved or zigzagged to shake off that officer, or if they concluded that for any reason he may not have realised the degree of danger to which he was exposing the police officer, a different situation would arise with regard to the inferences to be drawn. In the former case the jury might well have felt they were dealing with consequences that were certain; in the latter only with degrees of likelihood.

In such circumstances it was essential, once the language of presumption had been used, to make it clear that a presumption can be rebutted; to explain in broad language what view of the facts might constitute a rebuttal; to point out the distinction between consequences that must and consequences that might result; and in the end to make it plain that the overall burden of proving actual intent continued to rest on the prosecution.

When one looks at the summing-up which followed the direction as to the defence of mere accident, it would appear that the judge framed his charge to the jury upon the basis of various passages in *Reg.* v. *Ward*,[7] one at least of which appears to treat results which are likely as being on the same footing as results which are certain. In so doing he may well have been influenced by the request of Mr. Clarke at the trial to base his directions on that particular judgment. The result, however, was that when he came to the concluding passages of the summing-up he spoke of the jury being entitled to impute guilty intent if a reasonable man would have considered results "likely" or such as "might well" flow from the acts done, and spoke thus, in our opinion, without sufficient reference to the fact that those matters provided no more than a pointer towards the solution of the ultimate question: what was the actual state of mind of the appellant? Thus, phrases were used in this vital portion of the summing-up which, taken as a whole, we feel might have led the jury to consider that they were entitled to infer guilty intent from what a reasonable man would think to be likely, without sufficient warning that if on the facts as a whole they were left in reasonable doubt whether the appellant did intend to do grievous bodily harm, then it was for the jury to acquit on the charge of capital murder. The final passages included the phrases "If you are satisfied that . . . he must as a reasonable "man have contemplated that grievous bodily harm was likely to "result . . . then the accused is guilty of capital murder."

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[5] [1947] K.B. 997.

[6] [1954] Crim.L.R. 216, C.C.A.

[7] [1956] 1 Q.B. 351.

Accordingly, it does not seem to us safe to assume that the jury fully understood the position as regards the relevant presumption. We have for these reasons come to the conclusion that the verdict of capital murder should not stand and that a verdict of manslaughter should be substituted.

J. D. P.

The Crown appealed to the House of Lords.

Sir Reginald Manningham-Buller Q.C., A.-G., Mervyn Griffith-Jones and *S. A. Morton* for the appellant. If the jury were satisfied that Smith as a reasonable man must have contemplated that grievous bodily harm was likely to ensue from his act and death did ensue, they were bound to find him guilty of capital murder.

Before the Court of Criminal Appeal two points of law were submitted on behalf of Smith: (1) that the test of what he must have contemplated is a subjective one, and (2) that an intent to do grievous bodily harm is not enough to constitute murder if death ensues and that *Reg.* v. *Vickers*[1] was wrongly decided.

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[1] [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A.

The court in substance accepted the first submission and inferentially rejected the second.

It had been argued on behalf of Smith (a) that Donovan J. was wrong in directing the jury that if a reasonable man would realise that shaking a man off a car when it was accelerating in a main street with other traffic about might well cause him serious harm, then they would be entitled to impute to Smith an intent to do serious harm; (b) that Donovan J. was wrong in telling the jury that if they were satisfied that Smith as a reasonable man must have contemplated that grievous bodily harm was likely to result from his act and that such harm did happen and the constable died in consequence, Smith was guilty of capital murder; (c) that the test of the question of the existence of intent to do grievous bodily harm was a subjective one, so that the intent must be the intent in Smith's mind; (d) that the introduction of the test of what a reasonable man must have thought, which was an objective test, was wrong.

The view taken by the Court of Criminal Appeal seemed to be that, if the question had been left to the jury, they might have found: (1) that Smith did not intend grievous bodily harm, even if a reasonable man, doing what he did, must have intended grievous bodily harm, and (2) that he did not intend grievous bodily harm on the ground that he neither contemplated nor foresaw the consequences of his deliberate acts. The court held that the question should have been left to the jury.

The court was wrong in so holding and the summing-up of Donovan J. was not open to criticism. If the court were right, then, even when it was not disputed that the acts of the accused were deliberate and intentional, and even though there was no plea of insanity, diminished responsibility or incapacity to form an intention, by reason, for example, of drunkenness, the judge would be obliged to tell the jury that, although they might be satisfied that a reasonable man doing what the accused had done must have intended grievous bodily harm, they must not assume that the accused had the same intent that a reasonable man would have had and, if they were not satisfied that he had that intent, they must acquit him of murder.

Here the jury must have found that Smith did acts which a reasonable man must have known would cause grievous bodily harm, and that as a reasonable man he must have intended grievous bodily harm. The defence, on the other hand, submitted that he neither contemplated nor foresaw the consequences of his deliberate acts. But if it is established that the accused has deliberately done acts of a character likely to cause grievous bodily harm with full knowledge of all the relevant conditions, it is no answer for him to say that, whatever a reasonable person would have thought would be the probable results of his acts, he did not foresee them and so cannot be taken to have intended them. If it is no answer for him to establish that, there is no need to put the question to the jury. The fact that the accused did not foresee the consequences of his actions is of no relevance in a criminal trial.

The Court of Criminal Appeal in this case referred to *Reg.* v. *Vickers*,[2] but the Crown relies on what Lord Goddard C.J. said there as to implied malice.[3] *Rex* v. *Steane*[4] was also referred to. In that case it had to be proved that the acts done were likely to assist the enemy, that they were intentional and that they were done with that particular aim. That is a very different case from that of murder. But in such a case as the present if an act is certain or likely to result in grievous bodily harm, then, in the absence of proof of insanity, diminished responsibility or the like, there is an irrebuttable presumption that the accused intended to do grievous bodily harm. The test is what a reasonable man would have contemplated: see *Rex* v. *Ward*.[5] When a man has intentionally done certain acts, then, unless there is a plea of insanity, diminished responsibility or the like, he must be deemed to be a reasonable man and to be responsible for those acts accordingly.

There is an objective test in the case of the provocation which may reduce a killing from murder to manslaughter. So also the test is objective to determine whether the act done was of a kind likely to lead to grievous bodily harm. That objective test must be applied here to the nature and quality of the acts of Smith.

In the judgment of the Court of Criminal Appeal reference is made to a man's foresight of the natural consequences of his acts,[6] but while it may be right to have regard to a man's foresight of the probable consequences of his acts when the court is considering conduct amounting to an intention to desert in a matrimonial case, it is not relevant in criminal cases where intention can be established without proof of foresight, when it is shown that the act done was intentional and was likely (whether the accused foresaw it or not) to cause grievous bodily harm. If *Rex* v. *Philpot* [7] is right, then the passage in the judgment of the Court of Criminal Appeal referred to must be wrong. The two cannot stand together. *Rex* v. *Philpot* [7] expresses the correct principle in criminal law.

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[2] [1957] 2 Q.B. 664.

[3] Ibid. 670.

[4] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813; 32 Cr.App.R. 61, C.C.A.

[5] [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565; 40 Cr.App.R. 1.

[6] Ante, p. 299; [1960] 3 W.L.R. 92; [1960] 2 All E.R. 451.

Any reasonable person would say that a driver accelerating and zigzagging in the circumstances of the present case was doing acts which would certainly do grievous bodily harm to a person clinging to the car. It is wrong to draw a line between certainty and likelihood. The factor to be taken into account here is the fact that the accused knew that a man was hanging on to the side of the car with no foothold, and the jury might well have taken the view that the probability of grievous bodily harm was so high that it was certain. The reasonable man, with whom the law identifies an accused person, is the man who, with full knowledge of the circumstances, is doing the act. The proper objective test is: Would the the result be obvious to a reasonable man?: see *Rex* v. *Ward*,[8] a case with which the decision of the Court of Criminal Appeal in the present case cannot stand and which that court misread. That case is not the high-water mark of the application of the principle; it is in accordance with a long line of authorities. *Reg*. v. *Lenchitsky*,[9] which was relied on for the respondent, is not reconcilable with that case and is an exception to that line of authorities. The whole idea of taking what an accused person actually foresaw as to the consequences of his acts is inapplicable to this branch of the law.

On a charge of murder, where the charge is based, not on an intent to kill, but on an intent to do grievous bodily harm, the prosecution must prove that the accused acted either with intent to do grievous bodily harm or deliberately and intentionally did acts likely to result in that harm, and that death has resulted.

The presumption that a man intends the natural and probable consequences of his acts is rebuttable only on proof of insanity, diminished responsibility or incapacity to form an intent. It is not rebuttable simply by evidence that, though the accused was sane and did the acts deliberately, he did not intend grievous bodily harm because he gave way to panic or lost his head or lost his temper. Apart from the exceptions stated, he must be taken to be a reasonable man. Smith must be taken to be a reasonable man who would realise the consequences of shaking off the constable in the middle of fast-moving traffic. Therefore, Donovan J. was entitled to remind the jury that he was a reasonable man, accountable for his actions.

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[7] (1912) 7 Cr.App.R. 140, C.C.A.

[8] [1956] 1 Q.B. 351, 355–356.

[9] [1954] Crim.L.R. 216, C.C.A.

As to the general principles applicable, see Stephen's History of the Criminal Law in England, vol. III, p. 56. The distinction between an act likely to cause serious harm and one not likely to cause it, as, for instance, a slight blow, must be tested objectively.

It is permissible to ask the accused whether he intended to kill or do grievous bodily harm, because if the answer he gives is " Yes," there is an end of the matter as regards intention; it is one way in which intent can be established; but guilt can be established without proof of foresight on the part of the accused, or any admission by him that he foresaw the consequences of his acts.

In murder cases one is not concerned with any duty of care judged by the standard of the reasonable man. One must prove (a) the death; (b) that the death was due to the act of the accused, and (c) that that act was done with intent to kill or to do grievous bodily harm to someone. The objective test already referred to, the test of what could be reasonably be expected, relates to the nature and quality of the act and determines on which side of the line the conduct of the accused falls. The difference between murder and manslaughter is that in the case of murder there must be an intent to do something to somebody, to direct an act against somebody, as here to shake the constable off the car. The objective test is related only to the " something " which the accused intended to do, so that, if one man stabbed another with intent to do grievous bodily harm and killed him, that would be murder, but if he struck him a light blow not intending to do him great harm and killed him, that would be manslaughter. The court must be satisfied that the accused intended to do the act to someone, but in determining whether that act was sufficiently serious to involve a real expectation of grievous bodily harm, the test is objective. To drive down Piccadilly at 80 miles an hour would be grossly negligent, but if someone was killed in consequence that would not be murder, because it could not be proved that the act was directed against anyone in particular. But where there is an intention to do something to someone, then on the question of consequences the objective test must be applied, having regard to the relevant circumstances. An abortionist using filthy instruments which a reasonable person would have known were likely to cause grievous bodily harm would formerly have been charged with murder in the event of death. The test of what a reasonable person would have expected was applied. If, in the present case, the constable had jumped on the luggage carrier at the back of the car without the knowledge of the accused, and had fallen off as a result of his driving, that would have amounted to manslaughter at the most.

One does not apply any standard to the accused's appreciation of the consequences of his acts, because it is not material. If he did acts which, in all the circumstances of the case, a reasonable man would say were calculated to cause grievous bodily harm to someone, that is enough to establish intent on his part, and he cannot be heard to say that he did not intend to do grievous bodily harm to the deceased.

The distinction drawn by the Court of Criminal Appeal in this case between cases where the harm was obviously certain to result, and cases where it was to be expected, and the holding that in the latter cases a different direction must be given to the jury were unsound, and were a novel and untenable introduction into the criminal law. In murder cases, once the nature of the act has been established as one which a reasonable person would expect to cause grievous bodily harm, the degree of expectation does not matter.

A person of the age of discretion is presumed to be accountable for his actions: Archbold's Criminal Pleading, 34th ed., p. 13, para. 31. This involves that he intends the natural consequences of his deliberate acts: see Stephen's History of the Criminal Law in England, p. 111. See also p. 115 as to knowledge of fact. If a person possessed of his reason wilfully takes away the life of another, the first presumption is that he is guilty of murder: *Reg.* v. *Kirkham.*[10] The question is whether the accused must, as a reasonable man, have contemplated that death was likely to result from his acts: *Rex* v. *Lumley.*[11] See also *Rex* v. *Gibbins and Proctor*[12]; *Rex* v. *Betts and Ridley*[13]; *Rex* v. *Grant and Gilbert*[14] and *Director of Public Prosecutions* v. *Beard.*[15] In the absence of evidence to the contrary the courts must treat the accused as a reasonable man.

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[10] (1937) 8 C. & P. 115, 116.

[11] (1911) 22 Cox C.C. 635, 636.

[12] (1918) 13 Cr.App.R. 134, C.C.A.

[13] (1930) 144 L.T. 526, 527, 528; 22 Cr.App.R. 148, C.C.A.

[14] (1954) 38 Cr.App.R. 107, C.C.A.

[15] [1920] A.C. 479; 36 T.L.R. 379, H.L.

The respondent relied on *Reg.* v. *Vamplew*,[16] but the question there was different. It was whether the accused, aged 13 years, had reached an age when she was responsible for her acts. Compare that case with the summing-up in *Reg.* v. *Ward.*[17] It was wrong of the Court of Criminal Appeal to suggest [18] that that case was the high-water mark of the presumption of intention.

If a man intends to do an act and does it, the answer to the question whether it was calculated to do grievous bodily harm does not depend on his apprehension of its consequences or on whether he foresaw them. If a reasonable man would have concluded that the act was calculated or likely or certain to do grievous bodily harm, the jury are bound to conclude that the accused acted with the intent to do grievous bodily harm. The law was rightly put in *Reg.* v. *Rymell.*[19] If the Court of Criminal Appeal is right in the present case, that decision must be wrong. The objective test of the ordinary reasonable person must be applied in determining the nature and quality of the act: see *Rex* v. *Whybrow.*[20] *Reg.* v. *Pembliton* [21] turned on its own special facts and there is a real distinction between it and the present case. *Reg.* v. *Cunningham* [22] was much relied on by the present respondent. In that case the court purported to rely on Kenny's Outlines of Criminal Law, but see what was said there about malice, 1st ed., pp. 147, 164, and 13th ed., pp. 148, 164–165. See also *Reg.* v. *Welch* [23]; *Reg.* v. *Faulkner* [24]; *Reg.* v. *Walters* [25]; *Reg.* v. *Doherty* [26]; *Reg.* v. *Serné* [27] and *Rex* v. *Hedley.*[28] The last-named case does not support the proposition that the accused must foresee the likely consequences. The judge dealt with the point whether knocking down the deceased was an intended act; he said nothing as to the accused's foresight of the consequences which might ensue. *Lang* v. *Lang* [29] was a very different case from the present one. In considering the conduct of a husband to his wife over a long period of time it may be right to have regard to what he actually foresaw, but that is to be distinguished from the present case where the issue is what is the intent accompanying a limited number of acts on the same occasion within a short period of time.

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[16] (1862) 3 F. & F. 520.

[17] [1956] 1 Q.B. 351.

[18] Ante, p. 301.

[19] [1954] Crim.L.R. 60.

[20] (1951) 35 Cr.App.R. 141, 146, C.C.A.

[21] (1874) L.R. 2 C.C.R. 119, 121–122; 12 Cox C.C. 607.

[22] [1957] 2 Q.B. 396; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412; 41 Cr.App.R. 155, C.C.A.

[23] (1875) 1 Q.B.D. 23; 13 Cox C.C. 121, C.C.R.

[24] (1877) 13 Cox C.C. 550, 561.

[25] (1841) Car. & M. 164.

[26] (1887) 16 Cox C.C. 306.

[27] (1887) 16 Cox C.C. 311.

[28] (1945) 31 Cr.App.R. 35, C.C.A.

[29] [1955] A.C. 402, 424, 428, 429; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.

Three main passages in the judgment of the Court of Criminal Appeal are wrong. The first is the ruling as to the presumption of intention,[30] followed by the reference to *Rex* v. *Steane*,[31] which was misapplied. The second is the distinction drawn between cases where the act done will obviously produce grievous bodily harm and cases where it is only likely to have that result.[32] This distinction, which is novel and invalid, is based on a misinterpretation of *Reg.* v. *Ward*.[33] In either case one need not prove knowledge or foresight to establish the necessary intent. The third passage is that in which it is said that it was essential to make it clear that the presumption that the accused intended the natural consequences of his actions could be rebutted.[34] It was not necessary to put this to the jury because there was no evidence before them to entitle them to find that it was rebutted.

In summary, unless there are grounds advanced showing that the accused is incapable of forming an intent, then, being sane and accountable for his actions, he must be presumed to intend the natural and probable consequences of his actions. It must be determined whether his intentional acts were of such a character as to create an expectation of grievous bodily harm resulting from them. That must be determined as in *Reg.* v. *Rymell*[35] and *Reg.* v. *Ward*.[36] While the presumption that a man intends the natural and probable consequences of his acts is rebuttable, it is not rebuttable in the case of acts deliberately done; it is no defence that he did not actually foresee the consequences. In this case the condition of the road is relevant in determining what a reasonable man would have foreseen as the natural and probable consequences of what the accused did. In *Bedder* v. *Director of Public Prosecutions*,[37] the objective test of the nature and quality of the acts of the accused was applied, the test whether a reasonable man doing the acts which were done would have thought the consequences likely to ensue or, since "likely" might be misunderstood or misapplied, "calculated" may be more accurate.

In considering an intent to do "grievous bodily harm," the words are to be given the same meaning whether the charge is one of murder or of the statutory offence and should be given their ordinary natural meaning. The view that interference with comfort will amount to grievous bodily harm should be rejected. [*Reg.* v. *Ashman*[38] was referred to.]

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[30] Ante, p. 300.

[31] [1947] K.B. 997.

[32] Ante, p. 301.

[33] [1956] 1 Q.B. 351.

[34] Ante, p. 302.

[35] [1954] Crim.L.R. 60.

[36] [1956] 1 Q.B. 351.

[37] [1954] 1 W.L.R. 118; [1954] 2 All E.R. 801; 38 Cr.App.R. 133, H.L.

Edward Clarke Q.C., *Audrey Jennings* and *D. B. Watling* for the respondent. The task of the respondent's counsel is threefold: (1) They must persuade the House to dismiss the appeal and preserve the Court of Criminal Appeal's finding of manslaughter and the sentence of 10 years' imprisonment imposed by it. The death penalty, it is now known, will not, in any circumstances, be exacted, but, if the appeal were dismissed, the penalty would be life imprisonment. In some circumstances life imprisonment for murder would be a sentence preferable to one of 10 years, since it might be reviewed after five years, but it is important to the respondent personally not to be classed as a murderer. The first duty of the respondent's counsel is to establish that Donovan J. misdirected the jury in law and in fact. In arguing this case before the House they are in the same position as they were in before the Court of Criminal Appeal and are not limited to the point of law of exceptional public importance in respect of which the certificate was granted: see *Milne* v. *Commissioner of Police for City of London.*[39] (2) The second task of the respondent's counsel is to support the judgment of the Court of Criminal Appeal. (3) Their third task is to help the House to lay down for the future the proper direction in a case of murder and to rule whether the direction in *Reg.* v. *Ward*[40] was proper.

On the first point, the summing-up was not accurate or fair to the accused in its statement of the facts, and the Court of Criminal Appeal was more accurate. It is not true to say that the case for the Crown is clear and is based on the clearest evidence. Thus the evidence was that the deceased constable and the accused were on friendly terms. Again, some of the witnesses said that the constable was not on the bonnet of the car. The evidence does not establish that he suffered injuries from any other car besides the one which ran over him. The judge did not remind the jury of the presence of cyclists on the road, compelling the accused to swerve in order to pass them, of the discrepancies in the evidence of the witnesses for the prosecution as to the position of the constable on the accused's car, of the evidence of one witness that the appellant did not appear to have control of the car, or of the evidence of another witness that the accused was in a panic and was not trying to bump the constable off. The accused's denial that he knew the constable was on the car was not put to the jury in the summing-up and it was not right to imply that he did know it. His phrase about wanting to "shake him off" could mean wanting to get away from him, not necessarily to throw him off the car.

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[38] (1858) 1 F. & F. 88.

[39] [1940] A.C. 1, 21; 55 T.L.R. 898; [1939] 3 All E.R. 399; 27 Cr.App.R. 90, H.L.

[40] [1956] 1 Q.B. 351.

The summing-up was wrong in law in three respects:

(1) The judge said that if the jury concluded that a reasonable man would realise that the acts of the accused might well cause serious harm to the constable, that would entitle them to impute such an intent to him and convict him of capital murder. But the proper test is not what the reasonable man could or would have intended, the objective test, but what the accused himself intended, the subjective test, so that his state of mind is the matter of which the jury must be satisfied.

(2) The judge referred to "the presumption of law that a man "intends the natural and probable consequences of his acts." So stated, without any further direction, that amounted to a misdirection. Whether it is a presumption of law or fact or good sense it is not one which the jury must necessarily follow; but, it being described as a presumption of law, the jury, having been told that they must take the law from the judge, would automatically give effect to it. It was a misdirection to say that it was a presumption of law and not to add that it was rebuttable and could only be acted on if there was no evidence to disturb it. Here there was some evidence to disturb it.

(3) The judge also misdirected the jury in telling them that if they were satisfied that the accused had the intention seriously to interfere with the constable's comfort, that was sufficient for a conviction of murder. But in the context of murder the intent must be either to kill or to do an act which the accused must know is likely to kill, an act obviously dangerous to life.

The law of murder has grown too harsh in the suggestion that the intentional doing of an act which is likely seriously to interfere with the comfort of another is enough to support a conviction if death ensues. If that were right, murder by pinprick would be a legal possibility, since to prick a man in the stomach or the back would seriously interfere with his comfort. On the same principle, if a powerful man punched someone on the nose, that would be likely seriously to interfere with his comfort, and if he died of a heart attack as a result, that would be murder. It has been said that it is safe to leave such matters to the good sense of judges and juries, but it is not enough that the law of murder, the most serious known crime, should be left fluid to be interpreted at the whim of a judge or jury. Judges take different views and, when a man has an "unsympathetic" personality, a jury might take a bad view of his case in an emotional way, while a man with an attractive personality would be acquitted by them. The law as to murder should be clear and definite, providing the maximum guidance to juries, who are not experts, in deciding border-line cases.

In such cases as these, if murder is not proved, the alternative is manslaughter, for which the maximum penalty is life imprisonment, so that if it were now held that, in order to support a conviction for murder, the act done must either be likely to kill or be dangerous to life, the effect on public safety would be small.

Although under the Homicide Act, 1957, when the deceased is a police officer, the penalty for murder is death instead of life imprisonment, the discretion given to the jury should be the same whether the person killed is a constable or a private individual.

On the authorities it is open to the House to interpret the expression "an intent to cause grievous bodily harm" as an intent to do an act which is likely to kill or is obviously dangerous to life. There is no authority on the meaning of the expression binding on the House.

Homicide is dealt with in Stephen's History of the Criminal Law in England, vol. III, pp. 20–21. It is to be noted that in this connection he refers to "bodily harm" without any such adjective as "grievous" or "serious," but the expression is linked with "death." What is said in Kenny's Criminal Law, 17th ed., p. 134, as to mens rea and malice aforethought in murder is adopted. See also pp. 136–137, para. 107. Express malice can only arise when there is (1) an intent to kill, or (2) an intent to hurt by an act which the person doing it realises is likely to kill, or (3) doing an act which the person realises is likely to kill even if there is no intention to hurt. An example of the third class of act was the blowing up of the wall of Clerkenwell Prison by Fenian conspirators, in the course of which several persons were killed. Michael Barrett was tried for murder and hanged: see *Reg.* v. *Desmond and Others.*[41] See also *Rex* v. *Barnes and Richards.*[42]

There is implied malice when an act is done without any specific intention at all but the act is such that malice is implied, as, for example, in the case of death inflicted in furtherance of a crime of violence. The position has been dealt with by section 1 of the Homicide Act, 1957. The Act leaves only express malice in the case of murder; no possibility of implied malice is left. An intent to do grievous bodily harm, where it exists, is express malice. The expression " constructive malice " is not a phrase known to the law. Malice requires either an intention to do the kind of harm done in recklessness whether such harm should occur or not, that is, the accused must have foreseen that the particular harm might be done and yet have gone on to take the risk of it: *Reg.* v. *Cunningham.*[43]

The distinction defined between murder and manslaughter in *Reg.* v. *Vamplew*[44] is conclusive that in the case of murder the act done must be " likely to cause death." See also the note at the end of the report. A view which is too wide is corrected in a note appended to the report of *Reg.* v. *Horsey.*[45] See also Stephen's History of the Criminal Law in England, vol. III, pp. 79–80, 113, 115. The expression " grievous bodily harm " in relation to murder means grievous bodily harm which is in itself likely to kill or is a danger to life in the mind of the man charged.

From *Reg.* v. *Ashman*[46] came the definition of grievous bodily harm as harm " such as seriously to interfere with comfort or health." This is the main authority for the direction which has been held proper ever since: see Archbold's Criminal Pleadings, 34th ed., p. 1016, s. 2654. It has not always been strictly followed, however, since some judges have added that it must be something deliberate. The trial judge in the present instance applied that case in its most stringent form, but it is an authority which goes too far. A black eye or a broken nose suffered from a blow with a fist would fall within the words of that authority. The prosecution in that case was under section 12 of the Offences against the Person Act, 1828 (9 Geo. 4, c. 31). *Rex* v. *Cox,*[47] which was also cited in the paragraph in Archbold, was a prosecution under a still older Act (43 Geo. 3, c. 58).

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[41] (1868) 67 C.C.C.Sess.Pap. 486.

[42] (1940) 56 T.L.R. 379; [1940] 2 All E.R. 229; 27 Cr.App.R. 154, C.C.A.

[43] [1957] 2 Q.B. 396.

[44] 3 F. & F. 520, 522.

[45] (1862) 3 F. & F. 287, 288.

[46] 1 F. & F. 88, 89.

[47] (1818) Russ. & Ry. 362, C.C.A.

As to these two Acts and the cases decided under them, see Kenny's Outlines of Criminal Law, 17th ed., p. 149, para. 116a, where it is said that in the context of murder the intent to do grievous bodily harm should not be taken in this wide sense. See also pp. 137 and 152.

The accused disputes that he had the intention to shake the constable off. He was standing beside the car and it was reasonable to suppose that when the car accelerated violently he had let go of it. If the other car had not run over him his injuries might have been relatively trivial. In the recent case of *Reg.* v. *Clement*[48] at the Middlesex Sessions a man disqualified from driving who had driven zigzagging for half an hour knowing that a constable who had tried to stop him was clinging to the roof of the car, was only charged with causing the constable bodily harm by wanton or furious driving, although his act was far worse than that of the accused in the present case.

For the Crown it was argued that in a murder trial the accused cannot be heard to say that he had no intent to cause grievous bodily harm if the circumstances were such that a reasonable man would have realised that such harm would follow, and the state of mind of a reasonable man must be imputed to him. Under section 18 of the Offences against the Person Act, 1861, it is an offence to wound someone with intent to do him grievous bodily harm. In such a prosecution it is not correct to impute to the accused the intention of a reasonable man and the test should not be different where in a trial for murder an intent to do grievous bodily harm is relied on. In both cases the direction given to the jury should be the same. In cases of intent to defraud the proper test has always been: What did the man himself intend to do? To hold otherwise would affect the whole structure of the criminal law, which requires the prosecution to prove the actual intent. The decision in this appeal will be of vital importance, not only in murder cases, but in the other cases referred to.

Even if one applies the test of the reasonable man, it must be the reasonable man in the circumstances of the accused, though in applying that test one is pushing the intention of the accused into the background, whereas it ought to be in the foreground, and it is wrong to whittle down the requirement of proof of his intention. The intent which a reasonable man would have should be used as no more than a guide; it should not be used as imputing an intention to the accused. If one applies the test of the reasonable man to the present case, one should assume a reasonable man who has got stolen property in his car, is in a panic, wants to get away from the constable and steps on the accelerator. In those circumstances it is possible that the reasonable man might have intended no harm to the constable. Panic should be taken into consideration in the same way as drunkenness.

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[48] (1960) The Times, May 17, p. 8.

Since an accused person has been able to give evidence, it has been easier to go into his actual state of mind and less appropriate to rely on what would have been the state of mind of a reasonable man. In *Reg.* v. *Doherty* [49] Stephen J. in his direction to the jury did not mention the reasonable man. That is the proper way to direct a jury on a charge of murder. It can never be an embarrassment to a judge to refer to the intent of the accused. To apply the doctrine of the reasonable man is not a help but a hindrance. *Reg.* v. *Ward*,[50] which was wrongly decided, is the high-water mark of the test of the reasonable man. *Rex* v. *Philpot* [51] was also wrongly decided and should be overruled. This interposition of Lush J. in the argument [52] should be noted. To grab someone round the throat will not necessarily cause grievous bodily harm; the act must be accompanied by such an intention. The law is properly laid down in *Woolmington* v. *Director of Public Prosecutions*.[53] In that passage, it may be argued, the word " unintentional " may either mean that the accused did not intend to do the act or that he was without an intent to do an injury which was likely to kill. The latter is the correct meaning. As to *Rex* v. *Lumley*,[54] relied on by the Crown, the court was there dealing with peculiar circumstances of a doctor tried for killing through an illegal operation. In that case the test of the reasonable man assisted the accused and worked in his favour. It may well be that in such cases the judges thought that such a man should not be charged with murder and were giving the juries a loophole to find a verdict of manslaughter, as the jury in that case did. *Rex* v. *Hedley* [55] was on all fours with the present case, save that there was a stronger case against Hedley than against the present respondent.

To uphold a conviction of murder the intention as to the consequences of the act must be in the mind of the accused;

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[49] 16 Cox C.C. 306.

[50] [1956] 1 Q.B. 351.

[51] 7 Cr.App.R. 140, 144.

[52] Ibid. 142.

[53] [1935] A.C. 462, 481–482; 51 T.L.R. 416; 25 Cr.App.R. 72, H.L.

[54] 22 Cox C.C. 635–636.

[55] 31 Cr.App.R. 35.

the intent need not be the intent of a reasonable man. The excitement of the moment is to be taken into consideration for the purpose of reducing the crime from murder to manslaughter, because of the intent in the mind of the accused. *Rex* v. *Steane* [56] is strongly relied on. *Reg.* v. *Grant and Gilbert* [57] and *Reg.* v. *Ward* [58] are dealt with in Russell on Crime, 11th ed., vol. I, pp. 365 et seq. The Homicide Act, 1957, followed the last-named case. It effectively abandoned the doctrine of implied malice because the intent to cause grievous bodily harm resulting in death is a matter of express malice. Since the Act only express malice remains. *Reg.* v. *Vickers* [59] is on all fours with the present case because the question was whether there was an intent in the mind of the accused to cause grievous bodily harm. That case is relied on. The court there indicated that the prosecution must prove an intent to cause grievous bodily harm, the subjective test. That shows the proper way of summing up without mentioning the reasonable man. The proper direction to a jury on intent in murder cases was given in *Reg.* v. *Doherty* [60]; *Rex* v. *Hedley* [61] and *Reg.* v. *Lenchitsky*.[62] When one is dealing with a person accused of murder it is inappropriate to talk of the reasonable man, though one might talk of a man capable of reasoning. The test of the reasonable man substitutes the jury for the accused.

The authorities clearly lay down that the presumption that a man intends the natural and probable consequence of his acts is rebuttable, but the effect of what the trial judge told the jury was that it was a presumption which they must adopt. This was a misdirection. The Court of Criminal Appeal put the matter correctly in the present case.[63] That passage corresponds to what Denning L.J. said in *Hosegood* v. *Hosegood*.[64] What he wrote in an article on Presumptions and Burdens in the Law Quarterly Review (1945), Vol. LXI, pp. 379–380, 381–382, is adopted on behalf of the respondent, and also Glanville Williams on Criminal Law, pp. 77–81, para. 27, and pp. 705–706, para. 228. A man will not always be taken to intend the natural and probable consequences of his acts.

In summary, the trial judge used the test of the reasonable man, which is not the proper test in imputing an intention to the accused. In stating the presumption that a man intends the natural and probable consequences of his acts he did not tell the jury that the presumption is rebuttable. An intention seriously to interfere with the victim's health or comfort is not enough to support a charge of murder.

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[56] [1947] K.B. 997, 1004.
[57] 38 Cr.App.R. 107.
[58] [1956] 1 Q.B. 351.
[59] [1957] 2 Q.B. 664, 670.
[60] 16 Cox C.C. 306.
[61] 31 Cr.App.R. 45.
[62] [1954] Crim.L.R. 216.
[63] Ante, p. 300.
[64] (1950) 66 T.L.R. (Pt. 1) 735, 738, C.A.

Audrey Jennings following. In his summing-up the trial judge said that "grievous bodily harm" simply means some "harm "which is sufficient seriously to interfere with the victim's health "or comfort." That amounts to a misdirection: see *Rex* v. *Miller*,[65] where the Supreme Court of Victoria held that the expression "grievous bodily harm" bore its ordinary and natural meaning, and that it was a misdirection to tell the jury that it meant "some serious interference with bodily health and "comfort."

The trial judge read the words "likely" and "calculated" as if they meant the same thing. He also used the words "shaking "off" as if they were the same as dislodging, the deliberate act of forcing the constable off the car, of which there is no evidence. He equated the probable and likely consequences of an act with an actual intention. This was a loose use of language liable to lead to a misunderstanding.

In the Shorter Oxford English Dictionary intention is defined as "the action of straining or directing the mind or attention to "something." In connection with the meaning of "malice "aforethought" the word "aforethought" is defined as "pre-"meditated," while "premeditate" is defined as "to study with "a view to subsequent action." This is the right approach to intention and malice aforethought. Here the motive of the accused was to avoid arrest, and his intention was to leave the officer behind and get away from the place; the means adopted was to put his foot on the accelerator, causing the car to move and thereby presumably leaving the officer behind. It has been suggested that it is possible to equate the intention of the accused with an intention to cause the consequences which resulted, and with foresight of them. But in order to do so, the consequences would have had to be certain in his mind. In all the cases relied on by the Crown the act done has been one of physical violence. In *Rex* v. *Gibbins and Proctor*[66] the withholding of food from a child was equivalent to physical violence.

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[65] [1951] V.L.R. 346, 356–357.

[66] 13 Cr.App.R. 134.

Here there were two possibilities before the jury, (1) that the accused foresaw that the constable would be hurt as a certain result of his actions, and (2) that he did not direct his mind sufficiently to the constable and that, although he knew he was there, he was directing his mind to getting away, so that his mind was adverting to his escape rather than to the constable, and he did not give enough care to what happened to him. That would be recklessness or negligence, but mere negligence is not enough to support a charge of murder or manslaughter: see *Reg.* v. *Nicholls*[67] and *Rex* v. *Bonneyman*.[68] In equating a man's appreciation of the likely result of his actions with his intention the judge was running the tests of murder and manslaughter together. If the accused appreciated the risk, though, because his mind was occupied with something else, he took it recklessly, that would justify a verdict of manslaughter and not of murder. If the accused had realised that the certain result of his act would be serious injury to the constable, that might support a charge of murder. One must, therefore, apply the subjective test to his acts and their consequences, for in every case there must be an actus reus and a mens rea. The intention must be related to the crime: see Glanville Williams on Criminal Law, p. 32. The question here is: What was in the mind of the accused in relation to the consequences when he put his foot on the accelerator?

If the consequences of an act are certain or obvious, it may be right to say that a man intends those certain or obvious consequences. But if the consequences are only in the realm of likelihood, then, though he may intend the act, he is not to be taken as intending the consequences. Having found whether the consequences were certain or likely, one must ask whether the accused saw them as certain or likely. Subjectivity must be preserved throughout. One must see whether the act was deliberate and then find what was the accused's view of the act. The process is easy if a man hits another on the head with a chopper, when it would be hard to convince a jury that he did not intend the harm which he caused.

Here the accused, while saying that he is a reasonable man, also says that he did not act as a reasonable man.

The onus is on the prosecution throughout to prove the primary intent of the accused: see *Woolmington's* case.[69]

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[67] (1874) 13 Cox C.C. 75, 76.

[68] (1942) 28 Cr.App.R. 131, 134-135, C.C.A.

[69] [1935] A.C. 462, 480-482.

The effect of the Crown's proposition in this case would be to shift the burden of proof as to intention onto the accused.

In considering the possibilities of murder or manslaughter the court should consider whether the accused had the position of the constable in mind or whether he was entirely bending his mind towards escape. Did he just hope the constable would drop off? Did he try to knock him off? Did he think about him at all? The verdict should depend on the view the jury take of the direct and the oblique objects of the accused. In a criminal case intention is all-important.

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. It is agreed that intention is all-important in criminal cases. For the respondent the case was argued on the basis that, in the absence of direct evidence of intention, the burden is on the prosecution of showing that before the act was done there was knowledge or foresight or apprehension by the accused of the consequences of it. No authority cited for the respondent supported this. It is a fundamental fallacy that one can only prove intent if one can establish foresight, knowledge or apprehension of such consequences by the accused before he did the act. This is contrary to *Rex* v. *Philpot* [70] and to what Lord Birkenhead said in *Beard's* case.[71]

There is nothing in the evidence to suggest that this respondent did not know what he was doing. There was certainty or a very high degree of probability that the constable would fall off this fast-moving vehicle faced with oncoming traffic and that he would sustain serious injury. There is ample evidence that he knew the constable was on the car.

As to the meaning of "grievous bodily harm," it cannot be suggested that it includes something which is not dangerous, although the hurt need not be permanent. The trial judge expressed it rightly when he spoke of "at least serious hurt" and "at least serious harm." The expressions used have developed with time: Coke, 3 Inst. 50, says "wound or beat "another." Foster in his Discourses upon a Few Branches of the Crown Law (1762), p. 260, refers to "great bodily harm." The expression in Blackstone's Commentaries (1769 ed.), vol. IV, p. 199, is "one beats another in a cruel and unusual "manner." In Hale's Pleas of the Crown (1800 ed.), vol. I, p. 451, the expression is "some corporal harm." In East's Pleas of the Crown (1803 ed.) the words used are "some great

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[70] 7 Cr.App.R. 140.

[71] [1920] A.C. 479, 503.

"bodily harm." The expression "grievous bodily harm" was first used in *Reg.* v. *Bubb and Hook*[72]: it was subsequently used in *Reg.* v. *Porter*[73]; Stephen's History of the Criminal Law (1883), vol. III, p. 56; *Reg.* v. *Doherty*[74]; *Rex* v. *Lumley*[75]; *Rex* v. *Gibbins and Proctor*[76]; *Director of Public Prosecutions* v. *Beard*[77]; *Rex* v. *Larkin*[78]; *Holmes* v. *Director of Public Prosecutions*[79]; *Reg.* v. *Rymell*[80]; *Reg.* v. *Lenchitsky*[81]; *Reg.* v. *Ward*[82]; and *Reg.* v. *Vickers.*[83]

A person who, intending to do grievous bodily harm, kills, is guilty of murder. The relevant enactments dealing with wounding are section 1 of the Malicious Shooting and Stabbing Act, 1803 (43 Geo. 3, c. 58), section 12 of the Offences against the Person Act, 1828 (9 Geo. 4, c. 31), and section 18 of the Offences against the Person Act, 1861 (24 & 25 Vict., c. 100).

In the present case it was mere surplusage to talk of interfering with the comfort of the deceased, because the danger to him did not come into that category at all. In the phrase "grievous bodily harm" it is safe to treat "grievous" as equivalent to "serious," and the danger here was of serious harm. To speak of interfering with comfort in this connection is a meiosis. Grievous bodily harm must be of a character likely to cause serious injury or death. The direction in *Ashman's* case[84] went too far, and the decision in *Cox's* case[85] is unsatisfactory. *Reg.* v. *Vickers*[86] is right, whatever context one gives to grievous bodily harm. To support a charge of murder there must be an intent to do serious harm to some person: see Stephen's History of the Criminal Law, vol. III, pp. 20 and 80. In the passage at pp. 136–137 of Kenny's Outlines of Criminal Law, 17th ed., relied on by counsel for the respondent, it is hard to see how much is the law now and how much is what the editor thought the law should be. It expresses the complete subjective approach to the problem. Unless the test is that in the eyes of all reasonable people the act was likely to cause serious injury, a man of low intelligence and slow mental processes would have a great advantage. The test of foresight, "what a man of reasonable

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[72] (1830) 4 Cox C.C. 455.

[73] (1873) 12 Cox C.C. 444.

[74] 16 Cox C.C. 306.

[75] 22 Cox C.C. 635.

[76] 13 Cr.App.R. 134.

[77] [1920] A.C. 479, 499.

[78] [1943] K.B. 174; 59 T.L.R. 105; [1943] 1 All E.R. 217; 29 Cr.App.R. 18, C.C.A.

[79] [1946] A.C. 588, 598; 62 T.L.R. 460; [1946] 2 All E.R. 124, H.L.

[80] [1954] Crim.L.R. 60.

[81] [1954] Crim.L.R. 216.

[82] [1956] 1 Q.B. 351.

[83] [1957] 2 Q.B. 664.

[84] 1 F. & F. 88.

[85] Russ. & Ry. 362.

[86] [1957] 2 Q.B. 664.

"prudence would have foreseen," is adopted in Holmes's book on the Common Law, pp. 51–54. That is right. In section 5 (2) of the Homicide Act, 1957, it was not the intention of Parliament to eliminate the possibility of murder in the case of an assault with intent to do grievous bodily harm. In *Vamplew's* case [87] the report is not very satisfactory, but it appears that the court was directing its attention to the question whether, having regard to the age of the accused, she was conscious of the nature of her act. *Horsey's* case [88] was relied on by the respondent not so much for its substance as for the footnotes. If a reasonable man would have foreseen the consequences of the acts of the accused, then he must be taken to have foreseen them. If there was a real probability of grievous bodily harm resulting, then the degree of probability does not matter. It would have been very extraordinary if the constable, dislodged from the car on the road with traffic, had escaped without serious injury. *Philpot's* case [89] was rightly decided. What was said in *Woolmington's* case [90] is accepted as correct, but the two cases are not inconsistent. It is right to equate the accused with a reasonable man in the sense of a sane or responsible or thinking man, for the expression "reasonable man" is not used in this context as a term of art. The Crown must satisfy the jury as to the intent of the man himself in doing the act, but it need not show that he himself appreciated the consequences of his course of conduct. It matters little whether the presumption that a man intends the natural and probable consequences of his acts is one of fact or law. On either view, there was no need for the trial judge to tell the jury that it was rebuttable, because there were here no matters in evidence sufficient to rebut the presumption. *Hosegood's* case,[91] relied on by the respondent, was a matrimonial case relating to constructive desertion and the passage cited related to an overall intent to desert. But an overall intent, for instance, to escape is not in point here because it would afford no defence. Even if the accused did not foresee the consequence of death and did not desire it, he was still guilty of murder. To hold that the respondent's submissions and the decision of the Court of Criminal Appeal were right would involve holding that *Lumley's* case [92] and *Philpot's* case [93] were wrong, that what was said in *Whybrow's* case [94] was wrong, that *Rymell's* case [95] was wrong and that what was said in *Ward's* case [96] was wrong. *Beard's* case [97] would have to be distinguished.

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[87] 3 F. & F. 520.

[88] 3 F. & F. 287.

[89] 7 Cr.App.R. 140.

[90] [1935] A.C. 462, 482.

[91] 66 T.L.R. (Pt. 1) 735, 738.

[92] 22 Cox C.C. 635.

[93] 7 Cr.App.R. 140.

Edward Clarke Q.C., dealing with the passage in Holmes on The Common Law referred to in reply: On the author's test, a doctor performing a dangerous operation with knowledge that it will probably cause death would be guilty of murder. At pp. 62–63 Holmes contrasts malice aforethought in murder with the malice constituting malicious mischief and the malice in "wilfully "and maliciously" injuring another's property. The intent to cause grievous bodily harm must be proved in the same way in cases of murder as in cases of wounding. The passage in Holmes relied on by the court should not be followed, as it does not set out the correct view in the case of murder.

Their Lordships took time for consideration.

July 28. VISCOUNT KILMUIR L.C. My Lords, the respondent, Jim Smith, was convicted on April 7, 1960, of the wilful murder on March 2, 1960, of Leslie Edward Vincent Meehan, a police officer acting in the execution of his duty. Such a crime constitutes capital murder under section 5 of the Homicide Act, 1957, and, accordingly, the respondent was sentenced to death. There was never any suggestion that the respondent meant to kill the police officer, but it was contended by the prosecution that he intended to do the officer grievous bodily harm, as a result of which the officer died.

In his final direction to the jury the trial judge, Donovan J., said: "If you are satisfied that . . . he must as a reasonable "man have contemplated that grievous bodily harm was likely "to result to that officer . . . and that such harm did happen "and the officer died in consequence, then the accused is guilty "of capital murder. . . . On the other hand, if you are not "satisfied that he intended to inflict grievous bodily harm upon "the officer—in other words, if you think he could not as a "reasonable man have contemplated that grievous bodily harm "would result to the officer in consequence of his actions—well, "then, the verdict would be guilty of manslaughter."

The respondent appealed to the Court of Criminal Appeal alleging misdirection by the trial judge, the main ground being that the direction cited above was wrong in that the question for the jury was what he, the respondent, in fact contemplated. The appeal was heard by the Court of Criminal Appeal on May 9 and 10, 1960, when the court allowed the appeal, substituted a verdict of guilty of manslaughter and imposed a sentence of 10 years' imprisonment. The court gave its reasons on May 18, 1960. They upheld the respondent's contention, holding that " there " always remained the question whether the appellant " (the present respondent) " really did . . . realise what was the degree " of likelihood of serious injury."

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[94] 35 Cr.App.R. 141, 146.
[95] [1954] Crim.L.R. 60.
[96] [1956] 1 Q.B. 351.
[97] [1920] A.C. 479.

Thereupon the Attorney-General gave his fiat certifying that the appeal of Jim Smith involved a point of law of exceptional public importance and that, in his opinion, it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House on the appeal of the Director of Public Prosecutions. The appeal certainly involves an important question, raising, as it does, the question as to what is the proper direction to be given to a jury in regard to the necessary intent which has to be proved in cases of murder and also in cases under section 18 of the Offences against the Person Act, 1861.

[His Lordship stated the facts and continued:] In this state of the evidence the defence was twofold: (1) That he did not realise the officer was hanging on to the car until the officer fell off and that he could not keep a straight course having regard to the weight of metal in the back. In other words, he raised the defence of accident. (2) Alternatively, that it was a case of manslaughter and not murder in that he had no intent to kill or to do grievous bodily harm.

As regards the defence of accident, the learned judge went through the relevant evidence and ended by saying this: " There " is a limit, is there not, members of the jury, to human credulity, " and you may think that the accused man's unsupported assertion on this part of the case goes well past it, that the evidence " is overwhelming, and he knew his car was carrying the officer " up the road? The matter is one for you, but if you arrive at " the conclusion that, of course, he knew, it is one which I would " regard as abundantly right. Indeed, on the evidence I do not " see how you could properly arrive at any other conclusion. If " that be so the defence of pure accident goes."

My Lords, it would seem that this observation was fully justified on the evidence, and the jury by their verdict must have rejected the possibility of accident. Indeed, the defence of accident was never suggested either in the Court of Criminal Appeal or in your Lordships' House.

It is in regard to the second defence that the summing-up of the learned judge has been criticised, and indeed has been held to amount to a misdirection, by the Court of Criminal Appeal. It is said that the jury were misdirected as to the intent which has to be proved in order to constitute the necessary ingredient of malice. The passages complained of are these:

"The intention with which a man did something can usually "be determined by a jury only by inference from the surrounding "circumstances including the presumption of law that a man "intends the natural and probable consequences of his acts."

"If you feel yourselves bound to conclude from the evidence "that the accused's purpose was to dislodge the officer, then you "ask yourselves this question: Could any reasonable person fail "to appreciate that the likely result would be at least serious "harm to the officer? If you answer that question by saying "that the reasonable person would certainly appreciate that, "then you may infer that that was the accused's intention, and "that would lead to a verdict of guilty on the charge of capital "murder."

"Now the only part of that evidence of Police Constable "Weatherill which the accused challenges is the part that incriminates him, namely, 'I only wanted to shake him off.' He "says he did not say that. Well, you may think it is a curious "thing to imagine, and further it may well be the truth—he did "only want to shake him off; but if the reasonable man would "realise that the effect of doing that might well be to cause "serious harm to this officer, then, as I say, you would be "entitled to impute such an intent to the accused, and, therefore, "to sum up the matter as between murder and manslaughter, "if you are satisfied that when he drove his car erratically up "the street, close to the traffic on the other side, he must as a "reasonable man have contemplated that grievous bodily harm "was likely to result to that officer still clinging on, and that such "harm did happen and the officer died in consequence, then the "accused is guilty of capital murder, and you should not shrink "from such a verdict because of its possible consequences. "On the other hand, if you are not satisfied that he intended "to inflict grievous bodily harm upon the officer—in other words, "if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in "consequence of his actions—well, then, the verdict would be "guilty of manslaughter."

The main complaint is that the learned judge was there applying what is referred to as an objective test, namely, the test of what a reasonable man would contemplate as the probable result of his acts, and therefore would intend, whereas the question for the jury, it is said, was what the respondent himself intended. This, indeed, was the view of the Court of Criminal Appeal, who said [1]: "Once mere accident was excluded, the present case "became one in which the degree of likelihood of serious injury "to the police officer depended on which of the not always consistent versions of the facts given by witnesses for the prosecution was accepted. It was one in which it could not be said "that there was a certainty that such injury would result; and it "was one in which there always remained the question whether the "appellant really did during the relevant ten seconds realise "what was the degree of likelihood of serious injury. If the jury "took the view that the appellant deliberately tried to drive the "body of the police officer against oncoming cars, the obvious "inference was open to them that the appellant intended serious "injury to result; if, however, they concluded he merely swerved "or zigzagged to shake off that officer, or if they concluded that "for any reason he may not have realised the degree of danger "to which he was exposing the police officer, a different situation "would arise with regard to the inferences to be drawn. In the "former case the jury might well have felt they were dealing "with consequences that were certain; in the latter only with "degrees of likelihood."

Putting aside for a moment the distinction which the Court of Criminal Appeal were seeking to draw between results which were "certain" and those which were "likely," they were saying that it was for the jury to decide whether, having regard to the panic in which he said he was, the respondent in fact at the time contemplated that grievous bodily harm would result from his actions or, indeed, whether he contemplated anything at all. Unless the jury were satisfied that he in fact had such contemplation, the necessary intent to constitute malice would not, in their view, have been proved. This purely subjective approach involves this, that if an accused said that he did not in fact think of the consequences, and the jury considered that that might well be true, he would be entitled to be acquitted of murder.

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[1] Ante, p. 302; [1960] 2 All E.R. 451.

My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that upon which the courts have always acted. The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law, and I would only make a few citations.

The true principle is well set out in that persuasive authority "The Common Law" by Holmes J. After referring to Stephens' Digest of the Criminal Law and the statement that foresight of the consequence of the act is enough, he says at pp. 53–54: "But again, What is foresight of consequences? It is a picture "of a future state of things called up by knowledge of the "present state of things, the future being viewed as standing to "the present in the relation of effect to cause. Again, we must "seek a reduction to lower terms. If the known present state "of things is such that the act done will very certainly cause "death, and the probability is a matter of common knowledge, "one who does the act, knowing the present state of things, is "guilty of murder, and the law will not inquire whether he did "actually foresee the consequences or not. The test of foresight "is not what this very criminal foresaw, but what a man of "reasonable prudence would have foreseen.", and again at p. 56: "But furthermore, on the same principle, the danger which in "fact exists under the known circumstances ought to be of a class "which a man of reasonable prudence could foresee. Ignorance

" of a fact and inability to foresee a consequence have the same " effect on blameworthiness. If a consequence cannot be " foreseen, it cannot be avoided. But there is this practical " difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's " consciousness, the question of what he might have foreseen is " determined by the standard of the prudent man, that is, by " general experience."

In *Reg.* v. *Faulkner*[2] the Court of Crown Cases Reserved for Ireland, on grounds immaterial to this case, quashed a conviction for arson of a sailor who, with intent to steal, tapped a cask of rum. He was holding a lighted match and the rum caught fire and the vessel was destroyed. Palles C.B. stated the law as follows: " In my judgment the law imputes to a person who " wilfully commits a criminal act an intention to do everything " which is the probable consequence of the act constituting the " corpus delicti which actually ensues. In my opinion this inference arises irrespective of the particular consequence which " ensued being or not being foreseen by the criminal, and whether " his conduct is reckless or the reverse. This much I have " deemed it right to say to prevent misconception as to the " grounds upon which my opinion is based."

In *Rex* v. *Lumley*[3] Avory J. directed the jury in these terms: " When he did the act, did he contemplate, or must he as a " reasonable man have contemplated, that death was likely to " result, or must he as a reasonable man have contemplated that " grievous bodily harm was likely to result? If, in your opinion, " he must as a reasonable man have contemplated either of those " consequences, then your duty is to find him guilty of murder."

In *Rex* v. *Philpot*[4] the accused had strangled his wife. In evidence he said: " something seemed to snap in my head, and " I jumped up and caught her by the throat. I lost control of " myself altogether. I did not know what I was doing exactly; " I felt as if I was holding a very strong galvanic battery, and " wanted to leave go, and could not." The real issue was whether or not he was sane at the time. The jury found that he was sane and that he acted in a fit of temper without intending to kill her. In answer to a question from the judge the foreman said: " The jury are unanimously and emphatically of opinion " that at the moment of the act the prisoner did not realise the

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[2] (1877) 13 Cox C.C. 550, 561–562.

[3] (1911) 22 Cox C.C. 635, 636.

[4] (1912) 7 Cr.App.R. 140, 141, C.C.A.

"consequences of what he was doing." The judge then asked them to reconsider their verdict, saying that a man is held to intend the consequences of his act, and as a result the jury found the accused guilty of murder. The Court of Criminal Appeal (consisting of Lord Alverstone C.J., Hamilton and Lush JJ.) in dismissing the appeal said[5]: "The jury found that he "killed her in a fit of temper; they added that he did not realise "the consequences of his act, but they cannot have meant that "he began to do a harmless act, or one but little blameworthy, "which afterwards developed into something causing death. "They must have meant that the failure to realise the consequences was due to the fit of temper. In the circumstances it "was not a misdirection to tell the jury that a man is held to "intend the consequences of his act. The only act in question "was that which caused death, and the appellant who committed "this act, if sane, must be held to have intended that consequence."

In *Director of Public Prosecutions* v. *Beard*[6] your Lordships' House had to consider how far evidence of drunkenness could be taken into consideration in order to determine whether the accused had the necessary intent. Reference was made to *Rex* v. *Meade*,[7] in which the Court of Criminal Appeal had said that it was a defence if it was shown that the accused's mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous. In dealing with that case Lord Birkenhead L.C. in his speech said[8]: "Your Lordships have had "the advantage of a much more elaborate examination of the "authorities upon which the rule is founded than was placed "before the Court of Criminal Appeal, and I apprehend can have "no doubt that the proposition in *Meade's* case[9] in its wider "interpretation is not, and cannot be, supported by authority. "The difficulty has arisen largely because the Court of Criminal "Appeal used language which has been construed as suggesting "that the test of the condition of mind of the prisoner is not "whether he was incapable of forming the intent but whether he "was incapable of foreseeing or measuring the consequences of "the act."

Coming to more recent times, the judgment of the Court of

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[5] 7 Cr.App.R. 140, 143–144.

[6] [1920] A.C. 479; 36 T.L.R. 379, H.L.

[7] [1909] 1 K.B. 895; 25 T.L.R. 359, C.C.A.

[8] [1920] A.C. 479, 503–504.

[9] [1909] 1 K.B. 895.

Criminal Appeal in *Reg.* v. *Ward* [10] is to the same effect. Lord Goddard C.J. said: "Of course, the test must be applied to all "alike, and the only measure that can be brought to bear in "these matters is what a reasonable man would or would not "contemplate. If the act is one as to which the jury can find "that a reasonable man would say: 'It would never occur to me "'that death would result or grievous bodily harm would result,' "then the jury can find him guilty of manslaughter; but if the "jury come to the conclusion that any reasonable person, that "is to say, a person who cannot set up a plea of insanity, must "have known that what he was doing would cause at least "grievous bodily harm, and that the death is the result of "that grievous bodily harm, then that amounts to murder in law "and a verdict of murder is justified."

Indeed, the only case which could possibly be said to support the view taken by the Court of Criminal Appeal in the present case is *Reg.* v. *Vamplew*,[11] in which a young girl of thirteen was charged with the wilful murder of an infant about ten weeks old by administering poison. In summing up, Pollock C.B. directed the jury that [12] "the crimes of murder and of manslaughter were "in some instances very difficult of distinction. The distinction "which seemed most reasonable consisted in the consciousness "that the act done was one which would be likely to cause "death. No one, however, could commit murder without that "consciousness. The jury must be satisfied, before they could "find the prisoner guilty, that she was conscious, and that her act "was deliberate. They must be satisfied that she had arrived at "that maturity of the intellect which was a necessary condition "of the crime charged." It is clear, however, from the argument in the case, and, indeed, from the last sentence of the direction of the Chief Baron, that the real issue in the case was whether by reason of her age the accused had the necessary mens rea. Indeed, it was so cited in Archbold, 34th ed., paras. 28 and 2472.

My Lords, the law being as I have endeavoured to define it, there seems to be no ground upon which the approach by the trial judge in the present case can be criticised. Having excluded the suggestion of accident, he asked the jury to consider what were the exact circumstances at the time as known to the respondent, and what were the unlawful and voluntary acts which he did

[10] [1956] 1 Q.B. 351, 356; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565; 40 Cr.App.R. 1, C.C.A.

[11] (1862) 3 F. & F. 520.

[12] Ibid. 522.

towards the police officer. The learned judge then prefaced the passages of which complaint is made by saying, in effect, that if in doing what he did he must as a reasonable man have contemplated that serious harm was likely to occur then he was guilty of murder.

My only doubt concerns the use of the expression "a "reasonable man," since this to lawyers connotes the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury.

Another criticism of the summing-up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial judge dealt with the presumption that a man intends the natural and probable consequences of his acts. I will cite the passage again: "The intention with which a man did some-"thing can usually be determined by a jury only by inference "from the surrounding circumstances including the presumption "of law that a man intends the natural and probable conse-"quences of his acts." It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of common sense, matters not for this purpose. The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable.

Strong reliance was, however, placed on the case of *Rex* v. *Steane*,[13] in which Lord Goddard C.J. said: "No doubt, if the "prosecution prove an act the natural consequence of which "would be a certain result and no evidence or explanation is "given, then a jury may, on a proper direction, find that the "prisoner is guilty of doing the act with the intent alleged, but if

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[13] [1947] K.B. 997, 1004; 63 T.L.R. 403; [1947] 1 All E.R. 813; 32 Cr.App.R. 61, C.C.A.

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"on the totality of the evidence there is room for more than one "view as to the intent of the prisoner, the jury should be "directed that it is for the prosecution to prove the intent to the "jury's satisfaction, and if, on a review of the whole evidence, "they either think that the intent did not exist or they are left "in doubt as to the intent, the prisoner is entitled to be "acquitted." That, however, was a very special case. The appellant had been charged and convicted of doing acts likely to assist the enemy, with intent to assist the enemy. His case was that while he might have done acts likely to assist the enemy he had only done so out of duress and in order to save his wife and children. Accordingly, this was a case where over and above the presumed intent there had to be proved an actual intent or, it might be said, a desire by the appellant to assist the enemy.

It was also said that the Court of Criminal Appeal were right in stating the law thus [14]: "The law on this point as it stands today "is that this presumption of intention means this: that, as a "man is usually able to foresee what are the natural con-"sequences of his acts, so it is, as a rule, reasonable to infer "that he did foresee them and intend them. But, while that is "an inference which may be drawn, and on the facts in certain "circumstances must inevitably be drawn, yet if on all the facts "of the particular case it is not the correct inference, then it "should not be drawn." This passage in the judgment of the Court of Criminal Appeal seems to have been lifted verbatim from the judgment of Denning L.J. in *Hosegood* v. *Hosegood*,[15] a case dealing with proof of constructive desertion. In that case, my noble and learned friend, Lord Denning, was approving the school of thought which said that a husband is not to be found guilty of constructive desertion, however bad his conduct, unless he had in fact an intention to bring the married life to an end. Accordingly, the words in that passage were being used in connection with a case where an actual or overall intent or desire was involved. No such overall intent or desire is involved in the consideration of intent to kill or to do grievous bodily harm. Thus an overall intent or desire, for example, an intent or desire to escape, could not afford any defence.

While, however, I can see no possible criticism of the trial judge in regard to the use he made of the presumption in the present case, I cannot help feeling that it is a matter which might

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[14] Ante, p. 300.

[15] (1950) 66 T.L.R. (Pt. 1) 735, 738, C.A.

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well be omitted in summing up to a jury. The phrase "presumption of law" and the reference, if it has to be made, to the presumption being "rebuttable" are only apt to confuse a jury. In my opinion, the test of the reasonable man, properly understood, is a simpler criterion. It should present no difficulty to a jury and contains all the necessary ingredients of malice aforethought.

Before leaving this part of the case I should mention that the Court of Criminal Appeal in their judgment drew a distinction between serious harm which was "certain" to result and serious harm which was "likely" to result. In their judgment if serious harm was certain to result the presumption could safely be relied upon and there was no need for the judge to tell the jury that it was rebuttable. On the other hand, if serious harm was only a likely consequence, a judge should, in their opinion, tell the jury that the presumption was rebuttable and that it was for them to determine whether the accused in fact intended to inflict serious harm.

My Lords, there is, in my opinion, no warrant for such a distinction and no authority can be adduced in support thereof. Indeed, counsel for the respondent did not, in your Lordships' House seek to support the distinction. The Court of Criminal Appeal apparently based their opinion on the passage which I have already cited in the judgment given by Lord Goddard C.J. in *Ward's* case,[16] in which the words "must have known that "what he was doing would cause at least grievous bodily harm" occur. They treated these words as the true ratio of the decision in *Ward's* case,[16] whereas the case really decided that the direction to the jury was correct—a direction which had used the word "likely," not "certain." It seems clear that Lord Goddard was not considering the distinction which the Court of Criminal Appeal have drawn. In my opinion, the true question in each case is whether there was a real probability of grievous bodily harm.

The last criticism of the summing-up which was raised before your Lordships was in regard to the meaning which the learned judge directed the jury was to be given to the words "grievous "bodily harm." The passages of which complaint is made are the following: "When one speaks of an intent to inflict grievous "bodily harm upon a person, the expression grievous bodily harm "does not mean for that purpose some harm which is permanent "or even dangerous. It simply means some harm which is

[16] [1956] 1 Q.B. 351, 356.

"sufficient seriously to interfere with the victim's health or "comfort."

"In murder the killer intends to kill, or to inflict some harm "which will seriously interfere for a time with health or comfort."

"If the accused intended to do the officer some harm which "would seriously interfere at least for a time with his health and "comfort, and thus perhaps enable the accused to make good "his escape for the time being at least, but that unfortunately "the officer died instead, that would be murder too."

The direction in these passages was clearly based on the well known direction of Willes J. in *Reg.* v. *Ashman*[17] and on the words used by Graham B. in *Rex* v. *Cox*.[18] Indeed, this is a direction which is commonly given by judges in trials for the statutory offence under section 18 of the Offences against the Person Act, 1861, and has on occasions been given in murder trials: cf. *Reg.* v. *Vickers*.[19]

My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words "grievous bodily harm" a meaning other than that which the words convey in their ordinary and natural meaning. "Bodily harm" needs no explanation, and "grievous" means no more and no less than "really serious." In this connection your Lordships were referred to the judgment of the Supreme Court of Victoria in the case of *Rex* v. *Miller*.[20] In giving the judgment of the court, Martin J., having expressed the view that the direction of Willes J. could only be justified, if at all, in the case of the statutory offence, said: "It is not a "question of statutory construction but a question of the intent "required at common law to constitute the crime of murder. "And there does not appear to be any justification for treating "the expression 'grievous bodily harm' or the other similar "expressions used in the authorities upon this common law "question which are cited above as bearing any other than their "ordinary and natural meaning." In my opinion, the view of the law thus expressed by Martin J. is correct, and I would only add that I can see no ground for giving the words a wider meaning when considering the statutory offence.

It was, however, contended before your Lordships on behalf of the respondent that the words ought to be given a more restricted meaning in considering the intent necessary to establish malice in a murder case. It was said that the intent must be to do an act "obviously dangerous to life" or "likely to kill." It is true that in many of the cases the likelihood of death resulting has been incorporated into the definition of grievous bodily harm, but this was done, no doubt, merely to emphasise that the bodily harm must be really serious, and it is unnecessary, and I would add inadvisable, to add anything to the expression "grievous "bodily harm" in its ordinary and natural meaning.

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[17] (1858) 1 F. & F. 88.

[18] (1818) Russ. & Ry. 362, C.C.R.

[19] [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A.

[20] [1951] V.L.R. 346, 357.

To return to the summing-up in the present case, it is true that in the two passages cited the learned judge referred to "grievous bodily harm" in the terms used by Willes J. in *Reg.* v. *Ashman*,[21] but in no less than four further passages, and in particular in the vital direction given just before the jury retired, he referred to "serious hurt" or "serious harm." Read as a whole, it is, I think, clear that there was no misdirection. Further, on the facts of this case it is quite impossible to say that the harm which the respondent must be taken to have contemplated could be anything but of a very serious nature coming well within the term "grievous bodily harm."

Before leaving this appeal I should refer to a further contention which was but faintly adumbrated, namely, that section 1 (1) of the Homicide Act, 1957, had abolished malice constituted by a proved intention to do grievous bodily harm, and that, accordingly, *Reg.* v. *Vickers*,[22] which held the contrary, was wrongly decided. As to this it is sufficient to say that in my opinion the Act does not in any way abolish such malice. The words in parenthesis in section 1 (1) of the Act and a reference to section 5 (2) make this clear beyond doubt.

In the result the appeal should, in my opinion, be allowed and the conviction of capital murder restored.

Lord Goddard. My Lords, I agree with the opinion which has just been pronounced.

Lord Tucker. My Lords, I also agree.

Lord Denning. My Lords, I agree.

Lord Parker of Waddington. My Lords, I also agree.

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[21] 1 F. & F. 88.

[22] [1957] 2 Q.B. 664.

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It was ordered "that the order appealed from be reversed "and the cause be remitted to the Court of Criminal Appeal to "do what shall be just and consistent with this judgment."

Appeal allowed.

Solicitors: *Director of Public Prosecutions; Prothero & Prothero.*

F. C.

J. C.*

1960
Nov. 29.

COUNCIL OF THE SHIRE OF ASHFORD . APPELLANTS;

AND

DEPENDABLE MOTORS PTY. LTD. . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Sale of Goods—Implied term—Fitness for purpose—Tractor—Whether particular purpose made known to seller—Reliance on seller's skill or judgment—Buyer a corporation—Negotiation and purchase through different agents—Whether compliance with statutory requirements—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1)*—Sale of Goods Act,* 1923–1953 (*N.S.W.*), *s.* 19 (1).

Australia—New South Wales—Sale of goods—Tractor—Fitness for purpose—Whether particular purpose made known to seller—Reliance on seller's skill or judgment—Sale of Goods Act, 1923–1953 (*N.S.W.*), *s.* 19 (1).

Agency—Authority—One acting for prospective master—Shire engineer—Approval of tractor for purchase by council—Reliance of engineer on seller's skill and judgment—Tractor unfit for its purpose—Whether council entitled to claim breach of condition under Sale of Goods Act.

By section 19 (1) of the Sale of Goods Act, 1923–1953, of New South Wales [in words identical to those of section 14 (1) of the (British) Sale of Goods Act, 1893]: "Where the buyer expressly or "by implication makes known to the seller the particular purpose "for which the goods are required so as to show that the buyer relies "on the seller's skill or judgment, and the goods are of a description "which it is in the course of the seller's business to supply "(whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such "purpose: . . ."

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST.

The appellant shire council wishing to acquire a tractor for use in road construction work, the shire clerk, after consulting the president of the council and other councillors, and on their instructions, asked one B., who had recently been appointed the shire engineer but had not yet taken up his duties or become the servant of the council, to look at a tractor which the respondents had for sale. B. said in evidence that he called on the respondents, told C., their joint managing director, that he was there on behalf of the council, saw the tractor and asked about its capabilities and whether it would do the road construction work for which it was required, which he described, and was told, inter alia, "that it is "the type of work the tractor is built for. It is just the type of "work to suit it." C. denied that B. asked him whether the tractor was suitable, but admitted that he would have said that it was suitable for council work if he had been asked. B. made no written report of his conversation with C., but told the shire clerk that the tractor seemed big enough for the work for which it was required. In reliance on B.'s report the shire president, who had not been told what had taken place between B. and C., instructed the shire clerk to purchase the tractor. It was not in fact reasonably fit for the purposes of road construction, and on a claim by the appellant council for damages for breach of the implied condition in section 19 (1) of the Sale of Goods Act, 1923–1953:—

Held, that the requirements of the section had been satisfied, and that the appellants were entitled to damages. In all the circumstances the proper inference was that B. was being asked to anticipate his duties as shire engineer and to do gratuitously what it would have been his duty to do if he had already become the appellants' servant, and it must be inferred that he was given such authority as he would have had as their servant. B. was accordingly acting within the scope of his authority in disclosing to the sellers on behalf of the appellants the particular purpose for which the tractor was required, and that covered disclosing that purpose so as to show that he was relying on the sellers' skill or judgment in making his report to the appellants. C. had no reason to suppose that the appellants were not relying on his (C.'s) assurances when they placed their order.

Such general statements of the law as "Such a reliance must be "affirmatively shown; the buyer must bring home to the mind of "the seller that he is relying on him in such a way that the seller "can be taken to have contracted on that footing. The reliance is "to be the basis of a contractual obligation" (*per* Lord Wright in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* [1934] A.C. 402, 423; 50 T.L.R. 350, H.L.), and "The reliance in question "must be such as to constitute a substantial and effective induce-"ment which leads the buyer to agree to purchase the commodity" (*per* Lord Sumner in *Medway Oil and Storage Co. Ltd.* v. *Silica Gel Corporation* (1928) 33 Com.Cas. 195, 196, H.L.), did not deal with the position of a buyer who acted, as a corporation must do, through agents or servants.

The making known to the seller of the buyer's particular purpose may take place during negotiations which precede the making of the contract for sale. What is necessary is that the buyer shall contract in reliance on what took place during the negotiations and that his reliance at the time when the contract is made "is a "matter of reasonable inference to the seller and to the court": (*per* Lord Sumner in *Manchester Liners Ltd.* v. *Rea Ltd.* [1922] 2 A.C. 74, 90; 38 T.L.R. 526, H.L.). Here B. was the agent of the appellants when obtaining C.'s assurances, and the president and shire clerk were equally only the appellant council's agents when deciding to order and in ordering the tractor, and they were induced to do that by B.'s report which was induced by C.'s assurances received by B. on behalf of the appellants. The president was not the appellant corporation, and whether the latter was to be held to have relied on the sellers' skill or judgment should not be affected by the fact that the president was not told what had taken place between B. and C.

Order of the High Court of Australia (1959) 101 C.L.R. 265 reversed.

Appeal (No. 32 of 1960), by special leave, from an order of the High Court of Australia (McTiernan, Taylor and Menzies JJ., Dixon C.J. and Kitto J. dissenting) (May 8, 1959) reversing an order of the Supreme Court of New South Wales (Owen and Herron JJ., Hardie J. dissenting) (September 10, 1958) and restoring an order of Ferguson J. (December 4, 1956) in favour of the present respondents, the defendants in this action.

The following facts are taken from the judgment of the Judicial Committee: The appellants on March 16, 1951, ordered from the respondents a Breda motor-tractor with accessories, the price being £6,751 14s. The tractor was duly delivered in May, 1951. The appellants required it for road construction work in their shire and it was used on this work for some time. It developed a number of defects, and the appellants in this action, which was commenced on March 30, 1954, claimed damages for breach of the implied condition set out in section 19 (1) of the Sale of Goods Act, 1923–1953, of New South Wales. The defence was that the requirements of that section had not been satisfied. Damages were assessed by the Full Court of the Supreme Court of New South Wales at £4,915 and it was admitted that, if this appeal succeeded, that sum should now be awarded to the appellants.

Section 19 (1) was in the following terms: "Where the buyer "expressly or by implication makes known to the seller the "particular purpose for which the goods are required so as to "show that the buyer relies on the seller's skill or judgment, and "the goods are of a description which it is in the course of the

" seller's business to supply (whether he be the manufacturer or " not), there is an implied condition that the goods shall be " reasonably fit for such purpose:

" Provided that in the case of a contract for the sale of a " specified article under its patent or other trade name there is no " implied condition as to its fitness for any particular purpose."

At the trial before Ferguson J. the respondents admitted that the tractor was goods of a description which it was in the course of the respondents' business to supply. The respondents did not contend that the sale of the tractor was the sale " of a specified " article under its patent or other trade name," so that the proviso to section 19 (1) had no bearing upon the present appeal.

The greater part of the evidence at the trial dealt with the performance of the tractor and the defects which it developed while in use by the appellants. It was now admitted that the tractor was not in fact reasonably fit for the purposes of road construction and the argument before the Board was concerned with the question whether the other requirements of the section were satisfied: whether the buyer made known to the seller the particular purpose for which the tractor was required, whether the buyer made that known to the seller " so as to show that the " buyer relies on the seller's skill or judgment," and whether the buyer in fact relied on the seller's skill or judgment.

The relevant evidence in this connection, that of one Bowman, who had been appointed the shire engineer, but had not yet taken up his duties, but had been asked to look at the tractor, and that of one Corney, the respondents' joint managing director, appears from the judgment of the Judicial Committee.

1960. Oct. 24, 25. *C. L. D. Meares Q.C.* (Australia) and *Michael Kerr* for the appellant council. The only question is in relation to the appellants' claim for damages for breach of the implied condition of fitness for purpose under section 19 (1) of the Sale of Goods Act, 1923–1953, of New South Wales, which is identical with section 14 (1) of the English Sale of Goods Act, 1893. The proviso to the section does not apply in this case. Further, the goods were admittedly of the description which it was in the course of the seller's business to supply. Also, there is no issue as to whether the tractor was fit for the purpose for which it was required—both the trial judge and the Full Court held that there was abundant evidence that it was not fit for that purpose. And there is no issue, either, as to the amount of damages that were awarded by the Full Court. The only issues

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are: (1) whether within the meaning of the subsection the buyers made known to the sellers the particular purpose for which the tractor was required, and (2) whether there was a making known within the meaning of the subsection so as to show that the buyers relied on the sellers' skill or judgment. Incidentally, the section does not specifically make any provision as to whether the buyers did rely on the sellers' skill or judgment.

Only a small part of the evidence need be referred to because this appeal can be decided as a matter of principle. The English Act of 1893 is expressed to be "An Act for codifying the law in "relation to the sale of goods"; the New South Wales Act is expressed as being an Act to codify and amend the law. The common law rules were precisely stated in *Jones* v. *Just*[1] and subsequently followed in *Jones* v. *Bright*,[2] *Randall* v. *Newson*,[3] *James Drummond & Sons* v. *E. H. Van Ingen & Co.*[4] and *Manchester Liners Ltd.* v. *Rea Ltd.*[5] If the real object of the section be as stated in those authorities, the question here is whether the requirements of the section have been satisfied in the circumstances of this case. In construing that part of the section which deals with the "making known," Lord Wright said in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.*[6] that the tendency of the decisions has been to give a liberal interpretation to the words. Although there is no authority which says that the whole of the section should be read in a liberal way, it is submitted that the courts have endeavoured to give it such an interpretation so that it may be given commercial effect: *Wallis* v. *Russell.*[7] It is not necessary to prove an absolute reliance; it is sufficient if there is a substantial and effective reliance, although the section does not specifically say so.

The fundamental fallacy underlying the judgments below which concluded in favour of the respondents is that they fail to give any effect to the fact, which was not in dispute, that when Bowman relied on the statements made to him by Corney on behalf of the respondents, Bowman was acting or purporting to act as the agent of the appellants. One looks at the whole of the surrounding circumstances to see the extent of the agency, which arises not only by express words but by implication, and the crucial question here was what, applying the ordinary laws of agency, was Bowman's authority? It is clear from the whole of the circumstances that he undoubtedly had implied authority to do that which he did—it is not necessary to prove specific authority. Once a buyer says "I want a Breda tractor for road "purposes," he makes that purpose known so as to show that he relies on the seller's skill or judgment. Bowman possessed authority to tell the sellers the purpose for which the tractor was required, and that covered disclosing that purpose so as to show that he was relying on the sellers' skill or judgment.

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[1] (1868) L.R. 3 Q.B. 197, 202 et seq.

[2] (1829) 5 Bing. 533, 544.

[3] (1877) 2 Q.B.D. 102, 107–108, C.A.

[4] (1887) 12 App.Cas. 284, 290–291; 3 T.L.R. 541, H.L.

[5] [1922] 2 A.C. 74, 79; 38 T.L.R. 526, H.L.

[6] [1934] A.C. 402, 422; 50 T.L.R. 350, H.L.

[7] [1902] 2 I.R. 585.

In *Barwick* v. *English Joint Stock Bank* [8] and *Lloyd* v. *Grace, Smith & Co.*[9] the primary test of agency was whether the act was done in the course of the master's business. The question can only be determined by looking not only at the express words but at all the surrounding circumstances and the task which the buyer was expressly asked to do: here Bowman was asked to go to a showroom, to see there one Corney, to have a look at the tractor and to see if it was suitable. Such instructions do not convey an express limitation that he was simply to look at the thing and nothing else; Bowman was entitled to assume that he was to be in effect the deciding authority. The sellers said that it would do the work for which it was required; nobody has had any doubt that there was reliance by Bowman. On agency, see also Bowstead on Agency, 11th ed., p. 32, and arts. 36 and 38. Further, the matter is not tested by the intention of the principal: art. 34 of Bowstead. [Reference was also made to *Ireland* v. *Livingston*,[10] *Dingle* v. *Hare* [11] and *Mullens* v. *Miller*.[12]]

If there was authority for Bowman to talk to Corney, the rest flows. The appellants accept as correct the following analysis of the facts by Owen J. in the Full Court of the Supreme Court: (1) Corney knew that Bowman was inspecting the tractor on behalf of the plaintiff which was considering purchasing it. (2) Corney knew that Bowman was to make a report to the plaintiff on the suitability of the tractor for road construction work. (3) Corney knew that Bowman, in forming his opinion and reporting on the suitability of the tractor, was relying to a material extent on Corney's skill or judgment. (4) In making his report to the plaintiff, Bowman did in fact rely to a material extent on Corney's skill or judgment. (5) The plaintiff purchased the tractor in reliance on Bowman's report.

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[8] (1867) L.R. 2 Ex. 259.

[9] [1912] A.C. 716; 28 T.L.R. 547, H.L.

[10] (1872) L.R. 5 H.L. 395.

[11] (1859) 7 C.B.N.S. 145.

[12] (1882) 22 Ch.D. 194.

It is clear on the authorities (*Manchester Liners Ltd.* v. *Rea Ltd.*,[13] *Medway Oil and Storage Co. Ltd.* v. *Silica Gel Corporation* [14] and *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.*[15]) that the application of the subsection is not ousted by the fact that the buyer may have employed an expert for the purpose of making inquiries about or inspecting or ordering the goods purchased. The submission is, however, that Bowman was not in the defined category of an "expert." He simply said that he was the engineer of the council. There was nothing in the conversation from which it could be suggested that Corney could have thought that Bowman was not relying on him. Further, it is not a necessary ingredient of the subsection that the servant or agent acting on behalf of the buyer who relies on the seller's skill or judgment should also be a servant or agent with authority to conclude the contract of purchase on behalf of the buyer. It is also irrelevant in law whether Bowman had authority from the appellants to rely on the respondents' skill or judgment or whether he had no such authority. As pointed out by Owen J., section 19 (1) does not imply that any contractual promise moves from the buyer. The authority of an agent of a buyer who in fact relies on the seller's skill or judgment, and who does so to the seller's knowledge, is therefore irrelevant. This last submission is, of course, made on the assumption that Bowman had not the authority which it is submitted he had. In none of the three last-cited cases (*Manchester Liners*, *Medway Oil* and *Cammell Laird*) was there any question raised by way of argument that it was not the actual buyer in those cases who was making the purpose known, and in none of those cases was the question now raised a relevant matter for decision.

As regards the question whether the statements made by Corney to Bowman were contractual in their effect, they were contractual for the purposes of section 19 (1). For the purposes of that subsection it is not necessary that the seller should have made a statement which, having regard to the manner in which it is made and the terms in which it is expressed, can be treated as having the characteristics of an express warranty. Thus, as pointed out by Lord Sumner in the *Medway Oil* case,[16] the subsection may come into operation in cases where the seller says nothing specific but merely supplies a certain article in response to a request to supply an article which the buyer requires for a particular purpose. The statements made by Corney bring this case within the subsection.

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[13] [1922] 2 A.C. 74.

[14] (1928) 33 Com.Cas. 194, H.L.

[15] [1934] A.C. 402, H.L.

[16] 33 Com.Cas. 194, 197.

In summary: (1) The particular purpose for which the council required the tractor was made known to the respondents by Bowman, who had authority from the council to make the particular purpose known to Corney. (2) (a) Bowman *in fact* made the particular purpose known to Corney *so as to show* that the council relied on the respondents' skill or judgment. (b) Bowman relied upon Corney's assurance that the tractor was suitable for the particular purpose, and thereby the council so relied. (c) Alternatively to (b), the council so relied because the council purchased the tractor on the basis of Bowman's favourable report, which report was in turn based on Bowman's reliance on Corney's assurances. (3) Alternatively to (1), Bowman had authority from the council (i) to make the particular purpose known to Corney *and* (ii) to rely on Corney's skill or judgment, but the appellants submit that the authority under (ii) is not required by the section. (4) Alternatively to (2) and (3) the appellants submit that the precise scope of Bowman's authority is irrelevant, since Corney understood him to speak on a prospective buyer's behalf in such a way as to manifest to Corney a reliance upon Corney's judgment. (5) A reliance under the section can arise by implication from the circumstances and need not necessarily be directly made to the person who personally takes the decision to purchase the article in question. (6) There is no distinction between the reliance on the part of a plaintiff required to support an action for fraud and the reliance on the part of a plaintiff required to support an action under the section. If Corney had acted fraudulently in telling Bowman that the tractor was suitable for road making and all other facts had been the same, then the appellants submit that they would be entitled to succeed equally in deceit or under the section. (7) The true sense of the transaction was one for the sale of a tractor for the particular purpose of road making. The requirements of the section were satisfied by a combination of (a) the purpose being made known to the sellers by the buyers' representative and (b) the tractor being supplied for the particular purpose of road making.

Kerr followed.

R. G. Reynolds Q.C. and *R. J. Bainton* (both of Australia) for the respondents. On this appeal the facts and their interpretation are all important, and the authority of Bowman is of the utmost importance. The submission is that he was not authorised in the legal sense to do anything; he was requested ultimately to furnish his opinion. To the knowledge of the council he had quite a considerable experience in the very matter upon which they were seeking his opinion, and it is submitted that he went there as an expert selected by the buyers, and not as an agent. The relevant considerations of law are: (1) It is well established that the buyer must in fact rely on the seller's skill or judgment: the *Medway Oil* case.[17] (2) That question is of necessity one of fact: again the *Medway Oil* case. (3) This reliance must be affirmatively shown; the onus to show it is on the buyer. (4) Communication of the fact of reliance by the buyer to the seller must also always be proved affirmatively, by inference or by direct evidence—again the onus is on the buyer. (5) Today it is the statute which must govern the rights of the parties, and resort to cases before 1893 only leads to confusion. (6) The crucial time of reliance is the time of making the contract.

It is here a question of competing inferences and a question of fact and degree, and to some extent the proper interpretation to be put on the facts: the *Cammell Laird* case.[18] The appellants fail in this case unless it can be said that reliance by Bowman, and a showing of his reliance, is reliance by the council, and there is no such reliance. Bowman had no authority of any kind with the flavour of a contract—no authority to enter into negotiations. It is going too far to say that a man in this situation is an agent. On a true view of the facts the council purchased the tractor in reliance on a report expressing the opinion which was the result of the skill or judgment of an engineer appointed for the purpose of making that report and for that purpose alone: see the *Medway Oil* case.[19]

An agent is a person who has the capacity to work for another so as to bind him or to affect his legal relationship; to see whether he is an agent one must look at the terms of the appointment. This case is the antithesis of the case of reliance on the skill or judgment of an agent; Bowman had no authority; he was merely asked to inspect; the fact that he said that he was the engineer cannot give him any more authority than he had. If you are going to rely on an expert it makes no difference that he is going to enter your service at some later date. Bowman was not the agent of the council to act for it so as to bind it or affect its legal relations with others in any way, and any reliance which Bowman may have placed on the sellers' skill or judgment is not to be imputed to the council. Some weight must be given to the trial judge's findings of fact in such a case as this; they were right and, even if open to question, should not be disturbed. The judgment appealed from is correct.

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[17] 33 Com.Cas. 194.

[18] [1934] A.C. 402, 426.

[19] 33 Com.Cas. 194, 197.

Meares Q.C. in reply. Mr. Reynolds looks at the case as though Bowman was isolated from the council. [*Australian Knitting Mills Ltd.* v. *Grant* [20] was referred to.] Bowman was by no means an expert.

Nov. 29. The judgment of their Lordships was delivered by LORD REID, who stated the facts set out above and continued: The facts which give rise to the issue whether the requirements of the section were satisfied are somewhat unusual and it is necessary to state them in some detail. Early in 1951 the appellants wished to acquire a tractor for use in their road construction work. The shire clerk, Heywood, heard of a Breda tractor which the respondents had for sale in Sydney. Early in March the appellants appointed a new shire engineer, Bowman, after seeing him and satisfying themselves as to his qualifications. Bowman was still employed on other work and did not take up his duties or become the servant of the appellants until after the events with which this case is concerned. It was to be part of his duty to supervise road construction work and he had some experience of this and of the working of tractors in this connection. On or about March 12 Bowman was in Sydney. Heywood was aware of this and, after consulting Black, the president of the shire council, and certain councillors, he telephoned to Bowman. This telephone conversation is very important because much turns on the inferences which should be drawn from it.

Bowman said in evidence that Heywood told him that the council was interested in purchasing a tractor and asked him whether he would be so kind as to go and have a look at the tractor which could be seen at the respondents' showroom. He replied: "Yes. I will probably go and see them tomorrow." He added that nothing else was said besides a few pleasantries. Heywood's evidence is brief. "Q. Did you then ring up the "engineer? A. Yes. I rang Mr. Bowman. He was in Sydney "at the time. Q. What did you ask him to do? A. I asked him "would he go to Dependable Motors and have a look at the "tractor and see if he thought that it was suitable for the work

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[20] (1933) 50 C.L.R. 387.

"we required. Q. Was that something which you did on the "instructions of the council? A. Yes." There was no cross-examination. Bowman said that he was told to ask for Corney, but it does not appear whether or not he was told that by Heywood. It is not disputed that Bowman was aware of the type of work for which the tractor was required.

The next day Bowman went to the respondents' premises and met Corney, who was their joint managing director. Again it is important to have in mind exactly what took place, and their Lordships will set out the important part of the evidence. It appears that Bowman spent half an hour or an hour with Corney. Their Lordships quote from Bowman's evidence in chief: he did not depart from or modify it in cross-examination.

"Q. Would you tell us in direct speech what was said and "done by both of you then? A. In the first place I said to Mr. "Corney—I gave him my name and so on and I said: 'I am here "'on behalf of the Ashford Shire Council. I understand they are "'interested in a tractor which you have for sale and I would "'like to see it.' He said, 'There is the tractor over there'—it "was towards the front of the building. We walked over to the "tractor and I said to Mr. Corney, 'Can you tell me anything "'about it?' and he proceeded to point out a few good points "about the tractor—such as its robust construction. I think he "bent down to look at it underneath and I bent down too. He "pointed out the framework underneath and then he mentioned "something about the construction of the tractor—which was "unorthodox so far as tractors were concerned. He pointed out "that the tracks were made on what you would call unitary "construction. The pads and the rails of the tracks were cast in "one piece rather than assembled in two pieces, as is usual with "tractors.

"Mr. Reynolds (for the respondents): Q. Is that what he said "or what you observed? A. Really, what I observed. I mentioned the fact to him—that they were constructed somewhat "along unorthodox lines and he said, 'Yes. That is a special "'construction of this company. It is their own particular "'method. The tracks are made of a particular type of steel— "'specially treated to give very long life and work, and it has "'very high wear-resistance qualities.' I think he then started "the motor up. The motor seemed quite good actually. It ran "for a few minutes. This was a fairly big tractor and it made a "big noise in the showroom. He turned it off after a few "minutes. We discussed it further and I said to him, 'Tell me "'something about it. What are its capabilities? What is its "'horse-power?' and he said, '85 h.p.' I said, 'What about "'the weight?' and he said, 'It is about 7 tons in weight.' "I then asked, 'Do not you think that is a bit low for the horse- "'power?' and he said, 'Oh no. There are 7 or 8 others of this "'particular make of tractor in operation at the moment.' He "mentioned one up the North Coast—I think it was at Casino. "I am not sure on that point. There was another one up round "Tamworth somewhere, I think, and he said they were giving "good service. We had quite a lengthy discussion on the actual "tracks of the machine. They were of a kind that I was a bit "worried about—(Objected to).

"His Honour: Q. Would you give the conversation as well "as you can? A. Well, it is difficult, of course. I cannot "remember much that was said. He pointed out to me the "firm that had made the tractor—he said, 'It is a very reputable "'firm. It is a very big firm engaged in the manufacture of "'locomotives as well as tractors. It is quite an outstanding "'firm in Italy,' and he added that there was no doubt about "the quality of the machine or the quality of the tracks. Then "I said to him, 'Will this machine do the work *we* expect it to "'do?' and he replied, 'What do you expect it to do?' I said, "'It will be engaged entirely on road construction work,' and he "said, 'What does that entail?' I said, 'Clearing, some clearing "'and a lot of dozer work, and quite a lot of scoop work. The "'council had already purchased a 6–8 yard scraper scoop.' It "was a Le Tourneau make, purchased from Tutt Bryants. I then "said, 'This tractor will be required to haul that scoop. Will "'it be capable of doing that?' and he replied, 'Yes. That is "'the type of work the tractor is built for. It is just the type of "'work to suit it.'"

Their Lordships will not quote from the evidence of Corney because the argument before them proceeded on the footing that Bowman's evidence could be accepted. They will only note that Corney said that Bowman introduced himself as the shire engineer and said that he had been instructed to give a report on the tractor to his council with a view to purchase; and that, while Corney denied that Bowman asked him whether the tractor was suitable, he admitted that he believed that it was suitable for council work and would have said so if he had been asked.

The other matter of fact to which great importance was attached in argument is the report made by Bowman after

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his conversation with Corney. There was no written report. Heywood said: " Q. Did Mr. Bowman subsequently ring you up? " A. He rang me back within a day or two; I could not just be sure " when. Q. What did he report on it? A. He told me that he had " inspected the tractor. It seemed to him to have plenty of horse-" power and was big enough for the work we required. Q. Did " you communicate that to the various councillors, including the " president? A. Yes. Q. Did you then receive instructions from " the president as to its purchase? A. Yes." The president, Black, was asked whether in giving these instructions he relied on Bowman's report, and he answered " Yes. I had nothing else " to rely on."

On these facts the respondents' main contentions were briefly, first, that Bowman had no authority from the appellants to make known to the seller on their behalf the particular purpose for which the tractor was required and had no authority to place reliance on the seller's skill or judgment, because the sole duty entrusted to him was to make up his own mind about the suitability of the tractor; and, secondly, that whatever reliance Bowman may have put on the seller's skill or judgment in deciding what report to make, the buyer (the appellants) cannot have so relied if only because no councillor and no servant of the council was aware of what had passed between Bowman and Corney when the appellants bought the tractor.

The first question to be decided is the nature and extent of the authority given to Bowman by the appellants. That depends on the proper interpretation to be put on Heywood's brief telephone conversation with Bowman on March 12. It must, in their Lordships' judgment, be held that Bowman was given sufficient authority to enable him to perform the task which was then entrusted to him, and so the real question is—what was the task which Bowman then undertook to perform? That question must be answered by considering the words which Heywood used in the light of the circumstances known to both parties.

The respondents' submission is that what Bowman was asked to do was merely to go and inspect the tractor and use his own judgment in deciding whether he thought it suitable for road work, and that he should be regarded as an independent expert commissioned by the appellants to give them his expert advice about the tractor. The other interpretation is that he was to act on behalf of the appellants in the same way as he would have done if he had already entered on his duties as shire engineer. There is, their Lordships apprehend, no doubt that, if he had already taken up his duties as shire engineer, it would have been part of his duty to advise the council if asked to do so, and that if he had been asked, while shire engineer, to do what in fact he was asked to do on March 12, he would have had authority to ask for and receive assurances on behalf of the appellants: if as shire engineer he had received the assurances which, in fact, he received from Corney, the appellants could have relied on these assurances as having been given to them. The appellants being a corporate body must act through some person, and in a case like the present the obvious person would be the shire engineer.

The opinions of the judges of the High Court and of the Supreme Court of New South Wales were sharply divided on this matter, and their Lordships have given it their anxious consideration. In their Lordships' view the words of a brief conversation of this kind should not be considered in isolation, and Heywood's words should not be regarded as intended by themselves to define the legal basis on which Bowman was to act. The question is rather what meaning Heywood's words were calculated to convey to Bowman, and that involves consideration of the facts which were known to them when the conversation took place. Bowman had a good working knowledge of the use of tractors in road construction but he was not a technical expert in tractor construction. He was not asked to submit a written report and he was not paid for what he was asked to do. He was asked, and agreed, to carry out his task as an obligement to his future employers. He would become responsible to them in due course for working the tractor and his task was one which would naturally have fallen to him as part of his duties if he had already assumed the duties of the post to which he had been appointed. In these circumstances their Lordships, while recognising that no inference can be drawn with absolute certainty, have come to be clearly of opinion that the proper inference in this case is that Bowman was being asked to anticipate his duties as shire engineer and to do gratuitously what it would have been his duty to do if he had already become the appellants' servant. Certainly that was Bowman's understanding: he said in evidence that he told Corney that he had come on behalf of the appellants, and Corney said that he introduced himself as the shire engineer. In their Lordships' judgment Bowman was correct.

The extent of an agent's authority, if in doubt, must be determined by inference from the whole circumstances. If the task entrusted to Bowman was to act for the appellants as if he were already their servant then, in their Lordships' judgment, it must be inferred that he was given such authority as he would have had if he had already become their servant. It may be that, if a technical expert is called in to give independent advice to a buyer on the merits of certain goods, the terms of his engagement will not authorise him to disclose to the seller the particular purpose for which the goods are required, or to accept assurances from the seller as the basis of the independent advice which he is being paid to give. But Bowman was not called in because he was an independent technical expert; neither Heywood nor Black had any ground for supposing that he was an expert in these matters; and he was not being paid. If he was to act as if he were already performing the duties of shire engineer, the natural thing for him to do would appear to be just what, in fact, he did: to disclose to the seller the purpose for which the tractor was required and to seek assurances about it. The seller as agent for this make of tractor might be expected to know better than Bowman what work it was capable of doing. In their Lordships' judgment Bowman was acting within the scope of his authority in disclosing to the seller on behalf of the appellants the particular purpose for which the tractor was required. And if he had authority so to act on behalf of the appellants, that must cover disclosing that purpose so as to shew that he was relying on the seller's skill or judgment in making his report to the appellants.

Their Lordships turn to Corney's position. Did Bowman shew him that the buyer was relying on his skill or judgment? Corney thought that Bowman was the shire engineer and knew that after their conversation he was going to report to his council with a view to their buying the tractor. He must have realised—any reasonable man would have realised—that in making his report Bowman intended to rely on the assurances which he had given, and he had no reason to suppose that the appellants were not so relying when they placed their order.

The respondents argue that that is not sufficient because in ordering the tractor the appellants did not, in fact, rely on what had taken place between Bowman and Corney: Bowman never told them about this and a person cannot rely on something of which he is ignorant. The respondents found on well-known statements of the law. " Such a reliance must be affirmatively " shown; the buyer must bring home to the mind of the seller " that he is relying on him in such a way that the seller can be " taken to have contracted on that footing. The reliance is to be " the basis of a contractual obligation " (*Cammell Laird & Co.* v.

Manganese Bronze & Brass Co.,[1] *per* Lord Wright). " . . . the "reliance in question must be such as to constitute a substantial "and effective inducement which leads the buyer to agree to "purchase the commodity" (*Medway Oil & Storage Co.* v. *Silica Gel Corporation*,[2] *per* Lord Sumner). They argue that what Corney said cannot have been an inducement leading the appellants to purchase the tractor: the appellants relied solely on what Bowman told them and he said nothing about his conversation with Corney.

Such general statements of the law do not deal with the position of a buyer who acts through agents or servants, as a corporation must do. There is no doubt that the making known to the seller of the buyer's particular purpose may take place during negotiations which precede the making of the contract of sale and that there need be no reference to this in the contract itself. What is necessary is that the buyer shall contract in reliance on what took place during the negotiations, and that his reliance at the time when the contract is made "is a matter of "reasonable inference to the seller and to the court" (*per* Lord Sumner in *Manchester Liners Ltd.* v. *Rea Ltd.*[3]). If the agent who conducts the negotiations is the same person as the agent who makes the contract on behalf of the buyer there is no difficulty. But the case where they are different persons has to be considered. In the present case Bowman conducted the negotiations on behalf of the appellants and Heywood made the contract on their behalf. The question is whether it is necessary that the former should have made the latter fully aware of what took place during the negotiations before the latter agent made the contract.

The appellants, being a corporation, cannot itself rely on or be induced to act by anything: it can only rely on or be induced to act through its agents or servants. Bowman was its agent when obtaining Corney's assurances. Equally Black, the president of the council, and Heywood were only its agent and servant when deciding to order and ordering the tractor. Black and Heywood were induced to do this by Bowman's report, and that report was induced by the seller's assurances received by Bowman on behalf of the appellants. Black was not the appellant corporation, and their Lordships cannot hold that their answer to the question

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[1] [1934] A.C. 402, 423; 50 T.L.R. 350, H.L.

[2] (1928) 33 Com.Cas. 195, 196, H.L.

[3] [1922] 2 A.C. 74, 90; 38 T.L.R. 526, H.L.

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Ashford Shire Council v. Dependable Motors Pty. Ltd.

whether the appellant corporation is to be held to have relied on the seller's skill or judgment should be affected by the fact that Black was not told what had taken place between Bowman and the seller.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and that the order of September 10, 1958, of the Full Court of the Supreme Court of New South Wales should be restored. The respondents must pay the appellants' costs in the High Court of Australia and before their Lordships.

Solicitors: *Fisher, Dowson & Wasbrough; Galbraith & Best.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1960
May 2, 3;
June 21.

ABBOTT . . . . APPELLANT;

AND

PHILBIN (INSPECTOR OF TAXES) . . . . RESPONDENT.

Revenue—Income tax—Employment—Perquisite—Option to purchase shares—Purchase of option to subscribe for shares in employing company—Whether perquisite—Whether emolument—Whether taxable in the year of purchase or the year of exercise—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, c. 10), *Sch.* 9, *r.* 1.

In October, 1954, the taxpayer, who was at all material times secretary of a company, was granted an option to purchase 2,000 ordinary shares in the company at the price of 68s. 6d. per share. The price of the option was £20, and it was expressed to be non-transferable and to expire after 10 years or on the earlier death or retirement of the taxpayer. In March, 1956, when the market price of the shares was 82s. per share, the taxpayer exercised the option in respect of 250 shares. The taxpayer was assessed to income tax under Schedule E of the Income Tax Act, 1952,[1] in the year 1955–56 on the difference between the option price and the market price of the shares (with a deduction of a proportionate part of the cost of the option), as being an emolument received by him by virtue of his employment. The taxpayer appealed on the ground that the assessment should have been made in the year 1954–55:—

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD KEITH OF AVONHOLM and LORD DENNING.

[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall be "annually charged on every person "having or exercising an office or "employment of profit mentioned in "Schedule E, . . . in respect of all "salaries, fees, wages, perquisites or "profits whatsoever therefrom for the "year of assessment . . ."

Held (Lord Keith of Avonholm and Lord Denning dissenting), that the taxpayer should be assessed under Schedule E in respect of the year 1954–55 when the option was granted, since what taxable receipt there was lay in the acquisition of the option and it was its monetary value (if any) at that date which represented the profit or perquisite of the office (post, pp. 368, 377).

Per Lord Reid. Conditions and restrictions attached to or inherent in an option may affect its value but are only relevant on the question whether the option is a perquisite if they would in law or in practice effectively prevent the holder of the option from doing anything when he gets it which would turn it to pecuniary account (post, p. 376).

Per Lord Radcliffe. The conferring of a right of this kind as an incident of service is a profit or perquisite which is taxable as such in the year of receipt, so long as the right itself can fairly be given a monetary value, and it is no more relevant for this purpose whether the option is exercised or not in that year than it would be if the advantage received were in the form of some tangible form of commercial property (post, p. 379).

Tennant v. *Smith* [1892] A.C. 150; 8 T.L.R. 434, H.L. considered.

Forbes's Trustees v. *Inland Revenue Commissioners*, 1958 S.C. 177; 38 T.C. 12 overruled.

Per Lord Keith of Avonholm and Lord Denning. An option is not itself a perquisite or profit. It is on the exercise of the option that the benefit accrues and if capable of being valued in terms of money is assessable to tax (post, pp. 381, 387).

Decision of the Court of Appeal [1960] Ch. 27; [1959] 3 W.L.R. 739 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Sellers and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated October 6, 1959, allowing an appeal by the respondent, A. J. Philbin (Inspector of Taxes), from an order of the High Court (Roxburgh J.) dated March 19, 1959, whereby an appeal by the appellant, E. C. Abbott, by way of case stated from a determination of the Commissioners for the Special Purposes of the Income Tax Acts was allowed and their decision was reversed.

The matter arose upon an assessment made upon the appellant for the year of assessment 1955–56 under Schedule E of the Income Tax Act, 1952, in respect of emoluments from his employment by E. S. & A. Robinson Ltd. (hereinafter called " the "company") and the question at issue was whether the appellant, having been granted by the company in the year of assessment 1954–55 an option, expressed to be non-transferable, to subscribe for shares in the company, and having in the year of assessment 1955–56 exercised such option, and acquired certain shares in pursuance thereof, was properly assessable for the said year of assessment 1955–56 in respect of the excess of the value of the said shares at the time of their acquisition by him over the expenditure incurred by him for the purpose of the said acquisition. It was not disputed by the appellant that by reason of the matters aforesaid he derived a perquisite from his said employment, but it was contended for the appellant that such perquisite was the option acquired by him in the year of assessment 1954–55 and that he would be assessable in that year to the extent of any excess of the value of the option over the expenditure incurred by him in the acquisition thereof but was not assessable in the year 1955–56 on the basis of the benefit obtained by him from his exercise of the option.

The following facts were proved or admitted before the commissioners. The appellant was at all material times the secretary of the company which carried on business as wholesale stationers. At the annual general meeting of the company held on June 28, 1954, it was resolved that 250,000 of the 290,319 unclassified shares of £1 each in the capital of the company be classified as ordinary shares and that the directors be authorised to grant options over such 250,000 ordinary shares, or any of them, to executives of the company or its subsidiaries at such times and generally on such terms and subject to such conditions as the directors should think proper.

Pursuant to that resolution the directors at a board meeting held on October 6, 1954, resolved that options, upon the terms contained in a draft letter produced to the meeting, to subscribe for ordinary shares in the company at 68s. 6d. per share (being the middle price ruling on the Bristol Stock Exchange on that date) be granted to the executives, and in respect of the numbers of shares, specified in a list produced to the meeting, and the secretary was instructed to dispatch a letter in the form of the draft to each of the executives.

Accordingly, pursuant to his instructions, the appellant as secretary of the company dispatched on that date to the executives a letter of the salient conditions, which were that the employee was granted, at the price of £1 for every 100 shares, an option to purchase a specified number of shares at the price of 68s. 6d. per share, such option to be exercisable at any time within 10 years from the date of grant of the option. The option was expressed to be non-transferable and was to expire upon the death or retirement of the employee before the expiration of the 10 years. If the employee desired to purchase the option he was required to send in a form of application, which accompanied the letter, together with his cheque for the price of the option, whereupon an option certificate would be issued to him. Option certificates were not in fact issued until May 6, 1955, by which time the company had obtained in response to an application of March 4, 1955, the consent of H.M. Treasury to the issue of shares in response to the exercise of options, and by letter dated May 9, 1955, option holders were so advised.

The appellant was included in the list of selected executives above referred to as the prospective grantee of an option in respect of 2,000 shares, and on October 7, 1954, he sent in an application to the company to purchase an option in respect of such 2,000 shares on the terms of the company's letter of October 6, 1954, and forwarded with such application a cheque for £20, which was duly cashed by the company. Owing to the circumstances mentioned above he was not given an option certificate until May, 1955, but such certificate stated on its face that the option was granted on October 6, 1954. It was common ground between the parties that on that day no binding contract for the grant of the option was in existence but that such a contract came into existence on the following day, October 7, 1954, by virtue of the appellant's acceptance on that day of the offer made to him by the company. The terms and conditions applicable to the options were endorsed on the certificate.

Under the terms of the option any number of shares up to the number of 2,000 could be applied for by the appellant and on March 28, 1956, the price of the company's shares having then risen to 82s., he applied to the company for 250 ordinary shares at the option price of 68s. 6d. per share, sending with such application the sum of £856 5s., and he was duly allotted the said shares.

The appellant was assessed to tax under Schedule E for the year 1955–56 in the sum of £7,086 which included the sum of £166 in respect of the share transaction, that sum of £166 being made up as follows:

	£	s.	d.	£	s.	d.
250 shares taken up on March 28, 1956, when the middle market price was 82s.				1,025	0	0
Deduct: Option price 68s. 6d.	856	5	0			
cost of option at £1 per 100 shares	2	10	0	858	15	0
				£166	5	0

Such assessment charged the appellant to tax under Schedule E for the year 1955–56 in respect of the benefit of being able to purchase shares worth 82s. at a cost of 68s. 6d. plus a proportionate part of the price of the option, and, tax under Schedule E being in respect of the current year's emoluments, such charge was appropriate to tax a benefit arising in the year April 6, 1955, to April 5, 1956.

It was contended on behalf of the appellant that the contract of option vested a right of property in him forthwith; that such right represented money's worth and was inherently capable of realisation; that such right was, to the extent of any excess in value over the price paid therefor, an emolument of his employment assessable under Schedule E in the year of assessment 1954–55 and not otherwise; that the shares issued to him in the year 1956 were issued in virtue only of the right of property acquired by him in the previous year of assessment; and that any excess in value of the shares, when issued, over the price paid therefor represented an appreciation in the value of an item of property owned by him and was not an emolument of his employment.

It was contended on behalf of the respondent that when the shares were issued to the appellant there arose or accrued to him a profit from his employment assessable to tax for the year 1955–56; that the profit so assessable amounted to £166, computed as set out above; and that the appeal should therefore be dismissed and the assessment confirmed.

In their decision, which they gave in writing on April 9, 1958, the special commissioners said that they considered the present case to be indistinguishable from that of *Forbes's Trustees* v. *Inland Revenue Commissioners*,[2] and that the decision of the Court of Session in that case was binding upon them. In the present case the appellant had paid a small sum for his option, whereas Mr. Forbes was given his option, but they did not consider this difference to be material. In each case it was common ground that a benefit accrued to the appellant as part of his remuneration, and in each case the rights granted were personal to the appellant. Accordingly, they dismissed the appeal, and, figures having been subsequently agreed in accordance with their decision, on May 22, 1958, confirmed the assessment.

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[2] 1958 S.C. 177; 38 T.C. 12.

F. Heyworth Talbot Q.C., *R. O. Wilberforce Q.C.* and *Desmond Miller* for the appellant taxpayer. The Crown contends that for the year 1955–56, when the appellant exercised this option, he increased his tax liability under Schedule E in that he was assessable on the difference between the then market price of the shares taken up and the option price of those shares. It was only because the appellant was an official of the company that he was entitled to exercise the option, and, therefore, the appellant concedes that if the option he acquired in 1954 was worth more than the £20 paid for it the difference would constitute taxable subject-matter for the year 1954–55. But the appellant contends that any subsequent benefit he obtained, whether by exercise of the option or by a realisation of the shares, represents an appreciation of an item of property and not an emolument of his office as secretary of the company.

Suppose a company offers an employee the opportunity of subscribing at par for 100 £1 shares at a time when the market value of those shares is £3 a share. By accepting the offer the employee secures an immediate benefit of money's worth to the value of £200. Prima facie that benefit constitutes a taxable amount for the year in question. But if the employee, after taking up the shares, subsequently sells them for £500 he is not taxable on the further gain of £200, not even if he sells them whilst still in the service of the company, because that further gain is an appreciation of an item of property. It is nihil ad rem that he has acquired that item of property as holder of an office. The Crown's case here rests on the fact that the option was expressed to be non-transferable, but although the option qua option was not assignable at *law* that cannot affect its nature as an item of property—a chose in action. In October, 1954, the appellant acquired a chose in action, something which of its very nature was capable of being turned to pecuniary account there and then, and it was its monetary value at that date which represented the profit or perquisite of the office, and it was that which was chargeable to tax under Schedule E. If the option was worth more than £20 when it was granted, the excess value is taxable. The question is, was the option something which could be "turned into money" or "turned to pecuniary account"?—*per* Lord Halsbury L.C. and Lord Watson in *Tennant* v. *Smith.*[3]

Salmon v. *Weight*[4] is distinguishable. It was not an option case because the directors there could have withdrawn their offer at any time. No profit of any kind was received until the application had been accepted and the shares had been allotted. The parallel between that case and this would be between the shares *issued* and *accepted* by Salmon and the option granted to and accepted by the appellant. *Bridges* (*Inspector of Taxes*) v. *Bearsley*[5] is also distinguishable, for in that case the issue of shares was a reward for continuing in the service of the company. Reliance is placed on *Hochstrasser* (*Inspector of Taxes*) v. *Mayes*,[6] for just as there the conclusion rested on the view that the payment of £350 sprang from the agreement to indemnify and not from the service contract, so here, the benefit obtained by the appellant in March, 1956, when he exercised the option, was the benefit which sprang from the option contract. The causa causans was the option contract and not the fact of employment albeit that the latter was the causa sine qua non. The moment at which the option becomes the property of the holder is the time it has to be valued for tax purposes, for that is when it becomes a perquisite. Any increase thereafter is irrelevant since it is a capital gain.

The subject-matter of the perquisite is the option, the chose in action, a piece of personal property; and a third person might well have been prepared to pay money for the right to have the option exercised for his benefit. Provided that the rights are in their nature capable of being turned to pecuniary account the fact that it is difficult to assess their value is irrelevant.

The Crown rely on the decision of the Court of Session in *Forbes's Trustees* v. *Inland Revenue Commissioners*,[7] but it is submitted that case was wrongly decided and should be overruled for the reasons stated by Lord Evershed M.R.[8] In conclusion, the benefit which arose in the year 1955–56 by reason of the exercise of the option was in no way related to the emoluments of the appellant, or otherwise income of the appellant, for the year 1955–56 or any other year. Further, the payment of £20 in respect of the grant of the option has only been utilised in this case as a measure of the value of the option and not in relation as to whether or not the option was legally enforceable because of the consideration given. [Reference was also made to *Heasman* v. *Jordan* (*Inspector of Taxes*).[9]]

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[3] [1892] A.C. 150, 157, 159; 8 T.L.R. 434; 3 T.C. 158, H.L.

[4] (1935) 51 T.L.R. 333; 19 T.C. 174, 192, H.L.

[5] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; 37 T.C. 289, C.A.

[6] [1960] A.C. 376; [1960] 2 W.L.R. 63; [1959] 3 All E.R. 817, H.L.

[7] 1958 S.C. 177; 38 T.C. 12.

[8] [1960] Ch. 27, 44–46.

R. O. Wilberforce Q.C. following on the question of the non-transferability of the option. Although the option, when it was conferred in 1954, was non-transferable at law, it was nevertheless assignable in equity: *In re Turcan.*[10] An option to purchase land gives an interest in the land: *London and South Western Railway Co.* v. *Gomm.*[11] Similarly, if there is a contract for valuable consideration to purchase personal property the contract will attach to the property when it comes into existence. Here either (a) there was a proprietary interest in specific shares on the analogy of *London and South Western Railway Co.* v. *Gomm* [12]; or (b) when the shares come into existence by allotment the interest created by the option attached to such shares: *Tailby* v. *Official Receiver.*[13]

A declaration of trust can be made of a lease containing a clause forbidding assignment, and, also, of non-transferable shares in a private company. All such interests differ from a *purely personal* right which cannot be turned into money's worth by a declaration of trust in favour of another person, for example, the right of a railway employee to travel free on the railway, which is only available to the employee in question. It follows that the beneficial interest in this option could be disposed of even though the legal interest was not assignable.

Roy Borneman Q.C., *Alan S. Orr* and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the Crown. The question is whether this option can be turned to pecuniary account. Its value falls to be determined under Schedule E as interpreted by the authorities. Underlying the whole of the Crown's submissions is the proposition that, whatever be the subject of assessment under Schedule E, it is not assessable thereunder until it has been realised, that is, turned to pecuniary account in accordance with the term of the agreement between employer and employee. This option is a purely personal right. It is made specifically non-assignable and cannot be exercised after the employee has retired. That is the background against which the words of Lord Watson in *Tennant* v. *Smith*,[14] on which the appellant relies, must be viewed.

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[9] [1954] Ch. 744; [1954] 3 W.L.R. 432; [1954] 3 All E.R. 101; 35 T.C. 518.

[10] (1888) 40 Ch.D. 5, 10, C.A.

[11] (1882) 20 Ch.D. 562, C.A.

[12] Ibid.

[13] (1888) 13 App.Cas. 523; 4 T.L.R. 726, H.L.

The Crown's case is succinctly stated below by Sellers L.J.[15]: "If the option was never exercised it seems axiomatic that there "would be no profit and no accrued benefit. The contractual "right given by the company, and it was by the company to the "servant, the taxpayer, in this case could not be transferred, "and the view I should be inclined to take of the case, which, "I think, is in harmony with the *Forbes's Executors* case,[16] is "that that merely set up the machinery for creating a benefit—"that was its intention—which benefit ultimately accrued. It "is an ingenious device to avoid the incidence of taxation."

In every case it is necessary to ascertain from the facts the intended use of the benefit granted by the employer to the employee before it can be determined whether or not it satisfies Lord Watson's test.[17] A mere ability to find another person who will give value is not enough to bring the transaction within it. It is a misuse of Lord Watson's words to say that a benefit such as this is a "perquisite" within rule 1 of Schedule E provided it can be given some value in any manner whatsoever.

At the date of the grant of this option all that the appellant acquired was a right to take the shares upon fulfilling two conditions: (a) that he was still in the company's employment; (b) that he could pay for the shares. At the date of the grant of the option, hedged round as it was with those two conditions, the appellant was poised to take a benefit but he was not given a benefit within Lord Watson's definition. The option letters merely set up the machinery whereby shares could eventually be obtained. There is no essential difference between this agreement and the ordinary service agreement between employer and employee. In the Ninth Schedule in the Rules applicable to Schedule E, perquisites and salaries are found together and no distinction is drawn between them. The appellant conceded that salaries cannot be capitalised. Why should a different rule apply to perquisites? Suppose a service agreement for 10 years under which the employee receives £10 in the first year, £500 in the second, £2,000 in the third, £5,000 in the fourth, £20,000 in the fifth year reducing by stages to £100 in the tenth year. The only basis of assessment is what is received in any given year pursuant to the terms of the agreement, and there is no difference in principle between that case and the present. What has to be measured here is a contract right and nothing more. It is not a piece of property. The appellant is assessable in the year in which he exercises the option, for until then it is not a perquisite within Schedule E.

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[14] [1892] A.C. 150, 159.
[15] [1960] Ch. 27, 50.
[16] 1958 S.C. 177.
[17] [1892] A.C. 150, 159.

It is not sufficient to come within Lord Watson's definition [18] for the appellant to find anyone who will give him, for example, 10s. for the option, for in such a transaction the appellant is not dealing with the option but merely with the fruits of the option. Further, Schedule E is not concerned with gambling transactions, and that is what a third party is indulging in if he gives value for the option. Contrast the gift of a diamond ring with the giving of an option. The ring is on *receipt* money or money's worth, but the option is merely something which is *capable* of being money or money's worth on its exercise. That is the vital distinction between an item of property such as a diamond ring and a contractual right such as an option.

The appellants are using Lord Watson's words [19] as a formula. They cannot be so used, for they are referable to the facts of that case, although it is conceded that they are a useful guide in questions of this nature. The continuing relationship of employer and employee is a vital factor in the present case, and is implicit in *Forbes's Trustees* v. *Inland Revenue Commissioners*,[20] which, it is submitted, was rightly decided for the reasons there stated. In the present case, as in *Forbes's* case,[19] the employers never intended the employee to obtain anything until the option was exercised; until then it was merely an offer and as such was not capable of being turned to "pecuniary account."

In *Bridges* (*Inspector of Taxes*) v. *Hewitt*,[21] the question of the time at which liability to tax arose was discussed, but it was held that there was no liability, so that the observations were, admittedly, not part of the ratio. They are, nevertheless, a correct statement of the relevant principle because, although it was a case concerning remuneration, perquisites and salaries are within the same charging provision of the Ninth Schedule.

The appellant's argument comes to this: unless it can be shown that whatever is given is not worth the smallest coin of the realm the taxpayer is assessable on the option at the date of its grant. Lord Evershed M.R. in the Court of Appeal [22] overlooks the fact that if the taxpayer enters into a covenant with a third person for a money consideration to exercise the option in a particular way, the *option*, at the date of the covenant, is *still there* and has not been turned to pecuniary account since it has not been *exercised*. Further, the question to be posed is not, when did the appellant get this option, or why did he get it, but *did* he get it in 1956? Lord Evershed [23] in "tracing back" as it were the origin of this option is adopting a wrong approach, and his reference [24] to the possible anomalous position of assignable options is irrelevant to the present case. Anomalies are not unknown in the law of income tax.

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[18] [1892] A.C. 150, 159.

[19] Ibid.

[20] 1958 S.C. 177.

[21] [1957] 1 W.L.R. 674.

In conclusion, for the appellant to succeed, Lord Watson's words in *Tennant* v. *Smith* [25] have to be so interpreted that the grant of the option in 1954 was the perquisite. But that is plainly wrong, for at that date all that the appellant obtained was a right to *apply* for shares, and Lord Watson plainly had in mind, in using the words he did, something which came in at the moment of the grant, for example, the *Salmon* v. *Weight* [26] type of case.

Heyworth Talbot Q.C. in reply. Throughout the Crown's argument there was a recurrent theme, namely, that to give proper application to Lord Watson's words in *Tennant* v. *Smith* [27] it is necessary to take into consideration any understanding there may be between employer and employee as to the conditions under which the option is exercisable. It is relevant in this connection to consider an issue of shares to an employee. Roxburgh J.[28] referred to *Ede* (*Inspector of Taxes*) v. *Wilson & Cornwall*,[29] where Wrottesley J. held that despite a prohibition on sale the employee was assessable under Schedule E at the time of receiving the issue. Suppose the shares themselves were non-transferable, that only affects the value of the shares. It is irrelevant that there was an agreement or an understanding that the employee would not deal with the rights conferred on him, for that does not affect their nature as a perquisite. If *Ede* v. *Wilson* [30] be accepted as a correct decision, it is pertinent to ask: what is the difference between what Wilson obtained and what the appellant obtained? Wilson obtained shares at a beneficial price; the appellant obtained an option right—a chose in action. Wilson also obtained a chose in action, namely, shares. Similar considerations apply to *Salmon* v. *Weight.*[31]

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[22] [1960] Ch. 27, 44.

[23] [1960] Ch. 27, 38.

[24] [1960] Ch. 27, 44, 45.

[25] [1892] A.C. 150, 159.

[26] 51 T.L.R. 333; 19 T.C. 174.

[27] [1892] A.C. 150, 159.

[28] [1959] 1 W.L.R. 667, 672.

[29] (1945) 26 T.C. 381; [1945] 1 All E.R. 367.

[30] 26 T.C. 381.

The whole basis of the Crown's case is false, and this is underlined by the Crown's concession of the anomalous position of assignable options if the Crown's contention is accepted. The true principle is that the appellant is taxable on the value of the legally enforceable right he obtained on the grant of the option, over and above the price he paid for it, and it is an irrelevant consideration that there may be an understanding between employer and employee as to the conditions of its exercise.

Their Lordships took time for consideration.

1960. June 21. VISCOUNT SIMONDS. My Lords, this appeal relates to an assessment to income tax under Schedule E of the Income Tax Act, 1952, made upon the appellant for the year of assessment 1955–56 in respect of the emoluments of his office as secretary of E. S. & A. Robinson Ltd., which I will call "the "company." The Court of Appeal decided the case against him in deference to a decision of the Court of Session, *Forbes's Trustees* v. *Inland Revenue Commissioners.*[1] Your Lordships will find it necessary to review that case.

The facts are not in dispute. At the annual general meeting of the company held on June 28, 1954, it was resolved that 250,000 of 290,319 unclassified shares of £1 each in the capital of the company be classified as ordinary shares, and that the directors be authorised to grant options over such shares, or any of them, to executives of the company or its subsidiaries at such times, and generally on such terms and subject to such conditions, as the directors should think proper.

Pursuant to this resolution the directors of the company at a board meeting held on October 6, 1954, resolved that options upon the terms contained in a draft letter then produced to subscribe for ordinary shares in the company at 68s. 6d. per share (being the middle price ruling on the Bristol Stock Exchange on that day) be granted to the executives. The appellant, accordingly, as secretary of the company, sent to each of the executives, including himself, a letter, of which the salient conditions were that he was

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[31] 51 T.L.R. 333; 19 T.C. 174.

[1] 1958 S.C. 177; sub nom. *Forbes's Executors* v. *Inland Revenue Commissioners*, 38 T.C. 12.

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granted at the price of £1 for every 100 shares an option to purchase a specified number of shares at the price of 68s. 6d. per share, such option to be exercisable at any time within 10 years from the date of the grant of the option. The option was expressed to be non-transferable and was to expire upon the death or retirement of the executive (or employee, as I will call him) before the expiration of the 10 years. If the employee desired to purchase the option he was required to send in a form of application (which accompanied the letter) together with his cheque for the price of the option, whereupon an option certificate would be issued to him. The appellant, being included in the list as entitled to a grant of an option in respect of 2,000 shares, applied accordingly on October 7, 1954, for such option enclosing his cheque for £20 which was duly cashed. Some delay occurred in the issue of option certificates and he was not given his until May 6, 1955, but it bore on its face the statement that the option was granted on October 6, 1954. It was indorsed with the conditions as to the non-transferability and expiry to which I have referred.

On March 28, 1956, the price of the company's shares having then risen to 82s., the appellant exercised pro tanto his option by applying to the company for the issue to him of 250 shares at the price of 68s. 6d. per share, and sent with his application his cheque for £856 5s. The shares were duly issued to him. He was subsequently assessed to tax under Schedule E for the year 1955–56 in (inter alia) the sum of £166 which was made up as follows:

	£	s.	d.	£	s.	d.
250 shares taken up on March 28, 1956, when the middle market price was 82s.				1,025	0	0
Deduct: option price 68s. 6d.	856	5	0			
cost of option at £1 per 100 shares	2	10	0	858	15	0
				£166	5	0

The special commissioners upheld the assessment, considering the case indistinguishable from *Forbes's* case[2] to which I have referred. Roxburgh J., if I understand his judgment, thought it possible to distinguish that case and upon case stated allowed the present appellant's appeal. The Court of Appeal, as I have already said, decided in favour of the Crown.

[2] 1958 S.C. 177.

My Lords, once more your Lordships have to consider the words of rule 1 of the Rules applicable to Schedule E contained in the Ninth Schedule to the Income Tax Act, 1952, which are as follows: "Tax under Schedule E shall be annually charged on "every person having or exercising an office or employment of "profit mentioned in Schedule E . . . in respect of all salaries, "fees, wages, perquisites or profits whatsoever therefrom for the "year of assessment . . ."

Summarily the question is: Was the difference between (a) the market price on March 28, 1956, £1,025, and (b) the option price, £856 5s., plus a proportionate part of the cost of option, £2 10s., a "perquisite or profit therefrom," that is, from the office of secretary held by him, for the year of assessment?

The curious feature of this case is that the Crown appears to reach the conclusion that the sum of £166 was assessable for the year 1955–56 by first denying that the grant of the option was itself a perquisite or profit of the year 1954–55, and this is, I think, the aspect of the case that must first be examined. For it would not, as I understand the argument of counsel for the Crown, be contended that, if the grant of the option was itself a perquisite or profit arising from the office, the subsequent exercise of it would be another perquisite or profit.

My Lords, I cannot entertain any doubt that, when the company granted the option to the appellant, he acquired something of potential value. I do not think that it matters whether it falls into the category of proprietary or contractual right, or into some dim twilight that divides those juristic conceptions. We are concerned with a taxing statute whose language is to be reconciled with the law of England and Scotland alike, and the chosen words "perquisite or profit whatsoever" are as wide and general as they well could be. I can concede no relevant limitation of their meaning except in the oft cited words of Lord Watson in *Tennant* v. *Smith*[3] that they denote "something acquired which the "acquirer becomes possessed of and can dispose of to his advan- "tage—in other words, money—or that which can be turned to "pecuniary account."

How, then, can it be said that an option to take up shares at a certain price is not a valuable or at least a potentially valuable right? Its genesis is in the desire of the company to give a benefit to its employees and at the same time, no doubt, to enhance their interest in its prosperity. It is something which the employee thinks it worth his while to pay for: not a large sum truly, but £20 deserves a second thought. And it is something which can assuredly be turned to pecuniary account. This was challenged because the option was itself not transferable, but this objection is without substance. There was no bar, express or implied, to a sale of the shares as soon as the option was exercised, and there could be no difficulty in the grantee arranging with a third party that he would exercise the option and transfer the shares to him. It was further challenged on the ground (to quote the language of Sellers L.J. in the Court of Appeal[4]) that "a "notional use of the option or a use unintended and undesired by "the company, unrealised and unvalued" does not have the quality required by the accepted standard set by Lord Halsbury L.C. and Lord Watson in *Tennant* v. *Smith*[5] "to make it a taxable perquisite, if, indeed, it was a perquisite at all at that date." With great respect to the learned Lord Justice and to counsel who put it in the forefront of his argument, I find great difficulty in giving any weight at all to this consideration. It is mere guesswork what use of the option was intended or desired. I would not myself assume that the company intended that the grantee of an option should for ever, or for a day longer than he wished, hold the shares that he took up, or that he should not at once, if he wished, reap the benefit of a rise in price. But, guess right or wrong, there is nothing to prevent him doing so: that is his legal right, and, if he could so deal with the shares when acquired, nothing could prevent him so using his option by arrangement with a third party as to secure for himself a similar advantage. Two other adjectives are used by the Lord Justice, "unrealised" and "unvalued." But the fact that there was no realisation in the sense of actual turning into money is irrelevant. The test is whether it is something which is by its nature capable of being turned into money. Nor is it relevant that it is "unvalued." I have little doubt that, if the Revenue authorities had addressed their minds to the proper question, they could have ascertained whether it had any and what value. But again I must say that it is really irrelevant whether a value could be ascribed to it or not. If it had no ascertainable value then it was a perquisite of no value—a conclusion difficult to reach since £20 was paid for it. In my opinion, the Crown cannot succeed in this essential aspect of the case unless it is established as a general proposition that an option to acquire shares at a fixed price in such

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[3] [1892] A.C. 158, 159.

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[4] [1960] Ch. 27, 50, 51.

[5] [1892] A.C. 150, 156, 159.

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circumstances as those of the present case is not a perquisite of office. It must be shown that, even if at the date of the option being granted the market price is higher than the option price, the option is not a perquisite which falls within the Schedule. This appears to me an impossible proposition. What distinguishes such a right from that commonly given to a shareholder in a commercial company, when upon an issue of shares he is given in the form of a provisional allotment letter the right to take up new shares at a certain price? He can exercise his right and take up the shares or he can sell his right to do so, or he can do neither and let the offer go by default. But from the moment he has the letter he has a right of more or less value according to the circumstances. So, too, the grantee of such an option as that which we are considering has a right which is of its nature valuable and can be turned to pecuniary account. He has something at once assessable to tax.

My Lords, as I have said, the argument for the Crown appeared to demand for its success that the grantee of the option did not acquire a perquisite at the date of the grant. There could not be one perquisite at the date of the grant and a second perquisite when the shares were taken up. Therefore the Crown's case, in my opinion, fails at the initial step. But there are other grave difficulties in the way of its success. The taxable perquisite must be something arising "therefrom," i.e., from the office, in the year of assessment. I do not want to embark on the notoriously difficult problem as to the year to which for the purpose of tax a payment should be ascribed, if it is not expressly ascribed to any particular year. But I do not find it easy to say that the increased difference between the option price and the market price in 1956 or, it might be, in 1964 in any sense arises from the office. It will be due to numerous factors which have no relation to the office of the employee, or to his employment in it. The contrast is plain between the realised value, as it has been called, of the option when the shares are taken up (though the realisation falls short of money in hand) and the value of the option when it is granted. For the latter is nothing else than the reward for services rendered or, it may be, an incentive to future services. Unlike the realised value it owes nothing to the adventitious prosperity of the company in later years. On this ground also I should reject the claim of the Crown.

My Lords, as I have said, the Court of Appeal were constrained to decide this case in favour of the Crown in deference to the decision of the Court of Session in *Forbes*.[6] I agree that the two cases are not in any material respect distinguishable and think that they took the proper course in following it. The single fact upon which Roxburgh J.[7] appeared to rely, that in that case, unlike this, the grant of the option was gratuitous, cannot in my opinion affect the issue. The reasoning by which the learned judges in *Forbes*[8] supported the conclusion to which they came is that which formed the basis of the argument for the Crown on this appeal and I have already dealt with it. It treats the option as a thing of no value until it has been exercised and places an importance, in my opinion unjustified, on the non-transferability of the option. But, as I have pointed out, though that feature may reduce the value of the option, it cannot alter its character so that it is no longer something which can of its nature be turned to pecuniary account. Nor, even if it be the fact, can I accept the view clearly entertained by the Court of Session that, if in the year of grant the option had no value, it therefore became a taxable perquisite when in later years it was exercised. It was, in my opinion, a perquisite at the date of grant and, if it had no value, there was nothing to tax and that is the end of the matter.

Reference was also made to *Salmon* v. *Weight*.[9] This case does not assist the respondent. The taxpayer, Salmon, was a managing director of a limited company at a fixed salary. In addition the directors in each year gave him the privilege of applying for certain unissued shares of the company at their par value, which was less than the market value. He accordingly applied for shares and they were issued to him. He was assessed to tax on the difference between the par and market values and the assessment was upheld in the High Court and the Court of Appeal. The taxpayer appealed to this House and his appeal was dismissed. Lord Atkin, with whom the other learned Lords agreed, pointed out[10] that while the Board had expressed their willingness to entertain an application for shares, nobody was bound and no right was given and no profit was received of any kind by the appellant until the application had been accepted and the shares in question had been allotted to him. It is by no means a decision that, if the company had vested in him a right to have the shares allotted to him instead of allotting them forthwith, that right would not have been a taxable perquisite or profit.

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[6] 1958 S.C. 177.

[7] [1959] 1 W.L.R. 667, 682.

[8] 1958 S.C. 177.

[9] (1935) 51 T.L.R. 333; 19 T.C. 174.

[10] 51 T.L.R. 333, 334.

The facts in *Tait* v. *Smith*[11] are somewhat obscure but the decision of Wynn-Parry J. in that case appears, if anything, to be favourable to the appellant.

In *Bridges* (*Inspector of Taxes*) v. *Hewitt*[12] there are to be found observations of Danckwerts J. and Jenkins L.J. which support the contention of the respondent. But the substantial issue in that case was whether shares which had been issued to the taxpayer were or were not profits of his office. The question whether the profit lay in the right to acquire shares or in the shares when acquired was a subsidiary issue which in the event did not arise. If, as I think they probably were, the relevant facts of that case were indistinguishable from those of the present case, I must with respect decline to follow that decision.

Upon a consideration of the whole case I am of opinion that this appeal should be allowed with costs here and below.

LORD REID. My Lords, in 1954 the company of which the appellant is secretary offered to its executives options to buy a number of unissued shares at 68s. 6d., which was then the market price. The options were not transferable and were to endure for 10 years if the purchaser remained so long in the company's service. The price of the option was £1 per 100 shares and in October, 1954, the appellant acquired an option on 2,000 shares for which he paid £20.

The market price rose and in March, 1956, when the price was 82s. the appellant exercised his option to the extent of 250 shares and acquired them at 68s. 6d. If he had immediately sold those shares he would have made a profit of £166 and he has been assessed in this sum under Schedule E in the year 1955–56. Rule 1 of Schedule E is as follows: "*Ninth Schedule. Rules* "*applicable to Schedule E.* 1. Tax under Schedule E shall be "annually charged on every person having or exercising an office "or employment of profit mentioned in Schedule E, or to whom "any annuity, pension or stipend chargeable under that Schedule "is payable, in respect of all salaries, fees, wages, perquisites or "profits whatsoever therefrom for the year of assessment, after "deducting the amount of duties or other sums payable or charge-"able on the same by virtue of any Act of Parliament, where "the same have been really and bona fide paid and borne by the "party to be charged."

[11] (1954) 35 T.C. 79.

[12] [1957] 1 W.L.R. 59, 674, C.A.; [1956] 3 All E.R. 789; [1957] 2 All E.R. 281; 37 T.C. 289.

The parties agree that the appellant received something which comes within the words "perquisites or profits whatsoever." The question in this case is what it was. The appellant says that the option was the perquisite, and he admits that he was liable to be assessed for the year 1954–55 in respect of the value of the option when it was granted minus the price he paid for it. He maintains that the subsequent appreciation of its value is not taxable. On the other hand, the respondent maintains that he received no perquisite in 1954, the perquisite being the shares which were allotted to him when he exercised his option: if that is right the shares when allotted were worth £166 more than he paid for them and he has been properly assessed.

The first observation which I would make is that on the Crown's view the granting of the option in 1954 might result in 10 different perquisites being received by the appellant in 10 different years if he chose to exercise his option piecemeal. He was entitled to do this and in fact in 1955–56 he only exercised it to the extent of 250 out of 2,000 shares, and the company retained no control over the times at which or the extent to which he might exercise his option. If he did not exercise the last of his option until 1964–65 he would then, in the Crown's view, be receiving a perquisite taxable in that year in consequence of an irrevocable act of grace of the company 10 years earlier. If in 1965 he held 2,000 shares which he had acquired in 10 different parcels under his option he would have made precisely the same profit on each share—the difference between 68s. 6d., the price under the option, and the then market price. But he would have been taxed very differently in respect of each parcel, the tax depending on the market price at the date when he had acquired it—for it is not suggested that further appreciation after shares have been allotted can be taxed. Moreover, let me suppose that the option had been exactly the same except that it was to last for 10 years whether the appellant remained in the service of the company or not. It could hardly be that that change so completely altered the nature of the option as to change the basis of taxation and make the granting of the option and not the issue of the shares the perquisite. If, then, it was exercised years after the servant had retired what would the position be: would the issue of shares then be the perquisite and for what year of assessment would it be a perquisite? There would be no assessment under Schedule E for the year in which the shares were issued because the servant had retired. I realise that one ought not to be surprised at anything that happens under the Income Tax Acts but nevertheless all this does seem a little strange.

Both parties rely on *Tennant* v. *Smith*,[13] and in particular on the familiar passage in the speech of Lord Watson: "Is it, then, "a perquisite or a profit of his office? I do not think it comes "within the category of profits, because that word, in its ordinary "acceptation, appears to me to denote something acquired which "the acquirer becomes possessed of and can dispose of to his "advantage—in other words, money—or that which can be turned "to pecuniary account." I agree that the question is whether this option was a right of a kind which could be turned to pecuniary account. I do not use these words as a definition but it is undesirable to invent a new phrase if an old one of high authority fits this case, and the parties agree that it does.

But the test must be the nature of the right and not whether this particular option could readily have been turned to pecuniary account in October, 1954. Whether this option could then have been turned to pecuniary account is a question of fact and there is no finding about it. It is true that the option was not transferable, but there are other ways of turning such a right to pecuniary account than assigning it or calling for immediate performance of the obligation to allot the shares. Even taking this particular option I find nothing to indicate that there would have been much difficulty in finding someone who would have paid a substantial sum for an undertaking by the appellant to apply for the shares when supplied with the purchase money and called upon to exercise the option and thereupon to transfer the shares. It is not an unreasonable inference from the whole circumstances that both the appellant and his employers must have thought the option worth a good deal more than £20 and others may have thought the same. No doubt a person who wished to acquire an option on the shares would pay less for an undertaking such as I have indicated than he would pay for an assignable option because of the risks involved, but that only goes to valuation of the right which the appellant acquired. And if it is asked, why buy such an undertaking instead of buying shares on the market, the answer is that people often do prefer buying options to buying shares. I am not prepared to assume in the absence of a finding that this option could not have been turned to pecuniary account when it was granted. But if there is any doubt about that let me assume that the option had been to acquire shares at 10s.

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[13] [1892] A.C. 150, 159.

below the then market price. I cannot doubt that that could have been turned to immediate pecuniary account, and surely it could not be said that an option to buy at 58s. 6d. is itself a perquisite but an option to buy at 68s. 6d. is not. And that was not argued.

The argument for the Crown was not based on any special difficulty in turning the particular option to pecuniary account. It was based on the nature of the right: it was said that a right of option does not have the necessary qualities to make it a perquisite. I must confess that I do not understand that. If in fact this type of option is a kind of right which can be turned to pecuniary account, what more is necessary to make it a perquisite? I have not been able to find any clear answer to that question in the authorities cited or from the argument in this case. It appears to me that if a right can be turned to pecuniary account that in itself is enough to make it a perquisite.

Then it was said that, if the appellant had attempted in any way to raise money on his option before he exercised it, he would have been acting contrary to the tenor of his agreement with his employers. It was not argued that he would have been acting in breach of his contract with them—plainly he would not—nor was it said that there was any " gentleman's agreement " that he should not do this or even that he would have incurred his employers' displeasure if he had done it. There is no finding to that effect. I am willing to assume that it would not be irrelevant to show that a servant could only exercise his full legal rights at the risk of impairing good relations with his employers, but I do not stop to consider what the position would then be. In this case it was not suggested that his employers would have thought it in any way improper if the appellant had sold shares immediately they were allotted to him and I cannot assume that they would have had any objection to his raising money on his option before he exercised it.

Then there appears to me to be another difficulty in the way of the respondent. Rule 1 taxes a person exercising an office or employment of profit " in respect of all salaries, fees, wages, " perquisites or profits whatsoever therefrom *for* the year of " assessment." It does not say salaries or perquisites received during the year of assessment. It may be difficult to relate a perquisite strictly to a particular year. But if a reward is given in the form of an option and the option is itself the perquisite, it would generally be sufficiently related to the year in which it is given to be properly regarded as a perquisite for that year. If, on the other hand, the option is not the perquisite—if there is no perquisite until the option is exercised and shares are issued, it may be many years later—in what sense would the shares be a perquisite *for* the year when they were issued. There would be no relation whatever between the service during that year and the giving of the option many years earlier or the exercise of the option during the later year. I do not wish to express any concluded opinion on this point but it does seem to lend support to the conclusion which I have reached on other grounds.

In the present case the Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session in *Forbes's Trustees* v. *Inland Revenue Commissioners*.[14] I say very properly, because it is undesirable that there should be conflicting decisions on revenue matters in Scotland and England. So I must now examine the reasons for that decision. In that case Mr. Forbes, having been appointed manager, was granted by his company an option in 1938 which was repeated in a further agreement in 1944. This option was in all essentials similar to the option in the present case. The only distinction I need note is that the option in the 1944 agreement was to purchase a large number of shares at par, though the market price was then above par; and it was argued that the option gave Mr. Forbes an immediately enforceable right to the shares and that right could have been converted immediately into cash. Mr. Forbes exercised his option in 1946 and he was assessed under Schedule E as in this case on the difference between the value of the shares when they were allotted to him and the price which he paid for them. This assessment was upheld by the First Division.

The Lord President's (Lord Clyde) grounds of judgment appear from two passages which I shall quote from his opinion:

"In my opinion, the right which Mr. Forbes obtained on "signing the agreement in 1944 was a right merely to apply for "the shares; it gave him no right in or to any shares, for this "could only emerge when he exercised his right and when he "delivered to the company the par value of the shares he "demanded.

"Moreover—and this appears to me to be fatal to the appel-"lant's contention—there was no pecuniary value in the mere "right which he got by virtue of the agreement. For it was not "a right to any shares and it could not be disposed of nor sold by

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[14] 1958 S.C. 177.

" him. . . . For the option itself could not be turned to pecuniary " account."[15]

and on the next page

" The argument for the appellants was that in 1944 a legally " enforceable right had vested in Mr. Forbes when he signed the " agreement, which he could have converted into cash forthwith " by securing an allotment of shares which he could sell in the " market. Accordingly, it is said his benefit should be assessed " for tax as a benefit accruing in the year 1944. But this argu- " ment appears to me to involve two fallacies. In the first " place, the right which Mr. Forbes got under the agreement was " not a right to shares which sounded in money, but a mere right " to apply for shares, which he never exercised that year and " which in itself had no market value at all. But, in the second " place, the right which he obtained under the agreement was " not an unconditional one. He could not effectively exercise it " unless he complied with its conditions, one of which was the " payment to the companies of the par value of the shares applied " for. These two considerations appear to me to point necessarily " to the year 1946, when the right was effectively exercised, as " the year in which the profit accrued."[16]

The Lord President also derived some assistance from *Salmon* v. *Weight*[17] and *Bridges* (*Inspector of Taxes*) v. *Hewitt*.[18]

The essence of the first passage which I have quoted appears to be that because the option could not be sold or assigned therefore it could not be turned to pecuniary account. I have already given my reasons for not accepting that. The argument that a right could be turned to pecuniary account by raising money on it without assigning it does not appear to have been put forward, no doubt because the argument that it could be turned to pecuniary account by exercising it and taking up shares worth more than the option price may have seemed even stronger. That argument is dealt with in the second passage which I have quoted.

In the second passage the Lord President finds two fallacies in the argument for the taxpayer, but I am afraid I have been unable to see the force of his objections. If you get a share it is capable of being turned to pecuniary account because you can immediately sell it. There is generally no difficulty about that and if there is any difficulty there are other ways of raising

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[15] 1958 S.C. 177, 183.

[16] Ibid. 184.

[17] 51 T.L.R. 333.

[18] [1957] 1 W.L.R. 59, 674.

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money on it though you have to remain on the register. Similarly, if you get an option to buy shares below the market price it seems to me that the option is capable of being turned to pecuniary account by exercising it, acquiring the shares, and immediately selling them. It is true that that involves an extra step, but why should that matter? I can see no difficulty, unless it be in financing the transaction. But if the whole operation will yield a substantial profit I would not assume that that would be difficult.

The second fallacy appears to be a variant on the first. If the condition is one with which the taxpayer can easily and immediately comply, it does not, in my opinion, form an obstacle to turning the option to pecuniary account. If the condition is one which cannot immediately be complied with that may make a difference. In *Bridges* (*Inspector of Taxes*) v. *Hewitt*,[19] the taxpayer still had to earn his perquisite by a further four years' service, and it may well be that in such a case an agreement to confer a future benefit gives no immediate perquisite. The case of *Salmon* v. *Weight*[20] seems to me to be entirely different. There the servant had no enforceable right at all until he got his shares. He got his shares because the company chose to give him something then, to give him a perquisite when the shares were issued. But in this case the appellant getting his shares did not flow from any voluntary act of the company when the shares were issued. It flowed from the company's voluntary act in the previous year when they gave him an option by which they were thereafter bound. It would, I think, require some peculiar circumstances to make a mere expectation capable of being turned to pecuniary account.

Lord Carmont[21] regarded the option as an open offer. I would not dispute about words. But if it can be regarded as an offer it was an offer which the company had no power to withdraw and which conferred a valuable contractual right on Mr. Forbes. Lord Carmont then dealt with the restrictions and conditions to which the option was subject and pointed out their material bearing on the value of the option and the difficulty there would be in valuing it. I agree with those observations. But if I am right that the question whether a particular option is in itself a perquisite does not depend on these factors but rather on whether rights of that class are perquisites and capable of being turned to pecuniary account, then I do not think that these observations necessarily lead to his conclusion.

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[19] [1957] 1 W.L.R. 59, 674.

[20] 51 T.L.R. 333.

[21] 1958 S.C. 177, 185.

Lord Russell clearly stated his grounds of judgment in the following passage[22]:

"In my opinion, whatever may be the rights vested in the "holder of an option in the abstract, it is essential to have regard "to the nature and the quality of the right created in Mr. Forbes's "favour in 1944. As previously stated, that right was personal "and unassignable and was qualified by the condition that he "must tender cash in payment, while still remaining managing "director, before being in a position to enforce compliance by the "companies with their conditional obligation to allot. It appears "to me that the latter contingency, coupled with the personal "and unassignable nature of the right, prevents it from being "something which could be 'turned to pecuniary account.'"

I think that I have already dealt with the reasons which he gives but I can sum up my view by saying that conditions and restrictions attached to or inherent in an option may affect its value, but are only relevant on the question whether the option is a perquisite if they would in law or in practice effectively prevent the holder of the option from doing anything when he gets it which would turn it to pecuniary account. I am therefore of opinion that *Forbes's Trustees*[23] was wrongly decided and should be overruled, and that this appeal should be allowed.

LORD RADCLIFFE. My Lords, on March 28, 1956, the appellant applied for and received from E. S. & A. Robinson Ltd. 250 of its ordinary shares. He paid the company £856 5s. for them, a subscription at the rate of 68s. 6d. per share, although the current market price was then 82s. per share. He was enabled to obtain this advantage because in October, 1954, he and other officials and employees of the company had been offered by it options to take up stated amounts of ordinary shares at the market price then ruling, 68s. 6d. per share, and he had thus acquired at the cost of £20, which he then paid for an option on 2,000 shares, the right to make this call at the date which he selected.

The Inland Revenue claim that he is assessable under Schedule E for 1955–56 on the difference between what he paid and the value of what he got on the ground that this calculated amount is a profit or perquisite from his office. I do not think

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[22] 1958 S.C. 177, 187.

[23] 1958 S.C. 177.

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that he is. Oddly enough, however, the argument that took place before us was concentrated almost exclusively on a different point, whether he was assessable under the same Schedule on the value of the option itself in the year when he acquired it, 1954–55, the Revenue maintaining with much persuasive force that he was not, the appellant conceding that he was, provided always that it could be shown that a monetary value could fairly be placed on the option at the date of its acquisition.

It is a natural enough assumption for the tax gatherer that if a transaction does not attract tax in one year it must in another. I do not myself, however, regard that as a good general principle upon which to found the construction of the income tax code. Considering that, at any rate since the decision of this House in *Tennant* v. *Smith*,[24] it has been necessary to put a somewhat restricted meaning upon the words " all salaries, fees, wages, per" quisites or profits whatsoever " which now appear in the Ninth Schedule of the Income Tax Act, 1952, I should not be surprised to find that neither an option to take up shares at a price, more particularly perhaps if the option is made non-assignable, nor the advantage obtained later from exercising the option comes within the range of those words. On the whole, however, I do not think that that is the situation, because, in my opinion, the appellant is right in saying that what taxable receipt there is lies in the acquisition of the option, and that if it had a monetary value when received it is that value that represents the profit or perquisite of the office.

The difficulty in dealing with this point lies wholly in relating words used by several members of the House in *Tennant* v. *Smith*,[25] apparently of general import, to circumstances that they were not dealing with. The benefit of a right of occupation of part of bank premises which the occupier could only enjoy for the service of the bank is not very like the benefit of an option to take up freely transferable shares at a fixed price. The basis of the Revenue's claim in *Tennant* v. *Smith*[26] was really to tax the bank manager on expenditure which he was saved, not on any money that he got or could get, while tax on the full annual value of the premises was taken from the bank itself. It was not, however, the view of the House that profits or perquisites, to be taxable, could consist only of money paid. It was accepted that they could include objects or things of value received, payments in kind, so long as they were " capable of being turned into money " (Lord Halsbury L.C.[27]), " money—or that which can be turned to " pecuniary account " (Lord Watson [28]), " money payment or " payments convertible into money " (Lord Macnaghten [29]), " That which could be converted into money " (Lord Hannen [30]).

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[24] [1892] A.C. 150.

[25] Ibid.

[26] Ibid.

I think that it has been generally assumed that this decision does impose a limitation upon the taxability of benefits in kind which are of a personal nature, in that it is not enough to say that they have a value to which there can be assigned a monetary equivalent. If they are by their nature incapable of being turned into money by the recipient they are not taxable, even though they are in any ordinary sense of the word of value to him. It is obvious that this conception raises many attendant uncertainties which are not, so far as I know, cleared up except where some particular class of benefit in kind has offended the eye of the legislature and has been dealt with by special legislation. Must the inconvertibility arise from the nature of the thing itself, or can it be imposed merely by contractual stipulation? Does it matter that the circumstances are such that conversion into money is a practical, though not a theoretical, impossibility; or, on the other hand, that conversion, though forbidden, is the most probable assumption?

I do not think that the decision of this case can go very far, if any distance, to clear up such points as these. I think that the Revenue are right in saying that a line has to be drawn somewhere between convertible and non-convertible benefits, and that somehow we have to put a general meaning on the not very precise language used in *Tennant* v. *Smith*.[31] What I do not think, however, is that a non-assignable option to take up freely assignable shares lies on that side of the line which contains the untaxable benefits in kind. The option, when paid for, was thereafter a contractual right enforceable against the company at any time during the next 10 years so long as the holder paid the stipulated price and remained in its service. That right is, in my opinion, analogous for this purpose to any other benefit in the form of land, objects of value or legal rights. It was not incapable of being turned into money or of being turned to pecuniary account within the meaning of these phrases in *Tennant* v. *Smith* [32] merely because the option itself was not assignable. What the option did was to enable the holder at any time, at his choice, to obtain shares from the company which would themselves be pieces of property or property rights of value, freely convertible into money. Being in that position he could also at any time, at his choice, sell or raise money on his right to call for the shares, even though he could not put anyone he dealt with actually into his own position as option holder against the company. I think that the conferring of a right of this kind as an incident of service is a profit or perquisite which is taxable as such in the year of receipt, so long as the right itself can fairly be given a monetary value, and it is no more relevant for this purpose whether the option is exercised or not in that year, than it would be if the advantage received were in the form of some tangible form of commercial property.

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[27] [1892] A.C. 150, 156.
[28] Ibid. 159.
[29] Ibid. 163.
[30] Ibid. 165.
[31] [1892] A.C. 150.
[32] Ibid.

The claim to tax the advantage obtained in the year 1955–56 is not claimed by the Revenue if the right view is that the option itself was taxable in 1954–55. Even if there were no taxable subject in the earlier years I should regard the 1955–56 claim as failing on its own terms. The advantage which arose by the exercise of the option, say £166, was not a perquisite or profit from the office during the year of assessment: it was an advantage which accrued to the appellant as the holder of a legal right which he had obtained in an earlier year, and which he exercised as option holder against the company. The quantum of the benefit, which is the alleged taxable receipt, is not in such circumstances the profit of the service: it is the profit of his exploitation of a valuable right. Of course, in this case the year of acquiring the option was only the year immediately preceding the year in which, pro tanto, it was exercised. But supposing that he holds the option for, say, nine years before exercise? The current market value of the company's shares may have changed out of all recognition in that time, through retention of profits, expansion of business, changes in the nature of the business, even changes in the market conditions or the current rate of interest or yield. I think that it would be quite wrong to tax whatever advantages the option holder may obtain through the judicious exercise of his option rights in this way as if they were profits or perquisites from his office arising in the year when he calls the shares.

I agree that the appeal must be allowed. As to previous authorities, I am of opinion that for the reasons I have given *Forbes's Trustees* v. *Inland Revenue Commissioners*[33] was decided in error. I do not regard either the decision of or any observations in *Bridges* v. *Hewitt* [34] as being of any significance to the point we have to decide.

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[33] 1958 S.C. 177.

LORD KEITH OF AVONHOLM. My Lords, this case may be presented so as to raise some interesting and possibly fine legal points. I think it does. But I have come to the view that these arise by considering certain aspects of the case in isolation, and that this is not the proper approach to the question at issue. The object of the option under consideration was to afford certain selected " executives " of the company and of its subsidiary companies " an opportunity of obtaining an interest in, or increasing " an existing interest in, the capital of the company " as stated in the company's letter of October 6, 1954. There is nothing novel in such an idea, and, as the authorities show, the issue of shares to employees of a company may, in certain cases, attract tax, under Schedule E, as being a perquisite or profit from the employment. The simplest case would be a free bonus issue or transfer of fully paid shares, unless this could be related, as in *Bridges (Inspector of Taxes)* v. *Hewitt*,[35] to some cause other than remuneration for service in the company.

The specialty in the present case is that the matter started with the grant of an option to subscribe at 68s. 6d. a share for 2,000 ordinary shares of £1 each in the capital of the company. For this the appellant paid the sum of £20, a somewhat illusory price of rather less than 2½d. per share on the number of shares over which the option extended. The option was subject to certain terms and conditions. Among others, it was not transferable and, so long as the appellant was in the company's service, it would last for 10 years. As Lord Carmont pointed out in *Forbes's Trustees* v. *Inland Revenue Commissioners*,[36] in my opinion correctly, such an option is no more than a standing personal offer. An offer open for 10 years is certainly something unusual, but in Scots law, if expressed in writing, it could not be challenged and would not be revocable. In English law it may be that some element of consideration is required to prevent such an offer being withdrawn, and this may be the reason for the offer in the present case taking the form of an option for which a nominal payment was made. In my opinion no element of consideration should make any difference, in applying a taxing statute common to the two countries, to the determination of the nature and effect of the right granted.

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[34] [1957] 1 W.L.R. 59, 674.

[35] [1957] 1 W.L.R. 674.

[36] 1958 S.C. 177, 185.

The argument for the appellant is that, though the option is not transferable, it left it open to him to turn it to account by agreeing with some third party, in return for a payment, to exercise the option and to transfer the shares, or some part of them, obtained as a result of that exercise to the third party. Clearly, the same could be done in the case of a simple irrevocable offer of shares made on the same terms and conditions. But, in my opinion, the argument introduces a quite irrelevant consideration. Whatever happens, the appellant has got to apply for shares before any benefit or transferable right emerges. Whatever value the option has comes only from its exercise, and on its exercise the benefit offered to him arises. The option is an offer, to be accepted or not as and when the appellant pleases, but until it is accepted the transaction is not complete, nor has any profit been realised. The company has no concern with third parties, before the appellant gets his shares. When he gets his shares it will be seen what profit he has got from his acceptance of the company's offer. Even if he has made some advance arrangement with a third party it is what he has got from the company in shares that, in my opinion, determines the profit to which he is taxable under Schedule E.

It is conceivable, although I should think unusual, that a company should offer its employees shares, in the form of bonus shares fully paid or for payment on favourable terms, which offer was freely transferable or renounceable in favour of third parties before allotment. That would merely emphasise the favourable nature of the offer and would in no way impinge on the principles to which I have referred. No one can be put on the share register of a company without his consent. If an employee failed to take up the shares offered or to renounce them in favour of a third party he could not, in my opinion, be said by virtue of the mere offer to have obtained a profit from his employment. If he renounces his shares in favour of a third party he has accepted, or taken advantage of, an offer made to him by his employer, and by selling his rights has, in effect, secured a benefit equivalent to what he would have received if he had applied for the shares to be registered in his own name. I assume always that the renunciation would be for a genuine and not for a fictitious price. The result, in my opinion, assuming it could be regarded as a profit of the employment, would be in no way different in principle from

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that of *Salmon* v. *Weight*.[37] Though that case was presented as a case of a privilege given to the servant of applying for shares, it is clear from Lord Atkin's speech in this House, concurred in by all their other Lordships, that it was only upon the application being granted by the issue of shares that a profit was regarded as having been received by the servant. Nor is it material, in my opinion, that the offer of shares is at a price which, if accepted, will show an immediate profit, as where the market value of the shares is higher than the offer price. Until accepted, or otherwise dealt with in accordance with the terms of the offer, the offer cannot, for the reason I have given, be regarded as securing for the servant a profit from his employment. It follows, also, that the same option offered to a number of employees at the same time may have different results in the case of individual employees, if it is, as here, a continuing option, according to the respective dates when it is accepted. That follows from the nature and terms of the offer and the action that the particular servant takes upon it. The result is entirely consistent with a general rule of income tax law that there can be no profit until it is realised, or can be quantified.

I find it unnecessary to speculate on the precise scope or effect of the references by Lord Halsbury and Lord Watson in *Tennant* v. *Smith*[38] to a benefit received by an employee from his employer capable of being "turned to pecuniary account" in order that it should be assessable to income tax. Their application must be considered in relation to the kind of benefit received in specific cases. They were made in a context which does not make their scope easily definable. They cannot be confined to tangible or corporeal benefits, otherwise a share in a company would not come within their scope. The dicta are not, however, in my opinion, of any help to the appellant, because the normal and, I think, in a case like this the only way of turning an option, or offer, to pecuniary account is by exercising or accepting it. If it is exercised, as it was here, the benefit then accrues and, if capable of being valued in terms of money, is assessable to tax.

Under Schedule E no difficulty arises in the matter of relating a profit to a particular fiscal year. Under rule 1 of the Ninth Schedule it is the year of assessment in which the profit is received that determines the rate of tax. It is common ground here that there has been a profit of the employment, and the only question is whether that profit is to be extracted from the grant of the option per se or from the exercise of the option. On either view it is impossible to relate the profit to any year other than the year of receipt. The benefit, however it is estimated, was no doubt given in respect of past services, and possibly in the expectation of future services, but further than that it is impossible to say.

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[37] 51 T.L.R. 333.

[38] [1892] A.C. 150.

The situation, as I see it, is shortly summarised by Sellers L.J.[39] in words which I would adopt. "If the option was never "exercised," he says, "it seems axiomatic that there would be "no profit and no accrued benefit. The contractual right given "by the company, and it was by the company to the servant, the "taxpayer, in this case could not be transferred, and the view "I should be inclined to take of the case, which, I think, is in "harmony with the *Forbes's Executors* case,[40] is that that merely "set up the machinery for creating a benefit—that was its intention—which benefit ultimately accrued." I would only add that a transferable option, if transferred, might produce corresponding results, for the reasons which I have endeavoured to explain, though it is unnecessary so to decide for the purposes of this appeal.

I would dismiss the appeal.

LORD DENNING. My Lords, when I asked Mr. Heyworth Talbot in the course of the argument whether there was any special virtue in the sum of £20 which Mr. Abbott paid for this option, he said there was no particular merit in it. If the sum had been one shilling or one penny, the result would be the same. It was a nominal sum, he said, which was paid so as to provide consideration for the contract and make it legally enforceable. But it soon appeared that it was essential to his argument that there should be some consideration given for the option, even if it was only, what Sir George Jessel[41] once suggested, a tomtit or a canary. For Mr. Heyworth Talbot acknowledged that if no consideration had been given, then, unless the option were granted under seal, it would have been unenforceable at law: with the result that the case would have been governed by *Salmon* v. *Weight*.[42]

Now in *Salmon* v. *Weight*,[43] as your Lordships will recall, the directors of a company passed a resolution that each of the three managing directors "be permitted to make application for and to

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[39] [1960] Ch. 27, 50.

[40] 1958 S.C. 177.

[41] *Couldery* v. *Bartrum* (1881) 19 Ch.D. 394, 399.

[42] 51 T.L.R. 333.

[43] Ibid.

"take up at par 1,000 A ordinary shares in the capital of the "company." The managing directors, in pursuance of that resolution, acquired for £1 apiece shares which were worth £3 or £4 each in the market. It was held by this House that, when the directors received those shares, and not before, they received profits in the nature of money's worth as remuneration for their services. The shares, when received, were "profits" on which they were taxable under Schedule E. That case shows decisively that the *expectation* of receiving a benefit, no matter how well founded, is not itself a perquisite or profit. It must be reduced into possession. A bird in the hand is taxable, but a bird in the bush is not.

So here, if nothing had been paid for the option, the letters that passed would have been nothing more than a standing offer by the company to allot shares to Mr. Abbott at 68s. 6d. a share. That offer could have been withdrawn by the company, at any time before acceptance, with impunity. The offer itself would not be a perquisite or profit: for it conferred only the expectation of profit, not any profit itself. But when it was accepted, and shares worth 82s. apiece were allotted to Mr. Abbott for 68s. 6d., he would then receive "profits" which would be taxable in his hands. No difficulty would arise about the year of assessment. The profits would accrue to him in the year they were received.

My Lords, I ask myself, what is the difference, for tax purposes, between the case I have just put, where nothing is paid for the option, and the case we have before us, where a nominal sum is paid? The difference is that in the one case he has only an *expectation* of profit: whereas in the other he has a *right* to make profits in the future, if the opportunity arises. But in either case, until the option is exercised, he has not the *profits* themselves. And as I read the Act it is not the *expectation* to make profits, nor the *right* to make profits, which is taxable, but only the *profits* themselves. Just as it is not the expectation to salary nor the right to salary which is taxable, but only the salary itself. A bird in the bush is not taxable, even if you have the right to get it in the future, if it is still there. You must have it in hand before you can be taxed for it.

And when you come to consider what "profits" the servant receives from his employment by virtue of the option, surely it makes no difference whether he pays a nominal sum or not. In either case the employer grants him the option as a reward or return for his services: and the profits he makes out of it are the same save for this: if he paid nothing, it is all profit; if he paid a peppercorn, it is all profit less the value of a pepper berry; if he paid 1s., less a 1s.; if he paid £20, less £20.

There is, moreover, a very compelling reason why no distinction should be drawn according to whether a nominal sum is paid or not: for it would mean that "profits" in the Income Tax Acts would have a different meaning in Scotland from what it has in England. In Scotland, as your Lordships well know, it is unnecessary to have consideration to support a promise. The option would be legally binding in Scotland, even though nothing was paid for it: whereas it would not be binding in England unless some nominal sum was paid for it. It would not be right, I suggest, for the tax payable to depend on the technical requirements of English law as to consideration. The Income Tax Acts apply to England and Scotland alike, and there is the highest authority for saying that they must, if possible, be so interpreted as to make the incidence of taxation the same in both countries, see *Income Tax Special Purposes Commissioners* v. *Pemsel*[44] by Lord Halsbury L.C., and by Lord Watson, *Income Tax Commissioners for City of London* v. *Gibbs*[45] by Viscount Simon L.C., by Lord Macmillan and by Lord Wright.

My Lords, the point which I am now making can be tested by taking an illustration which is suggested by what Lord Atkin said in *Salmon* v. *Weight*.[46] Suppose that a colliery company made an *offer* to supply a director, who was in the coal trade, with 1,000 tons of coal at a price which was one-third of the market price of the day. No profit of any kind would be made by the director until he gave an order for coal. But as and when he ordered the coal and got it, he would receive a profit in the nature of money's worth. It would be assessed, said Lord Atkin, at the difference between the price he could get for it, and the price he had actually paid. Now take the same illustration but suppose that, instead of the company making an *offer* to the director, a clause was inserted in his *service agreement* giving him the right of obtaining coal at a price which was one-third of the market price of the day. Surely his profit would be just the same as before. It would arise as and when he ordered the coal and got it: and it would be assessed at the difference between the price he could get for it and the price he actually paid. It would not be assessed differently simply because in the one case he made the profit as a result of a standing offer, and in the other he made it under a service agreement.

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[44] [1891] A.C. 531, 548, 557; 7 T.L.R. 657; 3 T.C. 53, H.L.

[45] [1942] A.C. 402, 414, 419, 430: [1942] 1 All E.R. 415; sub nom. *Rex* v. *Income Tax General Commissioners, Ex parte Gibbs*, 24 T.C. 221, H.L.

[46] 51 T.L.R. 333, 334.

It will be noticed that, just as Lord Atkin's illustration corresponded very closely in substance to the facts in *Salmon* v. *Weight*,[47] so my illustration of a service agreement corresponds very closely in substance to the facts in *Forbes's Trustees* v. *Inland Revenue Commissioners*[48]: and it leads me to the conclusion that that case was correctly decided. And it is indistinguishable from the present case, as everyone agrees.

But Mr. Heyworth Talbot took a further point. He likened the grant of this option to the gift of a physical thing, such as a diamond, or a chose in action, such as an issue of shares, to a servant as a reward for his services. The value of it has to be assessed, he said, for tax purposes at the time of the grant, and it is immaterial that its value should rise or fall afterwards. But I would point out those are all interests in property, and they are very different from purely personal rights such as this option. Take the issue of shares on which Mr. Heyworth Talbot so much relied. It is clearly an interest in property. Parke B. said that " the shareholder acquires, on being registered, a vested interest " of a permanent character, in all the profits . . . of the company, " and, when registered, may be deemed a purchaser in possession " of such interest ": see *The Birkenhead, Lancashire and Cheshire Junction Railway Co.* v. *Pilcher*[49]; and shares are now, by statute, personal estate, see section 73 of the Companies Act, 1948. So, also, with any other right which is by its nature assignable, such as a bill of exchange or a " rights " issue of shares. It is in the nature of an interest in property. It can be valued at the time it is given to the servant and assessed accordingly. But a purely personal right stands on a very different footing. The right of a servant to his salary or wages is a purely personal right. So is his right to a bonus or commission. Suppose that a company in a service agreement agrees to pay the servant a bonus of 10 per cent. of the net profits whenever the net profits overtop £10,000. The servant, before he gets the bonus, may be able to turn it to pecuniary account in just the same way as it is suggested that he can turn this option to pecuniary account: for he might get someone to pay him something for it: by means of the simple expedient of undertaking to hand the bonus over to him when he gets it. But nevertheless he is only taxable on the bonus when he receives it. And if this be so, what is the difference, I ask, between giving a servant a right to a share of the profits when profits rise, and giving him a right to take up new shares when shares rise? For, after all, shares rise with profits. I can see no difference in principle at all.

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[47] 51 T.L.R. 333, 334.

[48] 1958 S.C. 177.

[49] (1850) 5 Ex. 121, 125.

There remains to consider the case of *Tennant* v. *Smith.*[50] That case showed that a right or privilege which *cannot* be turned to pecuniary account is not taxable at all. It does not prove the converse. It does not prove that a right or privilege which *can* be turned to pecuniary account is taxable. In any case, I doubt myself whether this option could be turned to pecuniary account, at any rate, at the moment when it was given. There was no evidence that it could be done. The option, as I have said, was purely a personal right. Mr. Abbott could not sell it. But it was suggested that he could agree with a third person that he would exercise it for his benefit on his request: and in return the third person would give him money. I should have thought it very difficult to get a third person to do this. There is, so far as I know, no market in options which are purely personal to the holder. But even if the option could be turned to pecuniary account in such a devious way, I do not think it should be regarded as taxable. It was, as I have said, only a right to make profits in the future, if the opportunity arose. It was not itself a perquisite or profit.

My Lords, in all the cases hitherto when a servant has been granted by his employer a purely personal right to receive in the future a benefit during his service, the judges have with one accord held that he receives the "perquisite" or "profit" when the thing is actually transferred to him and not before. So said Danckwerts J. in *Bridges (Inspector of Taxes)* v. *Hewitt,*[51] and both Jenkins and Sellers L.JJ. agreed with him on this point.[52] So said all the judges in *Forbes's Trustees* v. *Inland Revenue Commissioners.*[53] And I must say that I agree with them. It is the same point as I have insisted on throughout. Tax is not payable on the right in the future to receive "salaries, fees, wages, "perquisites or profits," but only on those things when received.

I would therefore dismiss this appeal.

Appeal allowed.

Solicitors: *Allen & Overy; Solicitor of Inland Revenue.*

J. A. G.

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[50] [1892] A.C. 150.

[51] [1957] 1 W.L.R. 59, 68, 69.

[52] [1957] 1 W.L.R. 674, 689, 703.

[53] 1958 S.C. 177.

J. C.*

1961
Jan. 18.

OVERSEAS TANKSHIP (U.K.) LTD. . . APPELLANTS;
AND
MORTS DOCK & ENGINEERING CO. LTD. . RESPONDENTS.

(THE WAGON MOUND.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Damages—Negligence—Remoteness—Damage directly caused by negligent act—Dangerous thing—Furnace oil—Spilled on harbour waters—Fire—Causation—Damage to wharf—Foreseeability of consequences the effective test of liability—One criterion for determining liability and compensation.

Australia—New South Wales—Negligence—Furnace oil spilled on harbour waters—Fire—Foreseeability of consequences the test of liability—Remission of claim founded on nuisance.

Ship's Names—Wagon Mound.

The decision in *In re Polemis and Furness Withy & Co.* [1921] 3 K.B. 560; 37 T.L.R. 940, C.A., that the defendant was responsible for all the consequences of his negligent act—held in that case to have been the direct result of the act—whether reasonably foreseeable or not, is not good law (post, p. 422).

The essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Liability does not depend solely on the damage being the "direct" or "natural" consequence of the precedent act; but if a man should not be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally he should not escape liability, however "indirect" the damage, if he foresaw or could reasonably have foreseen the intervening events which led to its being done. Foreseeability is thus the effective test—the "direct" consequence test leads to nowhere but the never-ending and insoluble problems of causation (post, pp. 423, 426).

There is not one criterion for determining culpability (or liability) and another for determining compensation; unforeseeability of damage is relevant to liability or compensation—there can be no liability until the damage has been done; it is not the act but the consequences on which tortious liability is founded (post, pp. 424, 425).

Dicta of Lord Russell of Killowen in *Bourhill* v. *Young* [1943] A.C. 92, 101; [1942] 2 All E.R. 396, H.L.(Sc.), and of Denning L.J. in *King* v. *Phillips* [1953] 1 Q.B. 429, 441; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A. applied.

Dictum of Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 983; 36 T.L.R. 640, H.L. disapproved.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST.

Sharp v. *Powell* (1872) L.R. 7 C.P. 253 considered.

Per curiam: It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct" (post, p. 422).

While an oil-burning vessel, of which the appellants were the charterers, was taking in bunkering oil in Sydney Harbour a large quantity of the oil was, through the carelessness of the appellants' servants, allowed to spill into the harbour. During that and the following day the escaped furnace oil was carried by wind and tide beneath a wharf owned by the respondents, shipbuilders and ship repairers, at which was lying a vessel which they were refitting, and for which purpose their employees were using electric and oxy-acetylene welding equipment. Some cotton waste or rag on a piece of débris floating on the oil underneath the wharf was set on fire by molten metal falling from the wharf, and the flames from the cotton waste or rag set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and thereafter a conflagration developed which seriously damaged the wharf and equipment on it.

In an action by the respondents to recover from the appellants compensation for the damage it was found by the trial judge on the evidence that the appellants "did not know and could not "reasonably be expected to have known that it [the furnace oil] "was capable of being set afire when spread on water"; and that apart from the damage by fire the respondents had suffered some damage in that oil had congealed upon and interfered with the use of their slipways, which was "damage which beyond question "was a direct result of the escape of the oil":—

Held, on the footing that the damage was the direct result of the escape of the oil, that, applying the test of foreseeability, the appellants who, as found by the trial judge, could not reasonably be expected to have known that the oil would catch fire, were not liable for the damage.

In re Polemis and Furness Withy & Co. Ltd. (supra) not followed.

Smith v. *London and South Western Railway Co.* (1870) L.R. 6 C.P. 14; *H.M.S. London* [1914] P. 72; 30 T.L.R. 196; *Weld-Blundell* v. *Stephens* (supra); *Rigby* v. *Hewitt* (1854) 5 Exch. 240; *Greenland* v. *Chaplin* (1850) 5 Exch. 243; *Hadley* v. *Baxendale* (1854) 9 Exch. 341; *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.* [1911] 1 K.B. 114; 27 T.L.R. 18, C.A.; *Glasgow Corporation* v. *Muir* [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44, H.L.(Sc.); *Hay or Bourhill* v. *Young* (supra) and *Woods* v. *Duncan* [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420, H.L. considered.

The "strict liability" rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330; (1866) L.R. 1 Exch. 265, H.L. not considered (post, p. 427).

Order of the Supreme Court of New South Wales, so far as it related to damage caused by negligence, reversed, but action remitted for that court to deal with it so far as it relates to damage caused by nuisance.

Appeal (No. 23 of 1960) from an order of the Full Court of the Supreme Court of New South Wales (Owen, Maguire and Manning JJ.) (December 3, 1959) dismissing an appeal by the appellants, Overseas Tankship (U.K.) Ltd., from a judgment of Kinsella J. exercising the Admiralty Jurisdiction of that court (April 23, 1959) in an action in which the appellants were defendants and the respondents, Morts Dock & Engineering Co. Ltd., were plaintiffs.

The following facts are taken from the judgment of the Judicial Committee: In the action the respondents sought to recover from the appellants compensation for the damage which its property known as the Sheerlegs Wharf, in Sydney Harbour, and the equipment thereon had suffered by reason of fire which broke out on November 1, 1951. For that damage they claimed that the appellants were in law responsible.

The relevant facts can be comparatively shortly stated inasmuch as not one of the findings of fact in the exhaustive judgment of the trial judge had been challenged.

The respondents at the relevant time carried on the business of ship-building, ship-repairing and general engineering at Morts Bay, Balmain, in the Port of Sydney. They owned and used for their business the Sheerlegs Wharf, a timber wharf about 400 feet in length and 40 feet wide, where there was a quantity of tools and equipment. In October and November, 1951, a vessel known as the *Corrimcl* was moored alongside the wharf and was being refitted by the respondents. Her mast was lying on the wharf and a number of the respondents' employees were working both upon it and upon the vessel itself, using for that purpose electric and oxy-acetylene welding equipment.

At the same time the appellants were charterers by demise of the *s.s. Wagon Mound*, an oil-burning vessel, which was moored at the Caltex Wharf on the northern shore of the harbour at a distance of about 600 feet from the Sheerlegs Wharf. She was there from about 9 a.m. on October 29 until 11 a.m. on October 30, 1951, for the purpose of discharging gasolene products and taking in bunkering oil.

During the early hours of October 30, 1951, a large quantity of bunkering oil was, through the carelessness of the appellants' servants, allowed to spill into the bay, and by 10.30 on the morning of that day it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The *Wagon Mound* unberthed and set sail very shortly after.

When the respondents' works manager became aware of the condition of things in the vicinity of the wharf he instructed their workmen that no welding or burning was to be carried on until further orders. He inquired of the manager of the Caltex Oil Company, at whose wharf the *Wagon Mound* was then still berthed, whether they could safely continue their operations on the wharf or upon the *Corrimal.* The results of the inquiry coupled with his own belief as to the inflammability of furnace oil in the open led him to think that the respondents could safely carry on their operations. He gave instructions accordingly, but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil.

For the remainder of October 30 and until about 2 p.m. on November 1 work was carried on as usual, the condition and congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the *Corrimal* caught fire and considerable damage was done to the wharf and the equipment upon it.

The outbreak of fire was due, as the judge found, to the fact that there was floating in the oil underneath the wharf a piece of débris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf: that the cotton waste or rag burst into flames: that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil, and that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf.

1960. Oct. 26, 27, 31; Nov. 1, 2, 3, 7, 8, 9. *Ashton Roskill Q.C.*, *C. L. D. Meares Q.C.* (Australia) and *Michael Kerr* for the appellants. The flash point of furnace oil is about 170°F., and the oil floating on sea water cannot reach that temperature. The trial judge found that the appellants did not know and could not reasonably be expected to have known that the oil on the water was capable of being set on fire. That is a very important finding,

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and it was not challenged on appeal. The only other finding to which reference should be made was that some of this oil had congealed on the respondents' slipways and interfered with their use. It is the appellants' contention that this fact is irrelevant. It is further to be observed that no claim against the appellants was raised in respect of it, and there was no proof of the respondents having thereby suffered any damage. The judge concluded that on the basis of the decision in *In re Polemis and Furness Withy & Co.*[1] (hereafter called "*Polemis*") the appellants were on the facts guilty of negligence. What constitutes negligence is the first major point in the case. On the appellants' appeal to the Full Court of the Supreme Court of New South Wales the main heads of appeal were, first, that *Polemis* was wrongly decided, and, secondly, that if it was right, the damage by fire was not the direct consequence of the appellants spilling the oil. The second point calls for independent consideration before this Board. The judgment of the Full Court contains a critical analysis of the decision in *Polemis*, and the conclusion was reached that it would not be proper to regard that decision otherwise than as binding on them. Manning J., however, giving the judgment of the court, said that it would be a gross understatement to say that he was able to apply that decision with any degree of confidence, and he expressed the hope that the House of Lords or Judicial Committee of the Privy Council would pronounce on it in the near future.

Reliance is placed on that part of the Full Court's judgment which analyses this admittedly difficult decision—*Polemis*. The present case is of some general importance and interest since it raises directly, and for the first time, the question whether *Polemis* was rightly decided. On the second point there are two heads; namely, if *Polemis* is right: (1) Was the damage by fire the direct consequence of the spilling of the oil? (2) Was it due to independent causes?

The argument is put on five grounds—the first two run together and must be argued together. (1) The damage by fire to the respondents' wharf was not a reasonably foreseeable consequence of the appellants' act in spilling the furnace oil into Morts Bay. Therefore the appellants' act in spilling the oil did not constitute actionable negligence at the suit of the respondents. The fact that the spilled oil polluted the respondents' slipways is irrelevant. (2) The basis of the decision in *Polemis* is misconceived, i.e., the authorities relied on in *Polemis* do not provide the foundation for that decision which it is claimed that they do. (3) The rule in *Polemis*, namely, that the damage is recoverable if direct but not foreseeable is not correct. (4) If, contrary to the above submissions, the appellants' act in spilling the oil afforded a cause of action in negligence to the respondents, and if the rule in *Polemis* is sound, the damage by fire to the respondents' wharf was not directly caused by the appellants' negligence; therefore *Polemis* does not apply. (5) The remarkable and unforeseeable combination of circumstances here constituted novus actus interveniens; therefore *Polemis* does not apply.

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[1] [1921] 3 K.B. 560; 37 T.L.R. 940, C.A.

Negligence involves breach of duty causing the damage. There is no actionable breach of duty unless it can be shown that at the time of the act the consequences of the act were reasonably foreseeable. The test is objective, the requisite foresight being that of the reasonable man. [The judgments of Sankey J.[2] and of the Court of Appeal[3] in *Polemis* were then read.] The first submission on *Polemis* is that the issue was one of contract, namely, the construction of the exceptions clause in a time charterparty. If that be so, it is difficult to regard the case as a satisfactory authority on the tort of negligence or on what constitutes a cause of action in negligence. That submission may be elaborated under three heads. First, negligence is read by implication into the exceptions clause: it does not, in the context of the exceptions clause, mean the same as the tort of negligence. The exceptions clause means that the charterers were not responsible for the fire unless caused by their carelessness. It is doubtfully correct to say, as Warrington L.J. said,[4] that the claim was based on the tort of negligence. Secondly, and still on the exceptions clause, it would seem that the decision in *Polemis* can be sustained only if the charterers were careless in relation to the fire through failing to provide against what was unforeseeable, namely, the fire, because the damage by fire, though unforeseeable, was the "direct" consequence of their carelessness. Thirdly, the Court of Appeal held, in effect, that the exception of fire was not foreseeable because the charterers had been careless not in relation to the fire, which was not foreseeable, but in relation to some other peril, namely, the carelessness of the Arab stevedores engaged by the charterers, which was not excepted. *Polemis* is therefore not a satisfactory authority for the reasons so far advanced on what constitutes the tort of negligence.

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[2] (1921) 37 T.L.R. 696; 26 Com. Cas. 281; 7 Ll.L.Rep. 196.

[3] [1921] 3 K.B. 560.

[4] Ibid. 573.

If *Polemis* can be considered purely as a tortious matter without regard to the contractual basis of the relationship of the parties, it is difficult to see how (apart from the supplementary finding of fact by the arbitration tribunal) the charterers could have been held liable in tort for the action of the stevedores, who clearly could not have been their servants. The stevedores were merely engaged by the charterers' agents. No principle of vicarious responsibility would result in the charterers being held liable for the carelessness of the stevedores. Hence, no doubt, the supplementary finding of fact that the stevedores were the charterers' servants.

There are three cases on which *Polemis* is based. First, *Smith* v. *London and South Western Railway Co.*[5] The statement in that case by Kelly C.B. that "there was negligence in "the defendants in not removing these trimmings, and that "they thus became responsible for all the consequences of their "conduct,"[6] involves (i) the view that one can have negligence in the air, and (ii) that if X by an act which is negligent in relation to Y, because it is foreseeable that X's act will injure Y, injures Z, then X is liable to Z for injury which Z suffers as a direct consequence of X's act. Those two conclusions, (i) and (ii), are not the law, and there appears to be no case which supports them. In *Haynes* v. *Harwood*[7] it is expressly said that "negligence in the air will not do,"[8] and that "it is not "necessary to show that this particular accident and this parti- "cular damage were probable; it is sufficient if the accident is of "a class that might well be anticipated as one of the reasonable "and probable results of the wrongful act."[9] That accurately states the position, and it is not reconcilable with what, it is submitted, necessarily follows from the dictum of Kelly C.B. in *Smith's* case.[10] As a dictum it is wrong; if a mere dictum it can be disregarded; if it means what it appears to mean, it is irreconcilable with later authorities, viz., *Bourhill* v. *Young*[11]; *Woods* v. *Duncan*.[12]

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[5] (1870) L.R. 6 C.P. 14.

[6] Ibid. 20.

[7] [1935] 1 K.B. 146; 51 T.L.R. 100, C.A.

[8] [1935] 1 K.B. 146, 152.

[9] Ibid. 156.

[10] L.R. 6 C.P. 14, 20.

[11] [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.

[12] [1946] A.C. 401.

Another aspect of *Smith's* case [13] must be mentioned. When that case was decided it had not previously been suggested that there was any difference between the measure of damages in contract and in tort. In that regard reference may be made to *Horne* v. *Midland Railway Co.*,[14] which was decided three years after *Smith's* case [15] and by a court consisting of very much the same judges. *Smith's* case was not, however, referred to. From this it may be inferred that *Smith's* case was not intended to depart from well-recognised lines with regard to damages in contract and in tort. Further, the view of the Chief Baron in *Smith's* case does not correspond with the position in the law of the United States of America as enunciated in *Palsgraf* v. *Long Island Railway Co.*[16]

The second case which was said to support the view in *Polemis* is *H.M.S. London.*[17] In that case, however, the judge regarded the consequence, i.e., the strike, as foreseeable. It was "not "unexpected." So regarded, the case affords insufficient foundation and support for the decision in *Polemis*.

The third case on which *Polemis* is based is *Weld-Blundell* v. *Stephens.*[18] A short passage in a long speech of Lord Sumner's is here relied on: "What are the 'natural, probable and neces- "'sary' consequences? Everything that happens, happens in "the order of nature and is therefore natural. . . . What a "defendant ought to have anticipated as a reasonable man is "material when the question is whether or not he was guilty "of negligence, that is, of want of due care according to the "circumstances. This, however, goes to culpability, not to "compensation." [19] Those words of Lord Sumner were not, it is submitted, considered in *Polemis* [20] in the light of the facts of *Weld-Blundell* v. *Stephens.* That case was based on breach of contract. If foreseeability is irrelevant to remoteness of damage (as *Polemis* decided), and Lord Sumner's dictum can be read as supporting this, it must be equally applicable in contract and in tort. This would involve the consequence that the first rule in *Hadley* v. *Baxendale* [21] is wrong. Hitherto this has never been suggested and *Hadley* v. *Baxendale* was never referred to in *Polemis*.

In two subsequent cases the Court of Appeal must have taken

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[13] L.R. 6 C.P. 14.
[14] (1873) L.R. 8 C.P. 131, 140.
[15] L.R. 6 C.P. 14.
[16] (1928) 248 N.Y. 339.
[17] [1914] P. 72, 80; 30 T.L.R. 196.
[18] [1920] A.C. 956; 36 T.L.R. 640, H.L.
[19] [1920] A.C. 983–984.
[20] [1921] 3 K.B. 560, 570.
[21] (1854) 9 Exch. 341.

Lord Sumner's passage as obiter: *Stansbie* v. *Troman*[22]; *Davies* v. *Liverpool Corporation*.[23] In *Weld-Blundell* v. *Stephens*[24] the "direct consequence" with which Lord Sumner was concerned was not a physical consequence. Yet in a later case, *Liesbosch, Dredger* v. *Owners of S.S. Edison*,[25] Lord Wright said that *Polemis* was limited in its scope to immediate physical consequences of negligence. In *Polemis* the Court of Appeal were relying on a dictum in *Weld-Blundell*[26] which, in the light of the decision in the *Liesbosch*,[27] had no applicability on the facts of *Polemis*, because no physical consequence was involved in *Weld-Blundell*.

In *Thurogood* v. *Van den Berghs & Jurgens Ltd.*[28] *Polemis* appears to have been accepted by the Court of Appeal without argument as authoritative and then applied to wholly different circumstances. In that case the court propounded the rule that, if the court concludes that the act of X might have injured Y in a foreseeable way (though it did not) but does injure Y in an unforeseeable way, X is liable. The decision invites the further comment that the defendant incurred no liability to the plaintiff until the plaintiff had been injured in an unforeseeable way. The only damage that was foreseeable was hypothetical and was therefore not damage in the legal sense. This decision shows the difficulties which are inherent in the *Polemis* decision. Moreover, it is not easy to reconcile the observations of Asquith L.J. in *Thurogood's* case[29] with his observations in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[30]

The next submission is that the decisions on which *Polemis* is based are not consistent with a number of subsequent decisions. In *Hambrook* v. *Stokes Brothers*[31] the defendant's negligence was admitted on the pleadings. That admission is material to a true appreciation of the case. In *Bourhill* v. *Young*[32] Lord Russell of Killowen said: "In considering whether a person owes "to another a duty a breach of which will render him liable to "that other in damages for negligence, it is material to consider

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[22] [1948] 2 K.B. 48, 51; 64 T.L.R. 226; [1948] 1 All E.R. 599, C.A.

[23] [1949] 2 All E.R. 175, C.A.

[24] [1920] A.C. 956.

[25] [1933] A.C. 449, 461; 49 T.L.R. 289, H.L.

[26] [1920] A.C. 956.

[27] [1933] A.C. 449.

[28] [1951] 2 K.B. 537, 550; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682, C.A.

[29] [1951] 2 K.B. 537, 539.

[30] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.

[31] [1925] 1 K.B. 141, 143, 150, 158; 41 T.L.R. 125, C.A.

[32] [1943] A.C. 92, 100; [1942] 2 All E.R. 396.

"what the defendant ought to have contemplated as a reasonable "man. This consideration may play a double role. It is relevant "in cases of admitted negligence . . . to the question of remoteness of damage, i.e., to the question of compensation not to "culpability, but it is also relevant in testing the existence of "a duty as the foundation of the alleged negligence, i.e., to the "question of culpability not to compensation." In this passage Lord Russell was in effect expressing the view that *Polemis* was wrong. The following submissions may be formulated as arising from *Bourhill* v. *Young*[32]: (1) The area of risk, although not defined, is clearly not limited to a geographical area; it includes an area of risk of sustaining damage such as that of which the plaintiff complained in the action. (2) The defendant will not be liable unless it is reasonably foreseeable that the damage complained of in the action is within such area of risk. (3) Whether or not damage of any particular character is within such area of risk will turn on the circumstances of each case. Damage will not be within the area of risk if it is of a character that could not reasonably have been foreseen as likely to be caused by the careless act. (4) The materiality of the area of risk will not arise in all cases, but it will or may arise where the damage is of a character that could not reasonably have been foreseen.

Bourhill's case[32] recognises and reconciles a possible conflict between two approaches to the problem of whether or not a defendant is guilty of negligence. One approach starts with the alleged negligent act and asks: "Were the consequences of the "act foreseeable?" The other approach starts with the consequences of the alleged negligent act and asks: "What was the "cause?" The latter approach has involved judges in adjectival distinctions, viz., "direct," "proximate," "dominant," which defy accurate definition. The former approach gives effect, first, to the view that it is for the consequences of his act that the law of torts holds a defendant responsible, and, secondly, that it is only for the foreseeable consequences that a defendant should be held responsible, because it is only against such consequences that he can take precautions. This approach can be further developed by regarding a duty of care as involving a duty to guard against a reasonably foreseeable risk to one's neighbour in law and a cause of action in negligence for breach of such duty as complete only if the damage sustained is of a character that it is reasonably foreseeable would result from the breach of duty.

The remaining authorities which are not consistent with the

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[32] [1943] A.C. 92.

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decisions on which *Polemis* is based are *Glasgow Corporation* v. *Muir*[33]: Lord Thankerton there said that "it has long been held "in Scotland that all that a person can be held bound to foresee "are the reasonable and probable consequences of the failure to "take care, judged by the standard of the ordinary reasonable "man"; *Woods* v. *Duncan*,[34] in particular the speeches of Viscount Simon, Lord Russell and Lord Simonds; *Bolton* v. *Stone*[35]; *Malcolm* v. *Dickson*.[36] This last case is of particular importance as showing beyond doubt that the *Polemis* decision does not form part of the law of Scotland and as indicating that Scots law considers that damage cannot be direct if it is not foreseeable.

Finally, on this branch of the argument, it is not easy to reconcile the judgment of Denning L.J. in *King* v. *Phillips*[37] with the decision in *Polemis*. In *Roe* v. *Minister of Health*[38] Denning L.J. said: "It is so easy to be wise after the event and "to condemn as negligence that which was only a misadventure. "We ought always to be on guard against it . . ."; and later: "The decision in *In re Polemis* is of very limited application."

Next, the rule in *Polemis* is wrong because, if it is right, a person can, and on occasions will, be held liable for the unforeseeable consequences of his act. This is manifestly contrary to justice. Irrespective, however, of such considerations, this branch of the argument involves the problem whether the *Polemis* rule is limited to contract cases, limited to tort cases, or applicable to both. In this connection three conflicting views have been expressed, a fact of itself sufficient to raise doubts as to the soundness of the rule. First, it has been said that the rule is limited to contract cases. This seems to be based on the view that *Polemis* should itself be regarded as a case of contract and on a passage in the judgment of Sargant L.J. in *Hambrook* v. *Stokes Brothers*.[39] There appears to be no other authority for this suggestion, which is difficult to sustain if only because it would contradict the first rule in *Hadley* v. *Baxendale*.[40]

The second view is that the rule in *Polemis* is limited to tort cases: see Lord McNair, "This Polemis Business," (1931) 4

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[33] [1943] A.C. 448, 454; 59 T.L.R. 266; [1943] 2 All E.R. 44, H.L.

[34] [1946] A.C. 401, 421, 426, 436–437; 62 T.L.R. 283; [1946] 1 All E.R. 420, H.L.

[35] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078, H.L.

[36] 1951 S.C. 542, 547, 550.

[37] [1953] 1 Q.B. 429, 437; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A.

[38] [1954] 2 Q.B. 66, 83; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131, C.A.

[39] [1925] 1 K.B. 141, 164; 41 T.L.R. 125, C.A.

[40] 9 Exch. 341.

Cambridge Law Journal, 125, at 140; Anson on Contract, 20th ed. (1945), p. 366; Halsbury's Laws of England, 2nd ed., vol. 10, p. 102. This view seems to be more favoured by textbook writers than the third possibility, namely, that the rule is applicable both in contract and in tort. Both these views are, however, inconsistent with decisions which show that, at any rate when *Polemis* was decided, the rule as to remoteness of damage was the same in contract and in tort.

There is a substantial body of authority, both before and after *Polemis*, to the effect that the rule governing remoteness of damage in tort is the same as that prescribed for breach of contract by the first rule in *Hadley* v. *Baxendale*[41]: see *The Notting Hill*[42]; *The Argentino*[43]; *Cobb* v. *Great Western Railway Co.*[44]; *H.M.S. London*[45]; *R. & H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[46]; *The Metagama*[47]; *The Edison*[48]; *Liesbosch, Dredger* v. *Owners of S.S. Edison*[49]; *The Arpad*[50]; *Haynes* v. *Harwood*[51]; *Domine* v. *Grimsdale*[52] and *Hyett* v. *Great Western Railway Co.*[53] It follows from these authorities that damages for negligence are only recoverable if the damage in question could reasonably have been foreseen as likely to arise "naturally, "i.e., according to the usual course of things" (in the words of the first rule in *Hadley* v. *Baxendale*[54]) from the act or omission complained of, otherwise such damage is too remote. In the present case, having regard to the finding that damage by fire could not have been foreseen as a consequence of the negligence in allowing furnace oil to escape, the damage by fire to the respondents' wharf is too remote in law. There appears to be no case in which it has been authoritatively suggested that one has to apply one measure of damages in tort and another measure in contract. The cases cited indicate authoritatively that the measure of damages is the same. They are cited to undermine the rule in *Polemis* by showing how ambiguous is its application.

The cases of *Smith* v. *Green*,[55] *Pearson* v. *Cox*[56] and *Hyett* v. *Great Western Railway Co.*[57] show that the *Hadley* v.

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[41] 9 Exch. 341.

[42] (1884) 9 P.D. 105, C.A.

[43] (1888) 13 P.D. 191, C.A.; affd. (1889) 14 App.Cas. 519.

[44] [1893] 1 Q.B. 459, 464, C.A.; affd. [1894] A.C. 419.

[45] [1914] P. 72; 30 T.L.R. 196.

[46] (1927) 33 Com.Cas. 324, H.L.

[47] (1927) 29 Ll.L.Rep. 253, 254.

[48] [1932] P. 52, 62, 68.

[49] [1933] A.C. 449.

[50] [1934] P. 189, 216; 50 T.L.R. 505, C.A.

[51] [1935] 1 K.B. 146; 51 T.L.R. 100, C.A.

[52] (1937) 106 L.J.K.B. 386, 392.

[53] [1948] 1 K.B. 345; 63 T.L.R. 411; [1947] 2 All E.R. 264, C.A.

[54] 9 Exch. 341.

[55] (1875) 1 C.P.D. 92, 94–96.

[56] (1877) 2 C.P.D. 369, 372, C.A.

[57] [1948] 1 K.B. 345, 346–347.

Baxendale[58] words "naturally, i.e., according to the usual course "of things," mean natural and probable. *Hadley* v. *Baxendale*[58] is authoritative. It was not, however, cited in argument or referred to in the judgments in *Polemis*. Sir Frederick Pollock (Pollock on Torts, 1939 ed., pp. 29–30) thought that *Polemis* might be regarded as having been decided per incuriam because *Hadley* v. *Baxendale* was not drawn to the attention of the court. The rule in *Polemis* cannot be reconciled with the first rule of *Hadley* v. *Baxendale.* Any attempt to reconcile the two cases involves, in the words of Sir Frederick Pollock, "a violent artificial construction." Lord Porter in *Morrison Steamship Co. Ltd.* v. *Greystoke Castle* (*Cargo Owners*)[59] said that "the "*Polemis* case added a further liability, viz., damage consisting "of the direct physical consequences of the tortious act whether "they would reasonably be anticipated or not." This view was, however, unnecessary to the decision and no authority supports it. "Naturally" as used in *Hadley* v. *Baxendale*[60] cannot mean "directly" as used in *Polemis*. The test is: "Is the damage "of such a character as a defendant could reasonably be expected "to have anticipated?" The test is objective, viz., what a reasonable man would have foreseen. Such a test is consonant with justice. It also avoids linguistic niceties of a quasi-philosophical character. It is practical. Moreover, to acknowledge the existence of one rule as to liability and another and different rule as to unforeseeable consequential harm means that closely related aspects of the same problem are governed by rules expressing widely divergent policies. The *Polemis* rule has, it is submitted, no pride of ancestry. It should—to complete the quotation—be allowed no hope of posterity.

Two cases referred to in *Polemis*—*Rigby* v. *Hewitt*[61] and *Greenland* v. *Chaplin*[62]—are both tort cases. Analysis of the reports of the judgments in those cases does not bear out the inconsistency suggested in argument in *Polemis*. Whichever version is accepted, the judgments of Pollock C.B. contain clear expression of view (even if obiter) that damage, to be recoverable, should be reasonably foreseeable. There are a number of cases on this aspect of the matter. In *Sharp* v. *Powell*[63] judgment was for the defendant on the ground that "the injury was not

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[58] 9 Exch. 341.

[59] [1947] A.C. 265, 295; 63 T.L.R. 11; [1946] 2 All E.R. 696, H.L.

[60] 9 Exch. 341.

[61] (1850) 5 Exch. 240; 19 L.J.Exch. 292.

[62] (1850) 5 Exch. 243; 19 L.J.Exch. 295.

[63] (1872) L.R. 7 C.P. 253.

"of such a character as the defendant could have contemplated "as the ordinary or likely consequence to result from his per- "mitting his van to be washed in the public street." The same principle, it is submitted, is inherent in the well-known statement of Lord Dunedin in *Fardon* v. *Harcourt-Rivington*[64]: "In other "words, people must guard against reasonable probabilities but "they are not bound to guard against fantastic possibilities." The limitation of reasonable damage to loss which might reasonably have been foreseen as a consequence of the wrongful act has been endorsed in other cases: see *Lynch* v. *Knight*,[65] *Clark* v. *Chambers*,[66] *Cory* v. *France*[67] and *Clinton* v. *J. Lyons & Co. Ltd.*[68] This view of the law was current among textbook writers before *Polemis*: see Salmond on Torts, 1st ed., p. 99 et seq., and Mayne on Damages, 9th ed., p. 45 et seq. Professor Goodhart in 68 L.Q.R. 514 discusses the difficulty of coherently expressing the basis of liability for damages since the rule in *Polemis*. The above body of authority is persuasive. If the *Polemis* rule is sound, *Cox* v. *Burbridge*[69] cannot be reconciled with it. See also *Blyth* v. *Birmingham Waterworks Co.*[70] In Mayne on The Law of Damages, 1st ed. (1856), at p. 19, it is said: "All the "previous cases, according to English law, are resolved by "answering the question: Is the particular result such as might "have been contemplated by the parties, as naturally flowing "from the act done? The same question, upon the same prin- "ciple, solves a number of other cases. . . ." That was two years after *Hadley* v. *Baxendale*,[71] and is in line with the cases which have been referred to.

There are two additional arguments with regard to *Polemis*. The first arises out of the decision in the *Liesbosch* case.[72] The *Polemis* rule is a rule as to remoteness of damage. Such a rule is unlikely to be sound if its applicability is to be confined to a particular type of damage, namely, to immediate physical consequences. The second argument arises out of the decision in *Gorris* v. *Scott*.[73] That case suggests that there is no room for the application of the *Polemis* rule to damage caused by a statutory tort. Therefore, if the rule in *Polemis* is sound, a different rule will exist according to whether the tort is a common law tort or a statutory tort. This is anomalous. [Reference was also made to *Director of Public Prosecutions* v. *Smith*.[74]] *Polemis* was regarded as an effective decision in *Thurogood's* case,[75] but there is no approval of it in that case. *Thurogood's* case affords scant support for the view, suggested by the respondents here, that *Polemis* has long been acted upon. *Aldham* v. *United Dairies (London) Ltd.*[76] was not a case in which *Polemis* was acted upon, although it has been referred to as a case in which *Polemis* was followed. Even if *Polemis* has been acted on, the Board should not thereby be deterred from concluding that it is wrong.

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[64] (1932) 146 L.T. 391, 392.

[65] (1861) 9 H.L.C. 577, 600.

[66] (1878) 3 Q.B.D. 327, 336–338.

[67] [1911] 1 K.B. 114, 122, 133; 27 T.L.R. 18, C.A.

[68] [1912] 3 K.B. 198, 203–205, 210–211; 28 T.L.R. 462.

[69] (1863) 13 C.B.N.S. 430.

[70] (1856) 11 Exch. 781.

[71] 9 Exch. 341.

[72] [1933] A.C. 449.

[73] (1874) L.R. 9 Exch. 124.

The next submission is that the damage here was not direct. Damage, it has been said, cannot be direct unless it is proximate, and if it is proximate it must be foreseeable. Since the damage here, on the concurrent findings of fact, was not foreseeable, it was not direct. That approach is conclusive. The only definition of what is meant by " direct " would appear to be that of Scrutton L.J. in *Polemis*[77] and the dictum of Lord Sumner in the *Weld-Blundell* case.[78] The following test is suggested as to what is meant by " direct ": " Was the injury caused by the " working out of the injurious tendencies of the negligent act " through known natural laws of cause and effect to its final " result, or did some outside agency, not in itself created by the " wrongdoer, intervene to divert the consequences to some new " and different end? " It would seem that damage would not be direct if it was not the immediate consequence or physical consequence, or if it arose as the result of the co-operation of some extraneous matters: see the *Liesbosch*.[79] On the facts of the present case, therefore, the fire damage was certainly not immediate—it was two-and-a-half days after the oil was spilled into the harbour—and it certainly arose as the result of the co-operation of extraneous matters. The damage here was not direct. [*Minister of Pensions* v. *Chennell*[80] was referred to.] This point does not, however, arise if the *Polemis* rule is not sound.

Lastly, the question of novus actus interveniens is linked with what has just been submitted. The authorities on it have already been cited: *Haynes* v. *Harwood*,[81] *King* v. *Phillips*,[82] *Woods* v. *Duncan*[83] and *Roe* v. *Minister of Health*.[84] There are two further cases: *The Oropesa*[85] and *Latham* v. *R. Johnson & Nephew Ltd*.[86] The remarkable concatenation of circumstances in this case, which are described in the judgment below as "a "most extraordinary and unusual combination" and "improba- "bility was heaped upon improbability," do constitute, in the light of the definitions to which attention has been drawn, novus actus interveniens. One must look at this particular combination of *all* the circumstances. Nobody could reasonably have foreseen that the circumstances would so combine as to produce this conflagration.

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[74] [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161, H.L.

[75] [1951] 2 K.B. 537.

[76] [1940] 1 K.B. 507; 56 T.L.R. 201; [1939] 4 All E.R. 522, C.A.

[77] [1921] 3 K.B. 560, 577.

[78] [1920] A.C. 956.

[79] [1933] A.C. 449.

[80] [1947] K.B. 250; 62 T.L.R. 753; [1946] 2 All E.R. 719.

Meares Q.C. following. With regard to novus actus interveniens, there may well be a force which is passive, but that has little bearing on the actual issues in this case. Another example of novus actus interveniens is a force which is in existence at the time of the carelessness but which actively operates after the carelessness is committed. Lord Simonds in *Woods* v. *Duncan*[87] referred to a combination of circumstances which could not be foreseen. It would be difficult to imagine—and there is certainly no precedent for it in the books—any more extraordinary combination of circumstances than existed in the present case. Not only was the combination of circumstances leading up to the fire even more coincidental and extraordinary than in *Woods* v. *Duncan*,[87] but, in addition, it was known to nobody who gave evidence at that time that the result itself could have been foreseen.

R. L. Taylor Q.C. and *Russell Bainton* (both of Australia) for the respondents. It is submitted: (1) that the respondents are entitled to retain this verdict for the reasons given by the trial judge. This involves that the principles to be extracted from the *Polemis* decision correctly state the law; that *Polemis* itself was correctly decided and is a decision on liability for damages in tort; that the decision has not been overruled or disapproved and, unless manifestly wrong or per incuriam, should not be disturbed. (2) The appellants' negligent act caused the damage by fire to the respondents' wharf. That question of fact was found in the respondents' favour by the trial judge and by

[81] [1935] 1 K.B. 146.
[82] [1953] 1 Q.B. 429.
[83] [1946] A.C. 401.
[84] [1954] 2 Q.B. 66.
[85] [1943] P. 32; 59 T.L.R. 103; [1943] 1 All E.R. 211, C.A.
[86] [1913] 1 K.B. 398; 29 T.L.R. 124, C.A.
[87] [1946] A.C. 401.

the Court of Appeal. These are concurrent findings of fact. (3) If the *Polemis* principle is not to be followed, the respondents are entitled to hold the verdict because the damage to their wharf was the natural consequence of the appellants' negligence, and this does not involve any challenge to the only relevant specific finding by the trial judge. (4) The facts pleaded and proved establish that the damage complained of resulted from the commission by the appellants of a public nuisance actionable at the suit of the respondents. In this respect foresight as to the character of the damage in fact caused is irrelevant.

The reasons for judgment in *Polemis* have for so long been acted upon that they ought not now to be departed from: *Thurogood* v. *Van den Berghs & Jurgens Ltd.*[88]; *Malleys Ltd.* v. *Rogers*[89]; *Dickson* v. *Commissioner for Railways* (*Qld.*).[90] [Reference was made to the argument in *Polemis*[91] and to Scrutton on Charterparties, 16th ed., p. 4, para. 2.] The presence of a clause of delivery and redelivery in a time charter was considered in *Italian State Railways* v. *Mavrogordatos*.[92] Not only is there nothing in the proceedings right up to the Court of Appeal to warrant the suggestion that *Polemis* was a decision on contract, but all the references that have been made to it are references to it on the tort of negligence. *Polemis* has been understood and followed as applicable in cases involving the actionable tort of negligence; it is a curious thing if it has been misunderstood for 40 years. The confusion arises mainly from a failure to appreciate the significance of the time charter and the position raised by the pleadings. Mr. Roskill submitted that there was no satisfactory factual basis for the decision in *Polemis*. There is. Mr. Roskill apparently adopted in its entirety the criticism of *Polemis* by Manning J. in the court below. It is all based, however, on a complete misconception that *Polemis* decided a contractual question whether the charterers failed to deliver the vessel. On the true construction of the clause there could not be a claim for redelivery. Secondly, there is the misconception that the parties litigated on the meaning to be attached to the words to be implied in clause 21, the words being "loss other than loss caused by the negligence of the charterers."

With regard to the decisions which Mr. Roskill said did not support *Polemis*, the first, *Smith* v. *London and South Western*

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[88] [1951] 2 K.B. 537.

[89] (1955) 55 S.R.(N.S.W.) 390.

[90] (1922) 30 C.L.R. 579.

[91] 15 Asp.M.C.N.S. 398, 399.

[92] [1919] 2 K.B. 305, 311.

Railway Co.,[93] correctly represents the law as it then was; the defendant was liable for all the direct consequences whether he could foresee them or not. What was said by Winfield in Selected Legal Essays, p. 70 (an article which appeared in (1934) 34 Columbia Law Review), where he traces the growth of the duty concept and its development in the English cases, is adopted. *Smith's* case[93] was a decision on whether or not there was sufficient evidence to go to the jury on the issue of negligence; the statement of principle was that, if the defendant was negligent, then he was liable for the consequences of his negligence irrespective of whether he could foresee them or not. See also *Bartlett* v. *Winnipeg Electric Railway Co.*,[94] a case in the Supreme Court of Canada before *Polemis* was decided. The significance of the decision in *H.M.S. London*[95] is that Sir Samuel Evans adopted what was said in *Smith's* case.[96] In *Weld-Blundell* v. *Stephens*[97] the majority of the Law Lords used the direct test to cut down the area of responsibility. The plaintiff failed because the consequence was not the direct result of the defendant's breach of duty. Mr. Roskill said that that decision did not support *Polemis*. It was concerned with remoteness of damage.

Thurogood's case[98] is cited for (i) the statement as to the criticism of *Polemis* in the intervening years, and (ii) it is a clear and direct application in 1951 of the *Polemis* principle. It has not been shaken and is a binding authority so far as the Court of Appeal is concerned. So far as the actual decision in *Rigby* v. *Hewitt*[99] went, it was one which anticipated *Polemis*. See also *Greenland* v. *Chaplin*.[100] It would be unfair to leave the respondents to bear the damage solely caused by the appellants. [Winfield on Torts, 6th ed., p. 97, was referred to.] What was said in *Hambrook* v. *Stokes Brothers*[101] cannot be regarded as a criticism of *Polemis*. *Aldham* v. *United Dairies (London) Ltd.*[102] was a direct application of the *Polemis* rule, and *Polemis* was referred to in *Adelaide Steamship Co.* v. *The King*.[103] What the judges said in *Bourhill* v. *Young*[104] was referable to the facts of that case, which are entirely different from those here. It will be seen that all the Lords were dealing with the case from the point of view of duty, and not of damage.

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[93] L.R. 5 C.P. 98, 103; L.R. 6 C.P. 14, 21.

[94] [1920] 1 W.W.R. 95.

[95] [1914] P. 72, 77.

[96] L.R. 5 C.P. 98.

[97] [1920] A.C. 956, 975.

[98] [1951] 2 K.B. 537.

[99] 5 Exch. 240.

[100] 5 Exch. 243.

[101] [1925] 1 K.B. 141, 164.

[102] [1940] 1 K.B. 507, 512.

[103] [1923] 1 K.B. 59, 65; 38 T.L.R. 864, C.A.

[104] [1943] A.C. 92, 98.

Polemis does not lay down a rule of universal application and say that in every case one is liable for direct consequences. In *Glasgow Corporation* v. *Muir* [105] there was no duty cast on the defendant, for the reason that there was no danger reasonably foreseeable of injury to any person. It does not conflict in any way with what was said in *Polemis*. *Woods* v. *Duncan* [106] takes nothing from *Polemis*. In all the speeches it was said that there was no breach of a duty owed in the particular circumstances.

The respondents submit that the appellants are liable for the damage caused by the fire because such damage was directly traceable to acts of the appellants, which constituted either negligence or a public nuisance. As to negligence: the appellants owed a duty to persons so closely and directly affected by their acts or omissions that they ought at the time of those acts or omissions to have had them in their contemplation as being so affected, the duty was to take reasonable care to avoid spilling a large quantity of furnace oil onto the water of Morts Bay: *Donoghue* v. *Stevenson*,[107] *per* Lord Atkin. The same proposition may be stated as that the appellants owed a duty to conduct the operation of bunkering with such reasonable care as would avoid the risk of injury to persons within that which the appellants ought to have reasonably contemplated as the area of potential danger which would arise as the result of the spillage of the oil: *Bourhill* v. *Young*,[108] *per* Lord Thankerton. The respondents ought reasonably to have been in the appellants' contemplation, at the time of bunkering, as likely to be closely or directly affected by the spillage of the oil, or within the area of potential danger which would arise as a result of the spillage, because it was obviously likely that such oil would be carried by wind and tide into the Bay. In fact the spillage did cause the damage in question; the appellants' failure to take reasonable care was the cause of the damage, which was recoverable from them by the respondents.

In *Woods* v. *Duncan* [109] the thing itself was of no danger, whereas in the present case the oil increased the risk of damage by fire. The last case in which *Polemis* was followed in the Court of Appeal (by a majority) was *Kilgollan* v. *William Cooke & Co. Ltd.*[110]; the particular injury there was not reasonably foreseeable. In the *Liesbosch* case [111] Lord Wright said that *Polemis* correctly stated the law, and the other Lords agreed with his speech. *Bolton* v. *Stone* [112] was basically a decision on whether the judge's finding on an issue of fact was correct; there is nothing in any of the speeches which is inconsistent with *Polemis*. The reference to *Polemis* by Denning L.J. in *Jones* v. *Livox Quarries Ltd.*[113] is relied on as directly rejecting the argument of the appellants here. Denning L.J. again referred to *Polemis* in *Roe* v. *Minister of Health.*[114]

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[105] [1943] A.C. 448.

[106] [1946] A.C. 401.

[107] [1932] A.C. 562, 580.

[108] [1943] A.C. 92, 98.

[109] [1946] A.C. 401.

[110] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294, C.A.

[111] [1933] A.C. 449, 461.

Polemis has been followed in Commonwealth courts: *Dickson* v. *Commissioner for Railways (Qld.)* [115]; *Chester* v. *Waverley Corporation* [116]; and it was referred to as correctly stating the law in *Victorian Railways Commissioners* v. *Speed* [117] and *Hoyt's Pty. Ltd.* v. *O'Connor.*[118] In New South Wales both branches of *Polemis* have been accepted as correctly decided: *Malleys Ltd.* v. *Rogers*,[119] and it has been followed in South Australia: *Richards* v. *Baker*,[120] and in New Zealand it has been applied extensively: *Barrett* v. *Hardie & Thompson Ltd.*[121]; *Cervo* v. *Swinburn (Ferretti, Third Party)* [122]; *Williams* v. *B.A.L.M. (N.Z.) Ltd. (No. 3)* [123]; *Hibberds Foundry Ltd.* v. *Hardy.*[124] Of the relevant Canadian cases, *Bartlett* v. *Winnipeg Electric Railway Co.*[125] was decided before *Polemis*. In *F. W. Jeffrey & Sons Ltd.* v. *Copeland Flour Mills Ltd.*[126] *Polemis* was applied. In *Duce* v. *Rourke* [127] it was held that the damages there were not too remote although the defendant could not have foreseen them. *Polemis* is cited in *Honan* v. *McLean.*[128] The last Canadian case, *Seaway Hotels Ltd.* v. *Consumer's Gas Co.*,[129] is, it is submitted, a case in which the *Polemis* principle was applied.

There is no conflict between *Polemis* and *Hadley* v. *Baxendale* [130]; *Polemis* is a decision on liability for negligence in tort; *Hadley's* case was an action for breach of contract, and not only did it not purport to say anything about the measure of damages in tort but it gave as the reasons for the two rules it promulgated matters which would be quite invalid as reasons for an action in tort. [Reference was made to the statements of principle in *The Arpad.*[131]] There appears to be no case in which the precise point that the damages in contract and in tort are the same has been decided. In *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co. Ltd.*[132] it was the presence of the anchor which caused the damage there. That case is cited for the proposition that the defendants, having made a breach of their contract, were liable for damages which in fact flowed from the breach, although they did not know, and neither party knew, that the cause of the damage existed.

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[112] [1951] A.C. 850, 868.
[113] [1952] 2 Q.B. 608, 615.
[114] [1954] 2 Q.B. 66, 84.
[115] (1922) 30 C.L.R. 579, 583.
[116] (1939) 62 C.L.R. 1, 6, 29.
[117] [1928] V.L.R. 150, 166.
[118] [1928] V.L.R. 222, 235.
[119] (1955) 55 S.R., N.S.W. 390, 393.
[120] [1943] S.A.S.R. 245, 249.
[121] [1924] N.Z.L.R. 228.
[122] [1939] N.Z.L.R. 430, 435.
[123] [1951] N.Z.L.R. 893, 899.
[124] [1953] N.Z.L.R. 14.
[125] [1920] 1 W.W.R. 95.
[126] (1922) 52 Ont.L.R. 617, 628.
[127] [1951] 1 W.W.R. 305, 307.
[128] [1953] 8 W.W.R. 523, 529.
[129] [1959] Ont.L.R. 177.
[130] 9 Exch. 341.

Mr. Roskill drew a distinction between the way in which the rule is expressed in *Hadley* v. *Baxendale* [133] and in *Polemis* and said that as those two cases were in conflict the rule in the former prevailed. That involved an examination of the cases in which it was said that the rules were the same, and also of the cases where the expression "natural and direct" occurred: *The Susquehanna* [134]; *The Argentino.*[135] All that Kelly C.B. is saying in *Rigby* v. *Hewitt* [136] is that at least every person is responsible for such consequences as he could reasonably foresee. "Direct" was preferred to "natural" in the *Weld-Blundell* case [137]; it was framed in tort, but was a decision on breach of contract; the real point at issue, however, was whether the damages were too remote. Lord Dunedin is using the words "natural and "probable" in a sense different from "foreseeable." Lord Sumner is not saying that "natural and probable" is wrong, but that in that particular case, which was a novus actus case, they are not the appropriate expressions; the appropriate expression was "direct." He rejects "probability" as the test so far as remoteness of damage is concerned. He said that different tests must be applied according to the category of the case under consideration. *Gorris* v. *Scott* [138] was considered in *Grant* v. *National Coal Board.*[139] That concludes the observations that *Polemis* was rightly decided.

Smith v. *London and South Western Railway Co.*[140] has now become a rule of law; it has been followed since 1871; the observations of Lord Goddard in *Carmarthenshire County Council* v.

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[131] [1934] P. 189, 201, 232; 50 T.L.R. 505, C.A.

[132] (1924) 41 T.L.R. 21, P.C.

[133] 9 Exch. 341.

[134] [1926] A.C. 665; 42 T.L.R. 639, H.L.

[135] 13 P.D. 191, 200, C.A.

[136] 5 Exch. 240.

[137] [1920] A.C. 956.

[138] (1874) L.R. 9 Exch. 124.

[139] [1956] A.C. 649, 655; [1956] 2 W.L.R. 752; [1956] 1 All E.R. 682.

[140] L.R. 6 C.P. 14.

Lewis [141] are apposite. As to the effect of the rule, what was said by Lord Porter in *Morrison Steamship Co. Ltd.* v. *Greystoke Castle* [142] is adopted; and there may be added to that what Lord Sumner said in the *Weld-Blundell* case [143] and what Denning L.J. said in *Roe* v. *Minister of Health.*[144] Mr. Roskill said that foreseeability is the only test and that he is not liable for this damage because he could not have reasonably foreseen it. It is not disputed that in many cases that may be the test, but the respondents here contend for a different test, the *Polemis* test, in a limited class of case.

It is submitted that where a person is under a duty to take care towards another, then, if he does any act which he should foresee may cause damage or injury to that other, he is responsible for any physical damage directly caused by that act, whether he could have foreseen that damage or not. That rule is exemplified by *Polemis* itself, in *Thurogood's* case [145] and in *Kilgollan* v. *William Cooke & Co. Ltd.*[146]

The next proposition for which we contend is that where a person has committed a tort and caused damage by negligence he is liable for all the physical damage directly resulting from his tortious act, even if it differs in type or character from the damage which he or the reasonable man could have foreseen as the result of his tortious act. Put more shortly, where the tortious act has caused both foreseeable physical damage and unforeseeable physical damage of a different kind, character or type, the defendant is liable for all. The second limb is that the defendant in this case committed the tort of causing damage by negligence because this case is taken a step further than *Polemis*. In *Polemis* there was no damage alleged or in fact caused by the plank which fell into the ship other than the spark which precipitated the conflagration. In this case there has been found as a fact that damage was caused to the plaintiffs' property and that damage sounded in financial loss.

On the basis that there was foreseeable physical injury caused and that the defendants were guilty of the tortious act of causing damage by negligence, it is submitted that they are responsible for all the physical damage resulting from that act, and that, if it were not foreseeable—which is not conceded—if in fact it was directly caused by the act of negligence, that concludes the matter, this being a question of remoteness of damage only. If one leaves out of consideration the question whether they in fact foresaw this damage, it is simply a case of the defendants' negligent act causing the oil to escape. The fire which consisted of the oil burning was the direct result of that act, since if they had not put the oil there it could not have been there to cause the fire. In this case foreseeability alone is not the appropriate test; the appropriate test is that laid down by Lord Porter as stated above.

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[141] [1955] A.C. 549, 560; [1955] 2 W.L.R. 517; [1955] 1 All E.R. 565.

[142] [1947] A.C. 265, 295.

[143] [1920] A.C. 956.

[144] [1954] 2 Q.B. 66, 84.

[145] [1951] 2 K.B. 537.

[146] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294, C.A.

This case was put as a *Polemis* case; alternatively, the appellants were negligent long before there ever was a fire, because they must have realised at that point that the oil would constitute a danger of injury to the respondents by fire. The appellants' first submission was that the damage by fire to the respondents' wharf was not a reasonably foreseeable consequence of the appellants' act in spilling the furnace oil into Morts Bay, and that therefore that act did not constitute actionable negligence at the suit of the respondents. That is unsound for these reasons: before the oil escaped the appellants were under a duty not only to prevent injury to the respondents but to refrain from acts which might cause damage or injury to them; and the question whether they were negligent, as distinct from the actionable tort of negligence, is to be determined at that point of time. They have been guilty of a breach of duty to the respondents and nothing that happened thereafter could alter that fact. The appellants' proposition involves this, that, until one has seen the full extent of what has resulted from what they did, one is not in a position to say whether they have committed a breach of their duty, because they say that it is only for foreseeable consequences that they owe a duty, and one cannot tell whether the damage was foreseeable or not until one finds out what it was. Their submission is contrary to all the principles which have been laid down on this branch of the law, and also contrary to the good sense of the matter. [Reference was made to *Donoghue* v. *Stevenson.*[147]]

The only question here is really one of remoteness of damage, and that is in substance a question of fact: *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ltd.*[148]

If the Board comes to the conclusion that the principle in *Polemis* is wrong, then, despite that, in the light of the fact that it has been for so long acted on, it should be allowed to stand; the basis of that submission being that it has been acted on in this country since *Smith* v. *London and South Western Railway Co.*,[149] and has been acted on in Canada since prior to *Polemis* and has been followed in New South Wales and the other States of Australia for so long and also in New Zealand.

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[147] [1932] A.C. 562, 580.

[148] [1951] 2 Q.B. 405, 409; [1951] 2 T.L.R. 30; [1951] 2 All E.R. 162.

On the question of causation, the argument for the appellants was that it was not the appellants' negligent act which caused the damage because there was a novus actus interveniens, and they rely on the concatenation of circumstances as constituting novus actus. Whether or not the breach resulted in or caused this damage is a question of fact on which there are concurrent findings: *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport.*[150] How it can be said that the very things and circumstances that they should have taken into account in deciding whether their act might cause damage to the respondents, and which were the very things which the appellants either knew or should have foreseen, can thereafter constitute a novus actus, it is difficult to see. This cannot be novus actus; it would be a curious argument that the very circumstances which make it incumbent on them to foresee the danger of injury can be said to amount to a novus actus.

It is further submitted that irrespective of the rule in *Polemis* the appellants committed the tort of negligence when they allowed this oil to escape when they could foresee the possibility of danger to the respondents of injury by fire. The damage was in fact directly traceable to the discharge of the oil and not to the operation of independent causes having no connection with the discharge of the oil except that they could not avoid its results. The damage was foreseeable. Furnace oil floating on water can in certain circumstances be ignited and the resulting fire is likely to do damage to foreshore installations: *Eastern Asia Navigation Co. Ltd.* v. *Fremantle Harbour Trust Commissioners*[151]; that case, where oil caught fire on water, is cited to show what are the physical properties of this particular oil, because it is in light of those that one is to judge the extent of the duty which the appellants owed.

Bainton following. Causing harm to land adjoining a public highway by a user of the highway constitutes the commission of a public nuisance and one actionable at the suit of the proprietor of any such land who has suffered greater injury than members of the public in general. For the purpose of that rule navigable waters fall into the same category as public highways, and foreshore proprietors fall into the same category as owners of land adjoining a highway. Secondly, it is irrelevant to such a cause of action that the person whose activities caused the harm did not foresee the type or the extent of the harm that his acts would cause. Thirdly, damages are recoverable for the physical injuries in fact caused by the nuisance irrespective of whether the person causing it could have foreseen the type or extent of the damage.

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[149] L.R. 6 C.P. 14.

[150] [1942] A.C. 691, 706; 58 T.L.R. 263; [1942] 2 All E.R. 6.

[151] (1951) 83 C.L.R. 353.

[The point having been taken for the appellants that it was not in the circumstances open to the respondents to raise the point of nuisance, the Board, after a short adjournment, said that in the event of the appellants succeeding on the main question they would preserve the right of the respondents to have the issue of nuisance raised in the courts of New South Wales, if those courts thought it proper to deal with it further.]

Ashton Roskill Q.C. in reply. It is unnecessary to qualify or withdraw any of the opening submissions for the appellants. At the basis of these submissions was the contention that one rule as to liability and another as to unforeseeable consequential harm meant that closely related aspects of the same problem were governed by rules expressing widely divergent policies. The whole tenor of the submissions was that the same rule as to foreseeability governed both. The test is whether the damage was of a character such as the appellants could reasonably be expected to have anticipated.

As to the decision in *Polemis* being of long standing, the House of Lords in the *Morrison Steamship Company* case [152] in 1946 overruled *The Marpessa*,[153] which had stood since 1891. Further, *Polemis* has never before arisen for consideration by this Board or the House of Lords. Of the four groups of cases relied on by the respondents—Australian, New Zealand, Canadian and English—so far as the Australian and New Zealand cases are concerned, it was conceded, obviously rightly, that in all the State cases the State High Court felt obliged to treat *Polemis* as sound law. No case that has been cited from Australia, New Zealand or Canada would, however, have been decided differently if *Polemis* had never been decided at all. None of the Canadian cases are true *Polemis* cases because (a) in all of them the decisions can be rationalised on the ground that the damage sustained was foreseeable, and (b) in one—*Bartlett* v. *Winnipeg Electric Railway Co.*[154]—there is the further factor that the Supreme Court purported to have based its decision on *Smith* v. *London and South Western Railway Co.*[155] Exactly the same comment —that the damage was foreseeable—can be made on all the English decisions save one, *Thurogood's* case,[156] which can be used to illustrate the fallacy that lies somewhere near the root of the rule in *Polemis*. [Reference was also made to *Kilgollan's* case [157] and *The Argentino*.[158]] The very conflict about whether *Polemis* is a rule in contract or in tort or in both casts doubt upon its soundness.

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[152] [1947] A.C. 265.

[153] [1891] P. 403.

Damages in nuisance follow the same rule as damages in negligence with regard to remoteness, and damages in trespass follow the same approach. [Reference was also made to *Read* v. *J. Lyons & Co. Ltd.*,[159] *The Arpad*,[160] the *Great Lakes Steamship* case [161] and *Donoghue* v. *Stevenson*.[162]] It is not merely contrary to law, but injustice, for a person to be held responsible for consequences which he cannot foresee.

1961. January 18. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: The trial judge also made the all-important finding, which must be set out in his own words: " The raison " d'être of furnace oil is, of course, that it shall burn, but I find " the defendant did not know and could not reasonably be " expected to have known that it was capable of being set afire " when spread on water." This finding was reached after a wealth of evidence, which included that of a distinguished scientist, Professor Hunter. It receives strong confirmation from the fact that at the trial the respondents strenuously maintained that the appellants had discharged petrol into the bay on no other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before their Lordships' Board to limit in some way the finding of fact, but it is clear that it was intended to cover precisely the event that happened.

One other finding must be mentioned. The judge held that apart from damage by fire the respondents had suffered some damage from the spillage of oil in that it had got upon their slipways and congealed upon them and interfered with their use of the slips. He said: "The evidence of this damage is slight and "no claim for compensation is made in respect of it. Neverthe-"less it does establish some damage, which may be insignificant "in comparison with the magnitude of the damage by fire, but "which nevertheless is damage which, beyond question, was a "direct result of the escape of the oil." It is upon this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. That consideration must begin with an expression of indebtedness to Manning J. for his penetrating analysis of the problems that today beset the question of liability for negligence. In the year 1913 in the case of *H.M.S. London*,[1] a case to which further reference will be made, Sir Samuel Evans P. said: "The doctrine of legal causation, in "reference both to the creation of liability and to the measure-"ment of damages, has been much discussed by judges and "commentators in this country and in America. Vast numbers "of learned and acute judgments and disquisitions have been "delivered and written upon the subject. It is difficult to "reconcile the decisions; and the views of prominent commen-"tators and jurists differ in important respects. It would not be "possible or feasible in this judgment to examine them in any-"thing approaching detail." In the near half-century that has passed since the learned President spoke those words the task has not become easier, but it is possible to point to certain landmarks and to indicate certain tendencies which, as their Lordships hope, may serve in some measure to simplify the law.

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[154] [1920] 1 W.W.R. 95.
[155] L.R. 6 C.P. 14.
[156] [1951] 2 K.B. 537.
[157] [1956] 2 All E.R. 294.
[158] 13 P.D. 191.
[159] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471.
[160] [1934] P. 189.
[161] 41 T.L.R. 21.
[162] [1932] A.C. 562.

It is inevitable that first consideration should be given to the case of *In re Polemis and Furness Withy & Co. Ltd.*[2] which will henceforward be referred to as *Polemis*. For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that the Full Court was constrained to decide the present case in favour of the respondents. In doing so Manning J., after a full examination of that case, said: "To "say that the problems, doubts and difficulties which I have "expressed above render it difficult for me to apply the decision "in *In re Polemis* with any degree of confidence to a particular "set of facts would be a grave understatement. I can only

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[1] [1914] P. 72, 76; 30 T.L.R. 196.

[2] [1921] 3 K.B. 560; 37 T.L.R. 940, C.A.

" express the hope that, if not in this case, then in some other " case in the near future, the subject will be pronounced upon by " the House of Lords or the Privy Council in terms which, even " if beyond my capacity fully to understand, will facilitate, for " those placed as I am, its everyday application to current " problems." This cri de coeur would in any case be irresistible, but in the years that have passed since its decision *Polemis* has been so much discussed and qualified that it cannot claim, as counsel for the respondents urged for it, the status of a decision of such long standing that it should not be reviewed.

What, then, did *Polemis* decide? Their Lordships do not propose to spend time in examining whether the issue there lay in breach of contract or in tort. That might be relevant for a tribunal for which the decision was a binding authority: for their Lordships it is not. It may, however, be observed that in the proceedings there was some confusion. The case arose out of a charterparty and went to arbitration under a term of it, and the first contention of the charterers was that they were protected from liability by the exception of fire in the charterparty. But it is clear from the pleadings and other documents, copies of which were supplied from the Record Office, that alternative claims for breach of contract and negligence were advanced, and it is clear, too, that before Sankey J. and the Court of Appeal the case proceeded as one in which, independently of contractual obligations, the claim was for damages for negligence. It was upon this footing that the Court of Appeal held that the charterers were responsible for all the consequences of their negligent act even though those consequences could not reasonably have been anticipated. The negligent act was nothing more than the carelessness of stevedores (for whom the charterers were assumed to be responsible) in allowing a sling or rope by which it was hoisted to come into contact with certain boards, causing one of them to fall into the hold. The falling board hit some substances in the hold and caused a spark: the spark ignited petrol vapour in the hold: there was a rush of flames, and the ship was destroyed. The special case submitted by the arbitrators found that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. They did not indicate what damage might have been so anticipated.

There can be no doubt that the decision of the Court of Appeal in *Polemis* plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences whether

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reasonably foreseeable or not. The generality of the proposition is perhaps qualified by the fact that each of the Lords Justices refers to the outbreak of fire as the direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not "direct," whatever that may mean. It has to be asked, then, why this conclusion should have been reached. The answer appears to be that it was reached upon a consideration of certain authorities, comparatively few in number, that were cited to the court. Of these, three are generally regarded as having influenced the decision. The earliest in point of date was *Smith* v. *London & South Western Railway Co.*[3] In that case it was said that "when it has been once determined that there is evidence of "negligence, the person guilty of it is equally liable for its conse-"quences, whether he could have foreseen them or not": see *per* Channell B.[4] Similar observations were made by other members of the court. Three things may be noted about this case: the first, that for the sweeping proposition laid down no authority was cited; the second, that the point to which the court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind; and the third, that so little was the mind of the court directed to the problem which has now to be solved that no one of the seven judges who took part in the decision thought it necessary to qualify in any way the consequences for which the defendant was to be held responsible. It would perhaps not be improper to say that the law of negligence as an independent tort was then of recent growth and that its implications had not been fully examined. The second case was *H.M.S. London*,[5] which has already been referred to. There the statement in *Smith's* case was followed, Sir Samuel Evans citing Blackburn J.[6]: "What the defendants might reasonably antici-"pate is only material with reference to the question whether "the defendants were negligent or not, and cannot alter their "liability if they were guilty of negligence." This proposition, which provides a different criterion for determining liability and compensation, goes to the root of the matter and will be discussed later. It was repeated by Lord Sumner in the third case which was relied on in *Polemis*, namely, *Weld-Blundell* v. *Stephens*.[7] In that case the majority of their Lordships, of whom Lord

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[3] (1870) L.R. 6 C.P. 14.

[4] Ibid. 21.

[5] [1914] P. 72.

[6] Ibid. 77.

[7] [1920] A.C. 956, 983; 36 T.L.R. 640, H.L.

Sumner was one, held, affirming a decision of the Court of Appeal, that the plaintiff's liability for damages in certain libel actions did not result from an admitted breach by the defendant of the duty that he admittedly owed to him. Lord Dunedin (another of the majority) decided the case on the ground that there was there no evidence which entitled the jury to give the affirmative answer that they did to the question as put to them that the actions of libel and damages recovered were the "natural and probable consequences" of the proved negligence of the defendant. Lord Wrenbury (the third of the majority) summed up his view of the case by saying[8]: "I am quite "unable to follow the proposition that the damages given in the "libel actions are in any way damages resulting from anything "which Stephens did in breach of duty." Lord Sumner, whose speech their Lordships, like others before them, have not found in all respects easy to follow, said[9]: "What a defendant ought "to have anticipated as a reasonable man is material when the "question is whether or not he was guilty of negligence, that is, "of want of due care according to the circumstances. This, "however, goes to culpability, not to compensation." But this observation followed a passage in which His Lordship, directing his mind to the problem of causation, had asked what were "natural, probable and necessary consequences," and had expressed the view that "direct cause" was the best expression. Adopting that test he rejected the plaintiff's claim as too remote. The question of foreseeability became irrelevant and the passage cited from his speech was unnecessary to his decision. Their Lordships are constrained to say that this dictum (for such it was) perpetuated an error which has introduced much confusion into the law.

Before going forward to the cases which followed *Polemis*, their Lordships think it desirable to look back to older authorities which appear to them to deserve consideration. In two cases, *Rigby* v. *Hewitt*[10] and *Greenland* v. *Chaplin*,[11] Pollock C.B. affirmed[12] (stating it to be his own view only and not that of the court) that he entertained "considerable doubt whether a "person who is guilty of negligence is responsible for all the "consequences which may under any circumstances arise and "in respect of mischief which could by no possibility have "been foreseen and which no reasonable person would have

[8] [1920] A.C. 956, 999.
[9] Ibid. 984.
[10] (1850) 5 Exch. 240.
[11] Ibid. 243.
[12] Ibid. 248.

"anticipated." It was not necessary to argue this question and it was not argued.

Next, one of many cases may be cited which show how shadowy is the line between so-called culpability and compensation. In *Sharp* v. *Powell*[13] the defendant's servant in breach of the Police Act washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer about 25 yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice and the water flowed over a portion of the causeway and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. The defendant was held not to be liable. The judgment of Bovill C.J. is particularly valuable and interesting. "No doubt," he said,[14] "one who "commits a wrongful act is responsible for the ordinary conse-"quences which are likely to result therefrom; but, generally "speaking, he is not liable for damage which is not the natural "or ordinary consequence of such an act unless it be shown "that he knows or has reasonable means of knowing that conse-"quences not usually resulting from the act are by reason of "some existing cause likely to intervene so as to occasion damage "to a third person. Where there is no reason to expect it, and "no knowledge in the person doing the wrongful act that such "a state of things exists as to render the damage probable, if "injury does result to a third person it is generally considered "that the wrongful act is not the proximate cause of the injury "so as to render the wrongdoer liable to an action." Here all the elements are blended, "natural" or "ordinary conse-"quences," "foreseeability," "proximate cause." What is not suggested is that the wrongdoer is liable for the consequences of his wrongdoing whether reasonably foreseeable or not, or that there is one criterion for culpability, another for compensation. It would, indeed, appear to their Lordships that, unless the learned Chief Justice was making a distinction between "one "who commits a wrongful act" and one who commits an act of negligence, the case is not reconcilable with *Polemis*. In that case it was not dealt with except in a citation from *Weld-Blundell* v. *Stephens*.[15]

Mention should also be made of *Cory & Son Ltd.* v. *France*

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[13] (1872) L.R. 7 C.P. 253.

[14] Ibid. 258.

[15] [1920] A.C. 956.

Fenwick & Co. Ltd.[16] In that case Vaughan Williams L.J., citing the passage from the judgment of Pollock C.B. in *Greenland* v. *Chaplin* which has already been read, said[17]: "I do not myself "suppose that although, when these propositions were originally "laid down, they were not intended as positive judgments but "as opinions of the learned judge, there would be any doubt "nowadays as to their accuracy." And Kennedy L.J. said of the same passage, "with that view of the law no one would venture "to quarrel." Some doubt was expressed in *Polemis* as to whether the citation of which these learned judges so emphatically approved was correct. That is irrelevant. They approved that which they cited and their approval has high authority. It is probable in any case that it had not occurred to them that there was any such dichotomy as was suggested in *Polemis*. Nor, clearly, had it at an earlier date occurred to Lord Wensleydale in *Lynch* v. *Knight*,[18] nor to Cockburn C.J. in *Clark* v. *Chambers*.[19] The impression that may well be left on the reader of the scores of cases in which liability for negligence has been discussed is that the courts were feeling their way to a coherent body of doctrine and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.

Before turning to the cases that succeeded it, it is right to glance at yet another aspect of the decision in *Polemis*. Their Lordships, as they have said, assume that the court purported to propound the law in regard to tort. But up to that date it had been universally accepted that the law in regard to damages for breach of contract and for tort was, generally speaking, and particularly in regard to the tort of negligence, the same. Yet *Hadley* v. *Baxendale*[20] was not cited in argument nor referred to in the judgments in *Polemis*. This is the more surprising when it is remembered that in that case, as in many another case, the claim was laid alternatively in breach of contract and in negligence. If the claim for breach of contract had been pursued, the charterers could not have been held liable for consequences not reasonably foreseeable. It is not strange that Sir Frederick Pollock said that Blackburn and Willes JJ. would have been shocked beyond measure by the decision that the charterers were liable in tort: see Pollock on Torts, 15th ed., p. 29. Their Lordships refer to this aspect of the matter not

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[16] [1911] 1 K.B. 114; 27 T.L.R. 18, C.A.

[17] [1911] 1 K.B. 114, 122.

[18] (1861) 9 H.L.C. 577, H.L.

[19] (1878) 3 Q.B.D. 327.

[20] (1854) 9 Exch. 341.

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because they wish to assert that in all respects today the measure of damages is in all cases the same in tort and in breach of contract, but because it emphasises how far *Polemis* was out of the current of contemporary thought. The acceptance of the rule in *Polemis* as applicable to all cases of tort directly would conflict with the view theretofore generally held.

If the line of relevant authority had stopped with *Polemis*, their Lordships might, whatever their own views as to its unreason, have felt some hesitation about overruling it. But it is far otherwise. It is true that both in England and in many parts of the Commonwealth that decision has from time to time been followed; but in Scotland it has been rejected with determination. It has never been subject to the express scrutiny of either the House of Lords or the Privy Council, though there have been comments upon it in those Supreme Tribunals. Even in the inferior courts judges have, sometimes perhaps unwittingly, declared themselves in a sense adverse to its principle. Thus Asquith L.J. himself, who in *Thurogood* v. *Van den Berghs & Jurgens Ltd.*[21] had loyally followed *Polemis*, in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*,[22] holding that a complete indemnity for breach of contract was too harsh a rule, decided that [23] "the aggrieved party is only entitled to recover "such part of the loss actually resulting as was at the time of "the contract reasonably foreseeable as liable to result from the "breach." It is true that in that case the Lord Justice was dealing with damages for breach of contract. But there is nothing in the case to suggest, nor any reason to suppose, that he regarded the measure of damage as different in tort and breach of contract. The words "tort" and "tortious" have perhaps a somewhat sinister sound but, particularly where the tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract, or that the negligent actor should suffer a severer penalty. In *Minister of Pensions* v. *Chennell* [24] Denning J. (as he then was) said: "Foreseeability is as a rule vital in "cases of contract; and also in cases of negligence, whether it "be foreseeability in respect of the person injured as in *Palsgref* "v. *Long Island Railway* [25] (discussed by Professor Goodhart in

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[21] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682, C.A.

[22] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.

[23] [1949] 2 K.B. 528, 539.

[24] [1947] K.B. 250, 253; 62 T.L.R. 753; [1946] 2 All E.R. 719.

[25] (1928) 248 N.Y. 339.

"his Essays, p. 129), *Donoghue* v. *Stevenson*[26] and *Bourhill* v. "*Young*,[27] or in respect of intervening causes as in *Aldham* "v. *United Dairies (London) Ltd.*[28] and *Woods* v. *Duncan*.[29] "It is doubtful whether *In re Polemis and Furness Withy &* "*Co.*[30] can survive these decisions. If it does, it is only in "respect of neglect of duty to the plaintiff which is the immediate "or precipitating cause of damage of an unforeseeable kind." Their Lordships would with respect observe that such a survival rests upon an obscure and precarious condition.

Instances might be multiplied of deviation from the rule in *Polemis*, but their Lordships think it sufficient to refer to certain later cases in the House of Lords and then to attempt to state what they conceive to be the true principle. In *Glasgow Corporation* v. *Muir*[31] Lord Thankerton said[32] that it had long been held in Scotland that all that a person can be bound to foresee are the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man, while Lord Macmillan said that[33] "It is still left to the judge to decide "what, in the circumstances of the particular case, the reason- "able man would have had in contemplation, and what, "accordingly, the party sought to be made liable ought to have "foreseen." Here there is no suggestion of one criterion for determining culpability (or liability) and another for determining compensation. In *Bourhill* v. *Young*[34] the double criterion is more directly denied. There Lord Russell of Killowen said[35]: "In considering whether a person owes to another a duty a "breach of which will render him liable to that other in damages "for negligence, it is material to consider what the defendant "ought to have contemplated as a reasonable man. This con- "sideration may play a double role. It is relevant in cases of "admitted negligence (where the duty and breach are admitted) "to the question of remoteness of damage, i.e., to the question "of compensation not to culpability, but it is also relevant in "testing the existence of a duty as the foundation of the alleged "negligence, i.e., to the question of culpability not to compensa- "tion." This appears to be in flat contradiction to the rule in

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[26] [1932] A.C. 562, H.L.

[27] [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.

[28] [1940] 1 K.B. 507; 56 T.L.R. 201; [1939] 4 All E.R. 522.

[29] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420, H.L.

[30] [1921] 3 K.B. 560, C.A.

[31] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44, H.L.

[32] [1943] A.C. 448, 454.

[33] Ibid. 457.

[34] [1943] A.C. 92.

[35] Ibid. 101.

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Polemis and to the dictum of Lord Sumner in *Weld-Blundell* v. *Stephens*.[36]

From the tragic case of *Woods* v. *Duncan*,[37] the facts of which are too complicated to be stated at length, some help may be obtained. There Viscount Simon analysed the conditions of establishing liability for negligence and stated them to be (1) that the defendant failed to exercise due care, (2) that he owed the injured man the duty to exercise due care, and (3) that his failure to do so was the cause of the injury in the proper sense of the term. He held that the first and third conditions were satisfied, but inasmuch as the damage was due to an extraordinary and unforeseeable combination of circumstances the second condition was not satisfied. Be it observed that to him it was one and the same thing whether the unforeseeability of damage was relevant to liability or compensation. To Lord Russell of Killowen in the same case the test of liability was whether the defendants (Cammell Laird & Co. Ltd.) could reasonably be expected to foresee that the choking of a test cock (itself undoubtedly a careless act) might endanger the lives of those on board; Lord Macmillan asked whether it could be said that they, the defendants, ought to have foreseen as reasonable people that if they failed to detect and rectify the clogging of the hole in the door the result might be that which followed, and later, identifying, as it were, reasonable foreseeability with causation, he said[38]: "The chain of "causation, to borrow an apposite phrase, would appear to be "composed of missing links."

Enough has been said to show that the authority of *Polemis* has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

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[36] [1920] A.C. 956, 984.

[37] [1946] A.C. 401.

[38] Ibid. 431.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in *Polemis*. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case, and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable or, alternatively, on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in *Polemis*. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the " direct " consequence) be substituted which leads to nowhere but the never-ending and insoluble problems of causation. " The lawyer," said Sir Frederick Pollock, " cannot afford to " adventure himself with philosophers in the logical and meta- " physical controversies that beset the idea of cause." Yet this is just what he has most unfortunately done and must continue to do if the rule in *Polemis* is to prevail A conspicuous example occurs when the actor seeks to escape liability on the ground that the " chain of causation " is broken by a " nova causa " or " novus actus interveniens."

The validity of a rule or principle can sometimes be tested by observing it in operation. Let the rule in *Polemis* be tested in this way. In the case of the *Liesbosch* [39] the appellants, whose vessel had been fouled by the respondents, claimed damages under various heads. The respondents were admittedly at fault; therefore, said the appellants, invoking the rule in *Polemis*, they were responsible for all damage whether reasonably foreseeable or not. Here was the opportunity to deny the rule or to place it secure upon its pedestal. But the House of Lords took neither course; on the contrary, it distinguished *Polemis* on the ground that in that case the injuries suffered were the "immediate "physical consequences" of the negligent act. It is not easy to understand why a distinction should be drawn between "immediate physical" and other consequences, nor where the line is to be drawn. It was perhaps this difficulty which led Denning L.J. in *Roe* v. *Minister of Health*[40] to say that foreseeability is only disregarded when the negligence is the immediate or *precipitating* cause of the damage. This new word may well have been thought as good a word as another for revealing or disguising the fact that he sought loyally to enforce an unworkable rule.

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[39] [1933] A.C. 449; 49 T.L.R. 289, H.L.

In the same connection may be mentioned the conclusion to which the Full Court finally came in the present case. Applying the rule in *Polemis* and holding therefore that the unforeseeability of the damage by fire afforded no defence, they went on to consider the remaining question. Was it a "direct" consequence? Upon this Manning J. said: "Notwithstanding that, if regard is "had separately to each individual occurrence in the chain of "events that led to this fire, each occurrence was improbable "and, in one sense, improbability was heaped upon improbability, "I cannot escape from the conclusion that if the ordinary man "in the street had been asked, as a matter of common sense, "without any detailed analysis of the circumstances, to state "the cause of the fire at Mort's Dock, he would unhesitatingly "have assigned such cause to spillage of oil by the appellant's "employees." Perhaps he would, and probably he would have added: "I never should have thought it possible." But with great respect to the Full Court this is surely irrelevant, or, if it is relevant, only serves to show that the *Polemis* rule works in a very strange way. After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule by substituting "direct" for "reasonably foreseeable" consequence leads to a conclusion equally illogical and unjust.

At an early stage in this judgment their Lordships intimated that they would deal with the proposition which can best be stated by reference to the well-known dictum of Lord Sumner: "This however goes to culpability not to compensation." It is with the greatest respect to that very learned judge and to those who have echoed his words, that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

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[40] [1954] 2 Q.B. 66, 85; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131, C.A.

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It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (a neutral word) of B, for example, a fire caused by the careless spillage of oil. It may, of course, become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened—the damage in suit? And, if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable?

But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre. Again, suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed: it cannot assist it if it succeeds. Each of them rests on its own bottom, and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by Lord Russell of Killowen in *Bourhill* v. *Young*.[41] As Denning L.J. said in *King* v. *Phillips*[42]: "there can be no doubt since *Bourhill* v. *Young* that the test "of *liability for shock* is foreseeability of *injury by shock*." Their Lordships substitute the word "fire" for "shock" and endorse this statement of the law.

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct." In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue* v. *Stevenson*[43]: "The liability for negligence, "whether you style it such or treat it as in other systems as a "species of 'culpa,' is no doubt based upon a general public senti-"ment of moral wrongdoing for which the offender must pay." It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done: cf. *Woods* v. *Duncan*.[44] Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth* v. *Birmingham Waterworks Co.*[45]

It is proper to add that their Lordships have not found it

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[41] [1943] A.C. 92, 101.

[42] [1953] 1 Q.B. 429, 441.

[43] [1932] A.C. 562, 580.

[44] [1946] A.C. 401, 442.

[45] (1856) 11 Exch. 781, 784.

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necessary to consider the so-called rule of "strict liability" exemplified in *Rylands* v. *Fletcher*[46] and the cases that have followed or distinguished it. Nothing that they have said is intended to reflect on that rule.

One aspect of this case remains to be dealt with. The respondents claim, in the alternative, that the appellants are liable in nuisance if not in negligence. Upon this issue their Lordships are of opinion that it would not be proper for them to come to any conclusion upon the material before them and without the benefit of the considered view of the Supreme Court. On the other hand, having regard to the course which the case has taken, they do not think that the respondents should be finally shut out from the opportunity of advancing this plea, if they think fit. They therefore propose that on the issue of nuisance alone the case should be remitted to the Full Court to be dealt with as may be thought proper.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed, and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed with costs, but that the action so far as it related to damage caused by nuisance should be remitted to the Full Court to be dealt with as that court may think fit. The respondents must pay the costs of the appellants of this appeal and in the courts below.

Solicitors: *William A. Crump & Son; Light & Fulton.*

C. C.

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[46] (1868) L.R. 3 H.L. 330, H.L.

[HOUSE OF LORDS.]

INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. *v.* INLAND REVENUE COMMISSIONERS.

H. L. (E).*

1960
Mar. 30, 31;
May 26.

Revenue—Stamp duty—Security—Agreement to provide broadcasting programmes — Fluctuating payments — Specified sums payable variable on a contingency—Whether liable to ad valorem duty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *First Schedule.*

By an agreement under seal dated May 23, 1955, made between

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* *Present*: LORD RADCLIFFE, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and LORD MORRIS OF BORTH-Y-GEST.

H. L. (E.)

1960

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Independent Television Authority ("I.T.A.") and Associated-Rediffusion Ltd. ("A-R."), A-R. agreed to provide programmes for broadcasting by I.T.A. pursuant to section 2 of the Television Act, 1954. The agreement was to come into operation between August 15, 1955, and November 15, 1955, and to continue in force until July 29, 1964. A-R. was to pay I.T.A. a fee at the rate of £495,600 a year for 2½ years and at a rate of £536,900 thereafter. The agreement further provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (therein defined), compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade).

The Inland Revenue Commissioners held that the agreement was liable to ad valorem stamp duty under the head of charge "Bond, "Covenant, or Instrument of any kind whatsoever (1) being the "only or principal or primary security for . . . any sum or sums of "money at stated periods" within the meaning of the First Schedule to the Stamp Act, 1891, and so assessed the duty on the sums payable annually of £495,600 and £536,900 respectively.

Wynn-Parry J. and the Court of Appeal affirmed their decision:—

Held, (1) that the head of charge in the Stamp Act, 1891, "Bond, Covenant, or Instrument" included a contract providing for periodical payments in consideration of services to be rendered as well as payments for other forms of executory consideration. Such a contract was a security, and the only security for the payments mentioned therein (post, pp. 441, 448, 451).

Jones v. *Inland Revenue Commissioners* [1895] 1 Q.B. 484; 11 T.L.R. 78, D.C.; *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners* [1899] 1 Q.B. 250; [1900] A.C. 1, H.L.; and *British-Italian Corporation Ltd.* v. *Inland Revenue Commissioners* [1921] W.N. 220, C.A. applied.

Quaere. Whether a service agreement as distinct from an agreement for services might be liable to duty under the "Bond, Cove-"nant" head of charge (post, pp. 441, 448, 451).

(2) That where it appeared on the face of a deed, being a security within the meaning of the Stamp Act, 1891, under the head of charge "Bond, Covenant, or Instrument," that there was a specific sum payable then, notwithstanding that such specific sum might on the happening of a contingency, be increased or reduced in part or to nothing, the deed was liable to be charged to stamp duty calculated on such specific sum; and that, accordingly, the agreement had been rightly assessed to ad valorem duty (post, pp. 443, 450, 453).

Underground Electric Railways Company of London Ltd. v. *Inland Revenue Commissioners* [1905] 1 K.B. 174; 21 T.L.R. 109; affirmed [1906] A.C. 21; 22 T.L.R. 160, H.L.; *Underground Electric Railways Company of London Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 210; affirmed [1916] 1 K.B. 306; and *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [1909] 2 K.B. 604; 25 T.L.R. 672 applied.

Decision of the Court of Appeal [1959] 1 W.L.R. 259; [1959] 1 All E.R. 464 affirmed.

APPEAL from the Court of Appeal (Jenkins, Romer and Pearce L.JJ.).

This was an appeal by the Independent Television Authority (hereinafter called "the authority") and Associated-Rediffusion Ltd. (hereinafter called "the contractor") from a judgment of the Court of Appeal dated February 9, 1959, which affirmed a judgment of Wynn-Parry J. dated July 15, 1958, dismissing their appeal on a case stated by the Inland Revenue Commissioners under section 13 of the Stamp Act, 1891, concerning the stamp duty payable on an instrument in the shape of an agreement under seal dated May 23, 1955, and made between the authority of the one part and the contractor of the other part, whereby the authority appointed the contractor to be a programme contractor to the authority for the purposes of the Television Act, 1954.

The case stated, so far as relevant, provided: The decision of the court was desired on the amount of stamp duty chargeable on an instrument which had been presented to the Inland Revenue Commissioners by the authority and the contractor under section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was an agreement under seal dated May 23, 1955, and made between the authority of the one part and the contractor of the other part.

The authority was established under the Television Act, 1954, to provide in accordance with the Act for the period of 10 years from July 30, 1954, television broadcasting services additional to those of the British Broadcasting Corporation.

Section 2 of the Act provided that the programmes broadcast by the authority should, so far as might be consistent with the observance of the requirements of the Act, be provided, not by the authority, but by persons who under contracts with the authority had in consideration of payments to the authority and subject to the provisions of the Act the right and the duty to provide programmes or parts of programmes to be broadcast by the authority, which might include advertisements. The agreement was such a contract.

Clause 4 (1) of the agreement provided that in consideration of the payments to the authority to be made by the contractor thereunder and upon the terms and subject to the conditions thereinafter contained and subject to the provisions of the Act

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the contractor should for the term mentioned in clause 10 of the agreement be a programme contractor and should have the right and be subject to the duty to provide programmes to be broadcast by the authority, and that accordingly the contractor should provide and without prejudice to the exercise by the authority (subject as therein mentioned) of its powers under section 2 (2) (*a*) of the Act (being powers conferred on the authority to arrange for the provision of parts of programmes so as to include items of particular classes to secure a proper balance and which could not, or could not as suitably, be provided by programme contractors) the authority should broadcast programmes provided by the contractor from the station or stations and on the days and within the hours and otherwise in accordance with the terms and conditions set out in the first schedule to the agreement (which set out particulars, inter alia, of the stations from which programmes were to be broadcast and the hours and times of broadcasting and laid down the period within which broadcasting was to commence as the period between August 15, 1955, and November 15, 1955) as from a date or dates (being a date or dates within the periods for commencement of broadcasting) to be determined by the authority by not less than 28 days' prior notice to the contractor. The sub-clause contained a proviso for variation of programmes and substitution of stations and a proviso for discontinuance of broadcasting in the circumstances mentioned.

Under clause 9 of the agreement the contractor was bound to make the payments to the authority provided for in the third schedule, under which the contractor was as from the date of commencement of broadcasting from the station, being a date within the period between August 15, 1955, and November 15, 1955, to pay to the authority a fee at the rate of £495,600 per annum until March 31, 1958, or the expiration of 2½ years from the commencement date (whichever was the later) and a fee at the rate of £536,900 thereafter. Paragraph 2 of the third schedule provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (thereby defined) compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade for the months specified). Paragraph 3 of the third schedule gave the authority the right to increase fees after the expiration of 3½ years from the commencement date (subject to an upper limit) and paragraph 4 provided for review of fees by arbitration in certain circumstances.

Clause 10 of the agreement provided that the terms for which the contractor should be a programme contractor should commence on the date thereof and should (subject to avoidance or determination as therein provided) continue in force until July 9, 1964. Clause 10 also contained power for (i) the authority and (ii) the contractor to determine the agreement in the events mentioned.

The commissioners were of opinion that the agreement was chargeable with ad valorem stamp duty under the head of charge "Bond, Covenant, or Instrument of any kind whatsoever (1) "Being the only or principal or primary security for any annuity ". . . or for any sum or sums of money at stated periods . . ." in the First Schedule to the Stamp Act, 1891. They were further of opinion that the agreement was not (within the meaning of this head of charge) "for the term of life or any other indefinite "period" (which would entail a stamp duty of £5 per cent. of the sum periodically payable) but "for a definite and certain "period, so that the total amount to be ultimately payable can "be ascertained," and that, in accordance with the terms of the said head of charge, the agreement was chargeable with the "same ad valorem duty as a bond or covenant for such total "amount." The commissioners were of opinion that the "definite "and certain period" within the meaning of this head of charge was under the agreement the period from November 15, 1955 (the last date at which broadcasting was to begin under the terms of the agreement), to July 29, 1964 (up to which date the agreement was to continue in force). On this basis they assessed the duty on the agreement pursuant to sections 1 and 4 of the Stamp Act, 1891, the said head of charge "Bond, Covenant," etc., duty, the head of charge "Mortgage, Bond, Debenture, Covenant," etc., in the First Schedule to the Stamp Act, 1891 (to which latter head securities for a definite and certain period chargeable under the head "Bond, Covenant," etc., were referred), and other relevant statutory provisions as follows: Ad valorem duty at the rate of 5s. for every £100 and also for any fractional part of £100—£11,430 10s. *and* under section 4 of the Stamp Act, 1891, a "deed" stamp of 10s. Total duty £11,431.

No objection was taken by the appellants to the fixed duty of 10s. but they contended—(1) that the agreement was not liable to ad valorem duty at all, as not being a "security" liable to ad valorem duty within the meaning of the head of charge "Bond, "Covenant," etc., duty in the First Schedule to the Stamp Act, 1891. (2) Alternatively that the agreement was not liable to such ad valorem duty at all as being a security for a definite period which was not certain. (3) That if, contrary to those first two contentions, the agreement was liable to such ad valorem duty as a security for a definite and certain period, it was chargeable only in respect of the fee payable during the period from November 15, 1955, until March 31, 1956, and not further or otherwise.

Wynn-Parry J. and the Court of Appeal affirmed the decision of the Inland Revenue Commissioners.

The authority and the contractor appealed.

F. Heyworth Talbot Q.C. and *J. G. Monroe* for the appellants. The contract is liable to stamp duty of 10s. but the Crown also contends that it is subject to ad valorem duty under the "Bond, "Covenant" head of charge on the footing that it is a "security" for the payment of a "sum" or sums of money at stated periods. This raises the questions: (1) whether the contract is properly describable as a security within the meaning of this head of charge; and (2) if it is, whether the total amount ultimately payable under the contract can be ascertained having regard to the possible increases and decreases provided for by it.

The origin of this head of charge is to be found, in relation to a bond, in Part I of the Schedule to the Stamp Act, 1815, and, in relation to a covenant, in the Schedule to the Stamp Act, 1850. In the Schedule to the Stamp Act, 1870, both bond and covenant are to be found together (as in the Act of 1891), and the words "or instrument of any kind whatsoever" were added.

As to (1) (supra), this is a contract for the rendering of services, and for this purpose there is no difference between an agreement for the rendering of services and an agreement for services. They both fall within the head "agreement" in the Stamp Act, 1891, and not under the head "Bond, Covenant." The present agreement is comparable to a service agreement in which a man enters into a service contract at a named salary. It could not seriously be suggested that such a contract provided a security for the payment of the salary.

The Act of 1870 was a consolidating Act. The addition of the words "or instrument of any kind whatsoever" was not intended to enlarge the scope of the subject-matter of charge but merely to extend the charge to a wider range of instruments. An executory contract is not within the contemplation of the "Bond, Covenant" head of charge. In determining the liability of an instrument to stamp duty, regard should be had rather to the substance of the transaction than to the form of the document: *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners.*[1]

The authorities relied on by the Court of Appeal on this first question, if and so far as they are contrary to the appellants' contention, were wrongly decided. It is difficult to distinguish *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*[2] on any point of principle since plainly under the agreement in that case there was an obligation to maintain the telephone lines. That decision, however, is confined to the point that the head of charge extends to instruments under seal; the question whether executory contracts are covered by the decision cannot be extracted from the single opinion delivered. Similarly, in *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners*[3] there is very little reference to the question whether an executory contract is a "security."

As to *British Italian Corporation* v. *Inland Revenue Commissioners*,[4] the argument there put forward on behalf of the Crown, as stated by Rowlatt J., is adopted, namely, that an agreement for the hire of any labourer, artificer, manufacturer or menial servant is exempt by the terms of the First Schedule to the Stamp Act, 1891, from duty as an agreement if not otherwise specifically charged with any duty. This provision would be nugatory if such an agreement were liable to "Bond, Covenant" duty, and therefore raises the inference that it was not intended that contracts of service (and, by parity of reasoning, contracts for services) should be liable to "Bond, Covenant" duty. An instrument cannot be a "security" for the payment of money if the right to receive payment depends upon the rendering of services by the payee. Accordingly, if the question is not concluded by the *National Telephone* case,[5] the present agreement, the primary purpose of which was the provision of mutual services, does not constitute a security for the payment of the sums of money which fall to be made under its terms, for those sums were payable for the elaborate services which the appellant authority had agreed to provide.

As to (2) (supra), in any event the contract is not a security for the payment of money "for a definite and certain period so

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[1] (1872) L.R. 7 Ex. 211.

[2] [1899] 1 Q.B. 250; affirmed [1900] A.C. 1, H.L.

[3] [1909] 2 K.B. 604, C.A.

[4] Sergeant on Stamp Duties, 3rd ed., pp. 334, 337, 338.

[5] [1900] A.C. 1.

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"that the amount to be ultimately payable can be ascertained" within the meaning of this head of charge, since the total amount to be ultimately payable was not at the date of the contract capable of being ascertained save in respect of that part of the period down to March 31, 1956. The total manifestly could not be ascertained in view of the provisions of paragraph 2 of the third schedule to the contract for the increase and decrease (without limit) of the fee payable by the contractor to the authority by reference to increases and decreases of 5 per cent. or more in the half-yearly index figure (as therein defined) of the interim index of retail prices published by the Board of Trade.

As to the authorities relied on by the Court of Appeal on this branch of the argument, *Underground Electric Railways Company of London Ltd.* v. *Inland Revenue Commissioners* ("the "first *Underground Railways* case")[6] is distinguishable, for it concerned the head of charge "Conveyance on Sale" and not "Bond, Covenant," and turned on the construction of section 56 (2) of the Act of 1891. Unless the minimum or maximum sum payable can be ascertained at the date of the execution of the document it is not within the "Bond, Covenant" head of charge. In the present case there is no standard sum on which to base the calculation on the total amount that might ultimately be payable.

Underground Electrical Railways Company of London Ltd. and Glyn, Mills, Currie & Co. v. *Inland Revenue Commissioners* (the "second *Underground Railways* case")[7] was a simple guarantee case and is therefore distinguishable. Reliance is placed on the observations of Scrutton J.[8]: "I can understand "that if you cannot ascertain from the instrument a fixed sum "which may become payable, though on contingencies, you "cannot stamp ad valorem." [Reference was also made to section 57 of the Stamp Act, 1891.]

Monroe following. In the *National Telephone* case,[9] Rigby L.J. observed in relation to the "Bond, Covenant" head of charge: "However much we may be struck by the sweeping "nature of the clause, I do not see where we can draw a line in "construing it." A line has to be drawn, however, and it should be based on agreements "not otherwise specifically charged with "any duty," which are subject to a fixed duty of 6d. with certain exemptions. One of these exemptions is an agreement or memorandum for the hire of any labourer, artificer, manufacturer or manual servant. Under Part I of the First Schedule to the Stamp Act, 1815, such an agreement was exempt from all stamp duty. It was the Stamp Act, 1870, which fixed the present exemption from duty, and it was that Act which added the words "or instrument of any kind whatsoever" to the "Bond, "Covenant" head of charge. It cannot be said that Parliament introduced those extra words by inadvertence. "Instrument," therefore, cannot be construed as relating to those instruments which are exempted from the fixed duty of 6d., and the presumption is that other service contracts are liable to a duty of 6d. only and are not chargeable under the "Bond, Covenant" head.

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[6] [1905] 1 K.B. 174; 21 T.L.R. 109; affirmed [1906] A.C. 1; 22 T.L.R. 160, H.L.

[7] [1914] 3 K.B. 210; affirmed [1916] 1 K.B. 306, C.A.

[8] [1914] 3 K.B. 210, 220.

[9] [1899] 1 Q.B. 250, 259.

The present agreement is one for services: see clause 4 of the contract. It cannot be construed merely as an agreement for I.T.A. to provide facilities for the contractors to transmit their programmes through the wires and aerials of the authority. The authority is undertaking to perform services for the contractor. No rational distinction can be drawn between a contract for services of this kind and other contracts for services, for example, those of a consultant. It is conceded that in the *National Telephone* case [10] the contract was executory, though it is to be observed that it was almost a contract for executed consideration: that case [11] should not be treated as a binding authority that instruments under which the consideration is executory are subject to "Bond, Covenant" duty.

Two observations may be made on whether this agreement constitutes a "security" for the payments to be made by the contractors: (a) The document should really secure the payments; (b) in common parlance a security is in the nature of transmissible property. As to (a), a personal obligation under seal to pay a stated sum of money is a security and comes under the head of charge "Mortgage, Bond, Debenture, Covenant," but a similar agreement under hand does not, except in certain circumstances. Further, a document is not a "security" for the payment of a stated sum if it is only payable at the option of the obligor: *Knight's Deep Ltd.* v. *Inland Revenue Commissioners.*[12] As to (b), a contract for the payment of an annuity certain is transmissible property and falls under the "Bond, Covenant" head of charge. In the present case the rights under the contract are inherently not assignable.

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[10] [1899] 1 Q.B. 250; [1900] A.C. 1.

[11] Ibid.

[12] [1900] 1 Q.B. 217; 16 T.L.R. 68.

As to the second branch of the appellants' argument, there is nothing in *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [13] which is inconsistent with their contentions. Duty was in that case assessed on the total of the quarterly payments of £57 10s. payable thereunder for the *right* to take electricity for a period of seven years. In other words, the agreement was held to be a security for the payment of £57 10s. and *not* for the payment of the cost of taking electricity at a 1d. a unit, for there was no obligation on the consumer to take any electricity at all.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown. This agreement, being executory in its nature, falls under the "Bond, Covenant" head of charge: the *National Telephone* case [14]—there is no relevant distinction between that case and this. It appears from the printed case of the appellants there that the present question was raised. Further, the report in the Law Reports [15] states that the arguments presented to the House were the same as those presented to the Court of Appeal, where, Asquith Q.C., for the appellants, contended, inter alia [16]: "An "agreement for hire of a carriage and the services of a coachman "from a livery-stable keeper, in consideration of periodical pay-"ments, would be chargeable with the ad valorem duty as a "security, if this instrument be so chargeable." That is precisely the point advanced by the present appellants. The Court of Appeal, however, in the *National Telephone* case,[17] refused to allow such an example to influence their decision as to the true construction of the word "security" in this particular taxing Act, and the House of Lords affirmed their decision.

There is on the authorities a good case for saying that, taking the Stamp Act, 1891, as a whole, a contract for the employment of a manual labourer does not come under the "Bond, Covenant" head of charge. This case, however, is in no sense a contract of employment but a contract for services. The appellants seek to equate the two types of contract, but in the Crown's submission a contract for services falls on the same side of the line as a contract for the sale of goods under which periodical payments are to be made or any other ordinary commercial contract providing for periodical payments. These are liable to "Bond, Covenant" duty. Quite apart from the *National Telephone* case,[18] the trend of authority is in favour of the Crown's contention. The principle of stare decisis is particularly appropriate to revenue cases: see *Bourne* v. *Keane* [19] and *John Smith & Son* v. *Moore*.[20]

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[13] [1909] 1 K.B. 737, 738; affirmed [1909] 2 K.B. 604; 25 T.L.R. 672, C.A.

[14] [1900] A.C. 1.

[15] Ibid.

[16] [1899] 1 Q.B. 250, 254.

[17] [1899] 1 Q.B. 250.

In summary, the present case is caused by the decision of the House of Lords in the *National Telephone* case,[21] and the Crown's contention here is supported by a practically unbroken line of authority and is consonant with the provisions of the Act.

(2) As to the appellants' second contention, it is plain that to give effect to this " Bond, Covenant " head of charge the sum or sums of money must be specified or capable of ascertainment. The second factor is the stated period; that may be definite or indefinite and, accordingly, the conclusion of paragraph (1) of the head of charge makes provision for the two alternative possibilities. The question thereupon arises whether this head of charge only applies to sums of money the obligation to pay which is unconditional or whether it applies to sums the obligation to pay which is conditional in the sense that it only arises in certain contingencies or the amount to be paid is only payable in certain contingencies.

It is submitted that this head of charge does apply to sums of money payable in certain contingencies. It is impossible to draw a line in this respect; it covers all cases of money payable on a contingency: see the first [22] and the second [23] *Underground Railways* cases. There can be no choosing between one contingency and another. Accordingly, where there is a covenant to pay a sum of money at stated periods and under certain conditions the sum might cease to be payable, nevertheless such a covenant is within this head of charge. Equally, where the stated sum is subject to variation upwards or downwards the instrument is a " security " for the payment of the specified sum. The sum chargeable is based on the maximum sum which, in the event of the contingency taking place, is payable under the document: see per Scrutton J. in the second *Underground Railways* case.[24]

In the present case the agreement is a security for the payment of the specified sums notwithstanding that in certain events they may be increased or decreased in amount, and accordingly it is subject to " Bond, Covenant " duty.

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[18] [1899] 1 Q.B. 250; [1900] A.C. 1.

[19] [1919] A.C. 815, 872, 873; 35 T.L.R. 560, H.L.

[20] [1921] 2 A.C. 13, 38, 39; 37 T.L.R. 613, H.L.

[21] [1899] 1 Q.B. 250; [1900] A.C. 1.

[22] [1906] A.C. 21.

[23] [1916] 1 K.B. 306.

[24] [1914] 3 K.B. 210, 219.

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Heyworth Talbot Q.C. in reply referred to *Canadian Eagle Oil Co.* v. *The King* [25] on the doctrine of stare decisis.

Their Lordships took time for consideration.

May 26, 1960. LORD RADCLIFFE. My Lords, on May 23, 1955, the appellants entered into an agreement under their respective seals whereby the first of them, the Independent Television Authority (hereinafter referred to as "I.T.A."), constituted the second of them, Associated-Rediffusion Ltd. (hereinafter referred to as "A-R."), programme contractors for one of I.T.A.'s television broadcasting stations during a period ending on July 29, 1964, in consideration of a fee of £495,600 per annum for the first 2½ years and a fee of £536,900 per annum thereafter. According to the appellants the only stamp duty payable on this document under the Stamp Act, 1891, is the deed stamp of 10s. This contention was rejected by the respondents, who assessed the duty ad valorem on a total sum of £4,572,193, made up of £495,600 per annum for 2½ years and £536,900 per annum for 6 years 76 days, and required payment of £11,430 10s. on this basis in addition to the 10s. stamp. Their decision was upheld by Wynn-Parry J. in the High Court and by the Court of Appeal (Jenkins, Romer and Pearce L.JJ.). I think that the opinions expressed in all the courts below were plainly right; and, as the two points argued on behalf of the appellants in this House are directly covered by authorities of long standing which I have no wish to disturb, I propose to deal with them as briefly as is consistent with respect for the argument that was put before us.

The head of charge in the First Schedule to the Stamp Act under which the ad valorem duty is claimed is "Bond, Covenant, "or Instrument of any kind whatsoever." This head falls into three sub-divisions, of which sub-division (1) runs as follows:

"(1.) Being the only or principal or primary security for any "annuity (except upon the original creation thereof by way of sale "or security, and except a superannuation annuity), or for any "sum or sums of money at stated periods, not being interest for "any principal sum secured by a duly stamped instrument, nor "rent reserved by a lease or tack.

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[25] [1946] A.C. 119; 61 T.L.R. 577; [1945] 2 All E.R. 499, H.L.

"For a definite and certain "period, so that the total "amount to be ultimately "payable can be ascer- "tained.	The same ad valorem duty as a bond or covenant for such total amount.	
"For the term of life or any "other indefinite period. "For every *5l.*, and also "for any fractional part of "*5l.*, of the annuity or "sum periodically payable		0 2 6"

Is the agreement that we have here a "security" for this purpose? It is not denied that an instrument may constitute a security even though it is itself the original and only source of the obligation to pay periodical sums of money which is the basis of the ad valorem charge of duty. This has long been settled law and, having regard to the actual wording that I have set out, I do not see how any other construction could well have been adopted by the courts.

But then, it is said, you have here an agreement which is fundamentally executory on both sides; and so it is. I need not go into any detailed analysis of the complicated provisions of the agreement; it is clear enough that A-R.'s obligation to pay its fee, which is due by monthly instalments, forms a promise in exchange for I.T.A.'s promise to broadcast the programmes supplied from the station installed and maintained by it for the purpose. If I.T.A. should fall down on its obligation, A-R.'s obligation to pay the fee would be in abeyance. The argument put before us is that a covenant of this kind which is executory and therefore, in a sense, conditional cannot be described as a "security" for a sum or sums of money at stated periods within the meaning of "Bond, Covenant, or Instrument" in the Stamp Act, all the less so, perhaps, because of the presence of the qualifying or explanatory words "so that the total amount to be "ultimately payable can be ascertained" which come after the words "For a definite and certain period." Indeed, to make the distinction effective, the argument goes so far as to say that an instrument is not a security for money unless the payee is either gratuitous or has executed by the date of the instrument all the consideration that is to move from him.

Certainly the law has never hitherto recognised a distinction on these lines. As long ago as 1872 an agreement for the payment of periodical sums in consideration of the supply of asphalte from time to time was held to be chargeable ad valorem as a "covenant "in relation to an annuity or other periodical payment" under the Stamp Act, 1870 (*Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* [1]). In *Jones* v. *Inland Revenue Commissioners* [2] an agreement between a telephone company and a theatre ticket agent for periodical payments for the use of telephone lines and apparatus to be erected and maintained in working order was held chargeable ad valorem as a "Bond, "Covenant, or Instrument" within the meaning of the Stamp Act, 1891. Then came the decision in *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*,[3] the agreement there in question being one for the hire of a private wire and apparatus to be installed and maintained by the telephone company. The point that agreements for periodical payments in executory contracts could not be "securities" was expressly put to the Court of Appeal by Mr. Asquith Q.C. of counsel [4]: Would you charge as a security, he said, an agreement to pay for the hire of a carriage? The point was noticed by A. L. Smith L.J. at the outset of his judgment.[5] It somewhat troubled him, he admitted, but the real question was, not what "security" meant in ordinary parlance but what it meant in the First Schedule to the Stamp Act. All the members of the Court of Appeal agreed that the agreement before them was chargeable ad valorem as a "Bond, Covenant, "or Instrument."

The case came to this House.[6] It is very briefly reported and only Lord Halsbury L.C. delivered any reasoned opinion. Evidently, the arguments raised before the Court of Appeal were repeated: the appellants' printed case put as its first reason that the instrument was "an agreement for the hire and use of a "chattel and for services . . . in connection therewith" and so not a "security" for the payment of money: there was the judgment of A. L. Smith L.J. before them: and all the members of the House, Lords Halsbury, Macnaghten, Brampton and Robertson, agreed in dismissing the appeal. Lord Halsbury's words [7]: "The real truth is that this Taxing Act intended, as it appears "to me, to apply taxation to every document of this kind; it "mentions in the first instance those under seal . . ." appear to me to be about as explicit a determination of the matter as one could expect to find from authority.

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[1] (1872) L.R. 7 Ex. 211.
[2] [1895] 1 Q.B. 484.
[3] [1899] 1 Q.B. 250; [1900] A.C. 1.
[4] [1899] 1 Q.B. 250, 254, 255.
[5] Ibid. 257.
[6] [1900] A.C. 1.
[7] Ibid. 2.

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No doubt the inclusion of executory contracts in this category for the purposes of the Stamp Act has created some anomalies which remain unresolved. The " Bond, Covenant, or Instrument " category, with its ad valorem charge, looks as if it had trenched very far on the category of simple " Agreement," with its 6d. stamp. If a written agreement promising periodical payments in return for supplies (see *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [8]) or services is chargeable ad valorem, can it be right that a written service agreement between, say, a manager and his employer or a managing director and his company should be stamped only with the 6d. " Agreement " stamp, as is still the standing practice? And, if by the statute agreements for the hire of labourers or menial servants or for the sale of goods are exempted from the 6d. agreement stamp altogether, could they nevertheless be charged ad valorem on any periodical payments or instalments provided for as being covenants or instruments forming the security for payments of money? I do not think that we are here concerned to give the answer to these questions. It is possible that at some future date counsel for the Commissioners of Inland Revenue may be able to convince a court of law that ad valorem duty, if ever claimed, has been rightly claimed in respect of service agreements: on the other hand, some other counsel appearing for a taxpayer may be able to demonstrate that, having regard to the provisions of the Act as a whole and the specific exemptions set out under the head " Agreement," no agreement for the sale of goods or the rendering of services by servants or labourers is liable to the ad valorem charge, notwithstanding that it may provide for instalments or recurrent payments. I think that it is enough for this House to recognise these possibilities without exploring them. In my opinion the present appeal relating to this agreement between I.T.A. and A-R. is untouched by such questions by reason of two considerations which are enough to conclude it. The first is that there is no plausible analogy between the treaty between these two corporations concerning the running of one of the commercial television programme areas and a hiring of a labourer or menial servant. The other is that the chargeability of an agreement of the kind now before us has twice been affirmed by the Court of Appeal in *Jones* v. *Inland Revenue Commissioners* [9] and *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners* [10] and once by this

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[8] [1909] 2 K.B. 604; 25 T.L.R. 672.

[9] [1895] 1 Q.B. 484.

[10] [1899] 1 Q.B. 250.

House, when the latter case [11] was on appeal: and there is no reason of any compelling force why the principle that was applied to them should now be challenged. Indeed, I have not myself been able to see why, if the recording of an enforceable promise for the payment of money under seal or in a written instrument constitutes a "security" for the payment of that money under the Stamp Act, such a document is any the less a security for that purpose because the promise is contingent or conditional or dependent for its enforceability upon the performance of some parallel engagement by the promisee.

I turn now to the second point which the appellants relied upon. The agreement between them, they said, was so constructed that, except for an initial period covering the 4½ months from November 15, 1955, to March 31, 1956, no fixed fee or other sum to be paid thereunder was ascertainable at the date when the document was tendered for stamping and consequently no "total amount to be ultimately payable" could be determined as the basis for an ad valorem charge.

Certainly it would be impossible to tell from studying the agreement how much money will eventually be paid under it before it expires. Quite apart from several provisions which could operate to determine it on either side and provisions (third schedule, para. 3 and para. 4) allowing I.T.A. to raise the fee for the time being payable in certain specified contingencies, the agreement included a general variation clause (third schedule, para. 2 (2)) whereunder the basic figures of £495,600 per annum and £536,900 per annum would rise or fall according to variations of 5 per cent. or more in the average of the index figures for all items in the Board of Trade Interim Index of Retail Prices as at January 15, 1952. It was upon the presence of this variation clause that the appellants' argument concentrated to make good its claim that there could be no total ascertainable amount under the agreement.

My Lords, in my opinion this argument misconceives the significance of such words as "money payable" when used in the Stamp Act in relation to the stamping ad valorem of contracts or other instruments. The true principle to be applied is, I think, well set out in the judgment of Collins M.R. in *Underground Electric Railways Co. of London Ltd.* v. *Inland Revenue Commissioners* [12]: "The question is the principle underlying the "construction of the Act, and it seems to me that we can get at a

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[11] [1900] A.C. 1.

[12] [1905] 1 K.B. 174, 182.

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" definite principle from those cases. The principle is that the word " 'debt' applies to money payable whether upon a contingency " or as an absolute and unconditional certainty . . . It seems to " me, therefore, that the words 'money payable for an indefinite " 'period' include money which may never become payable unless " the particular event happens." I think it clear that the same principle was adopted in the decision of the case when it later reached this House.[13]

I take it, therefore, to be a well-settled principle that the money payable is ascertained for the purposes of charge without regard to the fact that the agreement in question may itself contain provisions which will in certain circumstances prevent it being payable at all. If that is so, there is at least no better reason for adopting a different principle when there are found clauses which merely vary the amount to be paid according to specified contingencies. Nor does it matter for this purpose whether the effect of such a clause is to make it possible for the sum to be increased or to be diminished. In *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners*,[14] any variation would have been downwards: in the *Underground Electric Railways Co.* case [15] the variation might have been upwards or downwards. What is necessary is that it should be possible to ascertain from the agreement that there is some specified sum agreed upon as the subject of payment which may perhaps fairly be called the prima facie or basic payment. Even that minimum condition may have to be restated in relation to certain kinds of securities, such for example as guarantees, in which the ad valorem charge is calculated according to the maximum sum contingently payable, or, to put it in another way, the amount of the guarantee: see the second *Underground Electric Railways Co.* case.[16]

Applying these principles to the agreement now before us, I think it plain that the £495,600 per annum rate for the first 2½ years and the £536,900 per annum thereafter were the sums prima facie payable, and that the contingency that the Board of Trade price index figure might alter sufficiently from time to time to bring about variations of those figures does not affect the proper ad valorem calculation of duty.

I would dismiss the appeal with costs.

[13] [1906] A.C. 21.

[14] [1909] 2 K.B. 604.

[15] [1905] 1 K.B. 174.

[16] [1914] 3 K.B. 210; affirmed [1916] 1 K.B. 306, C.A.

My Lords, my noble and learned friends, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST, who are unable to be present today, ask me to say that they agree with this opinion and conclusions.

LORD COHEN. My Lords, the question at issue on this appeal is as to the stamp duty payable on an agreement made between the two appellants on May 23, 1955, under which the second appellants (the contractor) were appointed a programme contractor pursuant to section 2 of the Television Act, 1954, for a term commencing on the date of the agreement and (unless previously avoided or terminated under the provisions of the agreement) ending on July 29, 1964.

By clause 9 of the agreement it was provided that in consideration of the right and duty of the contractor to provide programmes to be broadcasted by the authority the contractor was to make payments to the authority as provided in the third schedule to the agreement.

Clause 1 of the third schedule was in the following terms:

" 1. The Contractor shall as from the date of commencement " of broadcasting from the station described in the Table (herein- " after called ' the commencement date ') pay to the Authority a " fee at the rate of £495,600 per annum until the 31st day of " March, 1958, or the expiration of 2½ years from the commence- " ment date (whichever is the later) and a fee at the rate " of £536,900 thereafter."

Under clause 2 (2) the fees fixed by clause 1 were liable to be increased or decreased by reference to increases and decreases of 5 per cent. or more in the half-yearly index figure as in sub-clause (1) of clause 2 defined of the interim index of retail prices published by the Board of Trade. Having regard, however, to the definitions in the said sub-clause (1) no increase or decrease could take effect in respect of any half-yearly period commencing before April 1, 1956. The third schedule contained other provisions as to the increase of fees in certain events with the details of which I need not trouble your Lordships.

The agreement was presented for adjudication and the commissioners assessed it to duty under the head of charge " Bond, " Covenant or Instrument of any kind whatsoever (1) being the " only or principal or primary security for any annuity . . . or for " any sum or sums of money at stated periods . . . " in the First Schedule to the Stamp Act, 1891. They were further of opinion that it was " for a definite and certain period so that the "total amount to be ultimately payable can be ascertained." It followed that in accordance with the terms of the said head of charge the agreement was chargeable with the "same ad valorem "duty as a bond or covenant for such total amount." Taking as their basis the figures given in clause 1 of the third schedule to the agreement the commissioners assessed the liability at £11,430 10s., to which was added the "deed" stamp of 10s. payable under section 4 of the Stamp Act, 1891.

No objection was taken by the appellants to the fixed duty of 10s. but they disputed the liability to the duty of £11,430 10s. on three grounds, only two of which are now maintained. They are as follows:

I. That the agreement is not liable to ad valorem duty at all as not being a "security" liable to ad valorem duty within the meaning of the above-mentioned head of charge "Bond, "Covenant," etc.

II. That if contrary to this contention the agreement is liable for ad valorem duty as a security for a definite and certain period, it is chargeable only in respect of the fee payable during the period from November 15, 1955, to March 31, 1956, that being the only period the fee for which could be ascertained with certainty at the date of the agreement.

The matter came before the court on a case stated and on July 15, 1958, Wynn-Parry J. rejected both contentions, and on February 9, 1959, his decision was upheld by the Court of Appeal.

Before your Lordships both points were again argued. I shall deal first with the question whether the agreement of May 23, 1955, was a security liable to ad valorem duty within the meaning of the head of charge "Bond, Covenant," etc.

Before your Lordships, as in the Court of Appeal, the appellants contended that the agreement was wholly outside the scope of this head of charge because it was not an agreement securing the payment of periodical sums recoverable by the obligee as a debt merely upon proof of the agreement, and of the fact of non-payment but was an executory agreement for the payment of periodical sums by way of remuneration for services to be rendered.

I agree with Jenkins L.J.[17] that this argument was concluded against the appellants so far as the Court of Appeal was concerned by the decisions in *Jones* v. *Inland Revenue Commissioners*,[18] *National Telephone Co. Ltd.* v. *Inland Revenue*

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[17] [1959] 1 W.L.R. 259, 264.

[18] [1895] 1 Q.B. 484.

Commissioners [19] (Court of Appeal), *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [20] and *British Italian Corporation Ltd.* v. *Inland Revenue Commissioners* [21] *per* Rowlatt J. and the Court of Appeal.

It was argued that your Lordships are not bound by those decisions. That is correct, but the decision in the *National Telephone Co.* case was affirmed by this House.[22] It is true, as Wynn-Parry J. said in the present case,[23] that the point now in issue was not dealt with by Lord Halsbury L.C. in his very short speech in which the other learned Lords concurred. Lord Halsbury dealt only with the question whether the head " Bond, Covenant, or " Instrument of any kind whatsoever " covered documents not under seal, but it would have been open to the appellants, despite the adverse decision on that point, to have argued that duty was not chargeable because the agreement was executory in character and covered payments for services. This point had been taken and fully argued in the court below, it was raised in the first of the reasons included in the case presented on behalf of the appellants to your Lordships' House, and it is difficult to believe that Mr. Asquith and Mr. Roskill abandoned it at the hearing; all the more so since the report of the proceedings in the House of Lords states [24] that " the facts and argument are set forth carefully " elaborately and in detail in the report below." In my opinion, therefore, their Lordships must be taken to have approved the ratio decidendi of the Court of Appeal [25] on the point now in issue and, if so, your Lordships are not free to hold that that decision was wrong.

I desire to add, however, that I think the ratio decidendi of the Court of Appeal [26] was correct, and that it governs the present case. The effect of the agreement under consideration in the *National Telephone* case [27] is conveniently stated in the headnote as follows:

" By an agreement in writing not under seal it was agreed " between a telephone company and one R. that the latter should " pay to the company the sum of £12 per annum in advance for the " hire of a private wire between his premises and the company's " local exchange system, and the telephonic apparatus relating " thereto, and that either the company or the lessee might put an

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[19] [1899] 1 Q.B. 250.
[20] [1909] 2 K.B. 604, C.A.
[21] Sergeant on Stamp Duties, 3rd ed., pp. 334, 337, 338 et seq.
[22] [1900] A.C. 1.
[23] [1958] 1 W.L.R. 943, 948.
[24] [1900] A.C. 1.
[25] [1899] 1 Q.B. 250.
[26] Ibid.
[27] [1899] 1 Q.B. 250.

" end to the agreement by giving three calendar months' notice in " writing expiring on the day previous to the rent being due in any " year, and the company agreed to erect and maintain in working " order the said wire and telephone apparatus: —"

The commissioners held that the agreement was chargeable under the head " Bond, Covenant, or Instrument of any kind whatsoever," and assessed the duty accordingly. On appeal, the Divisional Court gave judgment in favour of the Crown and the Court of Appeal affirmed that decision. Mr. Asquith argued [28] that if the decision stood, any executory agreement providing for periodical payments such as an agreement for hire of a carriage and the services of a coachman from a livery-stable keeper in consideration of periodical payments, would be chargeable with ad valorem duty as a security, but A. L. Smith L.J. was not frightened by that analogy. After referring to the argument he continued [29]: " The question, however, is, not what in ordinary " parlance could be called a security, but what is the meaning of " the word ' security ' in this taxing Act; and it seems to me that, " when the Act is fully considered, the meaning of the word as " used therein is fairly defined by the Act itself." Then, after setting out the relevant provisions of the head of charge, he continued: " I will take the words ' bond ' and ' covenant ' first of " all. A bond given for the payment of a sum of money at stated " periods, or a covenant given for such payment, is clearly a " security within the meaning of the Act. Then I come to the " subsequent words, upon which the question in the present case " depends, ' or instrument of any kind whatsoever being the only " ' or principal or primary security . . . for any sum or sums of " ' money at stated periods.' Those words, in my opinion, cover a " contract in writing, such as this, for the payment of a sum of " money at stated periods. I cannot sever the word ' instrument ' " from the words ' bond ' and ' covenant ' which accompany it; " and, as a bond or a covenant for the payment of a sum of money " at stated periods is within the Act, I cannot see how I can hold " that a contract in writing to the same effect is not within it. " It was argued that a ' security ' only means something auxiliary " to an antecedent obligation, and therefore that a simple contract " for the payment of £12 a year for the use of a telephone is not a " security within the meaning of the Act. I think that the word " ' security,' as used in the Act, clearly includes an instrument by " which the obligation to pay is originally created."

[28] [1899] 1 Q.B. 250, 254.

[29] Ibid. 257, 258.

Finally, after giving further reasons for this conclusion based on another part of the Schedule under the heading " Mortgage, Bond, " Debenture, Covenant," he concludes[30]: " On these grounds " I am of opinion that, upon the true construction of the statute, " a contract in writing, whereby, as in this case, an obligation is " undertaken to pay a certain sum of money at stated periods for " an indefinite period, is chargeable under the heading ' Bond, " ' Covenant, or Instrument of any kind whatsoever,' in the " First Schedule to the Stamp Act, 1891. I am alive to the far-" reaching result of this judgment, but, if alteration is to be made, " it must be by legislation. The above being in my judgment the " true construction of the statute, I think that the case of " *Limmer Asphalte Paving Co.* v. *Inland Revenue Commis-" sioners*,[31] and the case of *Jones* v. *Inland Revenue Com-" missioners*[32] which was decided by my brothers Wright and " Collins, were rightly decided. I have read the judgments " delivered in the latter case, and I agree with them entirely."

I find this reasoning (in which Rigby L.J. and Collins L.J. concurred) satisfactory. Even if, therefore, your Lordships are not bound to hold that the decision of this House in the *National Telephone* case[33] approved the ratio decidendi of the Court of Appeal in that case,[34] I would still reject the appeal on the first point taken for the appellants.

I must not overlook the argument of the appellants based on the exemptions to be found under the head " Agreement or any " Memorandum of Agreement " in the First Schedule to the Act of 1891. The second exemption is " Any Agreement or Memoran-" dum for the hire of any labourer, artificer, manufacturer or " menial servant." It was argued that if your Lordships upheld the decision in this case, it would follow that a service agreement for the hire of, for example, an artificer, though exempt from liability to the 6d. stamp under the heading " Agreement " would be liable to ad valorem duty under the head " Bond, Covenant, " etc." I do not think this necessarily follows. Your Lordships are dealing with an agreement for services, not a service agreement, and I note that in *British Italian Corporation* v. *Inland Revenue Commissioners* Rowlatt J. said[35]: " Now it is perfectly " well known to everybody that these documents [contracts for " the engagement of servants to be paid certain sums at intervals

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[30] [1899] 1 Q.B. 250, 258, 259.

[31] L.R. 7 Ex. 211.

[32] [1895] 1 Q.B. 484.

[33] [1900] A.C. 1.

[34] [1899] 1 Q.B. 250.

[35] Sergeant on Stamp Duties, 3rd ed., pp. 337, 338.

" over a period of time] are simply stamped as agreements and " there is material . . . for thinking they are rightly so stamped, " because if such a document is made between an employer and " an artificer or menial worker it is obviously treated as stamp-" able only as an agreement because there is an exemption under " the heading of 'agreement' for it, and a document does not fall " under the heading of 'agreement' if it is independently stamp-" able in some other character."

For the reasons indicated by Rowlatt J. it may well be that if the question of the stamp on a service agreement arises for your Lordships' decision, your Lordships may be able to hold that it is not liable to duty under the head "Bond, Covenant," but like Rowlatt J., I do not think that this reasoning would justify your Lordships in holding that the agreement for services now under consideration is not so liable.

I turn, therefore, to the second point. Mr. Heyworth Talbot argued that assuming the agreement is a security within the meaning of the head "Bond, Covenant," etc., and admitting that it is for a definite and certain period, it is chargeable only in respect of the fee payable for the period from November 15 (the latest date by which broadcasting was to begin) until March 31, 1956 (the first, though broken half-yearly period contemplated under the agreement). His contention is that upon the true construction of the agreement it was impossible at the date of the agreement to predicate as regards the period subsequent to March 31, 1956, what sums would be payable because of the provisions in clause 2 (2) of the third schedule to the agreement for the increase or diminution of the sums specified in clause 1 of that schedule. My Lords, if the matter were res integra, I should have seen much force in the argument that a condition of liability to charge was that by an examination of the instrument the total amount payable thereunder must be ascertainable as at the date of agreement, with the consequence that if the total amount was not so ascertainable the charge would not operate, but the question is not free from authority, and I agree with Wynn-Parry J. and the Court of Appeal that the decisions in the two *Underground Railway* cases [36] make it impossible for us to accept this argument or allow the present appeal. These cases have been carefully reviewed by Wynn-Parry J. and by Jenkins L.J. (as he then was) delivering the judgment of the court in the Court of Appeal, and

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[36] [1905] 1 K.B. 174; affirmed [1906] A.C. 21, H.L.; [1914] 3 K.B. 210; affirmed [1916] 1 K.B. 306, C.A.

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Lord Cohen.

I will not detain your Lordships by repeating what they have so clearly stated. Suffice it to say that—

1. I agree with Jenkins L.J. that no material distinction can be drawn between the words "payable periodically" in section 56 (2), which was the material section calling for consideration in the first *Underground Railway* case,[37] and the words "any sums or "sums of money at stated periods" in the head of charge with which we are now concerned and that, accordingy, the latter phrase includes money payable on a contingency.

2. I agree with Jenkins L.J. that one contingency possible at the date of the agreement was that the half-yearly index figure mentioned in clause 2 (2) of the third schedule would remain constant within 5 per cent. either way.

3. I accept and adopt the proposition based on the two *Underground Railways* cases[38] stated by Wynn-Parry J. in the concluding paragraph of his judgment as follows[39]: "In the case of "a deed, being a security within the meaning of that word as used "in the First Schedule to the Stamp Act, 1891, under the heading "'Bond, Covenant, or Instrument of any kind whatsoever,' where "it appears on the face of the deed that there is a specified sum "payable by one party to the deed to the other party, then, "notwithstanding that such specified sum may (a) be increased "on the happening of a contingency or (b) may be reduced in part "or to nothing on the happening of a contingency, the deed is "liable to be charged to stamp duty calculated on such specified "sum."

I agree with Wynn-Parry J. that the agreement your Lordships have to consider falls within this proposition, and for the reasons I have given I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, under section 1 and the First Schedule of the Stamp Act, 1891, ad valorem stamp duty is charged at a prescribed rate upon (I omit certain words not material for the purpose of this case) any "Bond, Covenant, or "Instrument of any kind whatsoever. (1.) Being the only or "principal or primary security for . . . any sum or sums of money "at stated periods, not being interest for any principal sum "secured by a duly stamped instrument, nor rent reserved by a "lease or tack. For a definite and certain period so that the total "amount to be ultimately payable can be ascertained . . ."

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[37] [1905] 1 K.B. 174; [1906] A.C. 21.

[38] [1906] A.C. 21; [1916] 1 K.B. 306.

[39] [1958] 1 W.L.R. 943, 954.

The Commissioners of Inland Revenue have held that an agreement under seal dated May 23, 1955, between the Independent Television Authority (called " the authority ") and Associated-Rediffusion Ltd. (called " the contractor ") (appellants in this appeal) comes under this head of charge and that the ad valorem duty amounts to £11,430, calculated on a fee payable by the contractor to the authority at the rate of £495,600 per annum under paragraph 1 of the third schedule of the agreement for the period from November 15, 1955, to May 14, 1958 (two and a half years), and on a fee of £536,900 per annum, similarly payable, for the period from May 15, 1958, to July 29, 1964 (six years and 76 days). November 15, 1955, was taken by the commissioners as the date when broadcasting under the agreement commenced, and July 29, 1964, was the date on which, under the agreement, the contractor should (subject to avoidance or prior determination under certain clauses of the agreement) cease to be programme contractor.

The two questions in the case are (first) whether the agreement is a security falling under the head of charge set out above; and (secondly), if it is, whether the duty payable has been correctly calculated by the commissioners.

In view of the course of authority going back nearly one hundred years and culminating in the decision of this House in *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*,[40] it is impossible, in my opinion, to say that the agreement is not a security and the only security for the payments mentioned therein, within the meaning of the statute. All the considerations which might tell against an instrument like this being a security were advanced and weighed by the Court of Appeal in the *National Telephone Co.'s* case,[41] and the opinions of the Lords Justices must, in my opinion, have been regarded by their Lordships who heard the appeal as calling for no elaboration in speeches in this House. It is not possible, in my opinion, to regard the sole speech of the Lord Chancellor, short as it is, as indicating that the argument before the House and the decision of the House were directed solely to the question whether an instrument had to be under seal in order to be a security. Nor do I find it necessary to consider whether there can be agreements for sums of money at stated periods which do not come under this head of charge as securities. I am satisfied that the fact of an agreement being for services, as this one is, is not per se a reason for excluding it from being a security, and that this agreement is indistinguishable in character from the agreements held, in the line of authority to which I have referred, to be securities.

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[40] [1900] A.C. 1.

[41] [1899] 1 Q.B. 250.

On the second point the answer is also, I think, concluded, in principle, by authority, including a decision of this House. But before proceeding to authority I should say that I find no difficulty in applying a strict and literal reading of the words in the head of charge to the sums stated in the agreement. The sums in question are sums at the rate of £495,600 and £536,900 per annum accruing from day to day and payable by equal monthly instalments on the last day of each calendar month (third schedule, paragraph 5). They are thus " sums of money at stated " periods " as mentioned in the head of charge. They are to run, the £495,600 from the commencement date of broadcasting to March 31, 1958, and the £536,900 from March 31, 1958, till July 29, 1964 (clause 10 and third schedule, paragraph 1). They thus run " for a definite and certain period." The controversy turns upon the next succeeding words in the head of charge, " so " that the total amount to be ultimately payable can be ascer- " tained." The reason is that the agreement contains provisions under paragraph 2 (2) of the third schedule for increasing or reducing the contractor's fees by a percentage corresponding to a certain increase or decrease in the half-yearly index figure of retail prices published by the Board of Trade over the index figure of the preceding six months; under paragraph 3 for increasing the fee from time to time within certain limits at the discretion of the authority after three and a half years; and under paragraph 4 for increasing the fees at any time by agreement or by arbitration in the event of the authority's revenue being insufficient to meet its expenditure. There are other provisions for terminating the agreement in certain contingencies, but these were not relied on by the appellants. In this situation the appellants say it is not possible at the date of the agreement, at which time the stamp duty falls to be fixed, to ascertain the total amount that will be ultimately payable. This is not, in my opinion, the outlook of the Act. The words, I consider, are meant merely to indicate the arithmetical result of the continuance of the stated sums for a definite period in producing a total sum on which duty can be assessed. They are in contrast with the reference to an annuity or other periodical sum payable for the term of life or any other indefinite period for which another method of assessment is necessarily directed in the same head of charge.

Authority, I think, supports this point of view. I do not feel it necessary to examine in detail the cases of *Underground Electric Railways Company of London Ltd.* v. *Inland Revenue Commissioners*[42] and *Underground Electric Railways Company of London Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners*,[43] which were very fully considered by the Court of Appeal and Wynn-Parry J. It is true that these cases were not directed to the precise point that arises here, inasmuch as they were concerned with payments for an indefinite period payable in certain contingencies and which might in other contingencies fluctuate in amount within certain limits, and the question rather was whether they could be regarded as periodical payments or sums payable at stated periods. If so, no question of quantification arose. But the problem is, I think, in principle the same. If sums which might not be payable at all in certain contingencies, or sums which might be increased (or diminished) in certain contingencies, are regarded as periodical payments, or sums payable at stated periods, for an indefinite period, I can see no distinction in the case of sums payable at stated periods for a time certain, albeit in certain contingencies these sums may likewise be increased or diminished. The only distinction I see between the present case and the cases referred to is that the limits of increase or decrease are in certain contingencies unknown. But that, in my opinion, makes no real difference. It does not appear to me to matter whether sums payable at stated periods are maximum sums capable of decrease or minimum sums capable of increase under the terms of an agreement. They are still sums the total of which are capable of ascertainment, unless they are payable for life or for an indefinite period. The sums here are sums which, I think, may be regarded as maximum sums capable of decrease or minimum sums capable of increase. That fact is, in my opinion, immaterial and irrelevant. They are, in my opinion, sums to which the rules of calculation under the Act can be applied. I accordingly agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Allen & Overy; Solicitor of Inland Revenue.*

J. A. G.

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[42] [1905] 1 K.B. 174; [1906] A.C. 21.

[43] [1916] 1 K.B. 306.

J. C.*

1961
Jan. 17.

THE QUEEN . . . . APPELLANT;

AND

PANIKKAPODY EDIRIMANASINGHAM . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.

Crime—Court of Criminal Appeal—Substitution of sentence—Conviction on three counts—Sentence passed on one only—Conviction on that count quashed on appeal—Power of appellate court to impose sentence on the other counts—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (1)—*Court of Criminal Appeal Ordinance* (*Ceylon*), *No.* 23 *of* 1938, *s.* 6 (1).

Ceylon—Criminal law—Court of Criminal Appeal—Statutory power to substitute sentence—Construction—Court of Criminal Appeal Ordinance, No. 23 *of* 1938, *s.* 6 (1).

By section 6 (1) of the Court of Criminal Appeal Ordinance, 1938, of Ceylon (which is identical in terms with section 5 (1) of the English Criminal Appeal Act, 1907): "If it appears to the Court "of Criminal Appeal that an appellant, though not properly "convicted on some charge or part of the indictment, has been "properly convicted on some other charge or part of the indict-"ment, the court may either affirm the sentence passed on the "appellant at the trial or pass such sentence in substitution "therefor as they think proper and as may be warranted in law "by the verdict on the charge or part of the indictment on which "the court consider that the appellant has been properly convicted."

The respondent, who had been indicted on three charges, one of murder and two of attempted murder, was found guilty on all three counts. The trial judge sentenced him to rigorous imprisonment for life on the murder count, but passed no sentence on him in respect of either of the other two counts. On his appeal, the Court of Criminal Appeal quashed his conviction on the murder count, and held that section 6 (1) of the Court of Criminal Appeal Ordinance gave them no jurisdiction to pass the appropriate sentences on the other two counts on which the jury's verdict stood, and which was not challenged on the appeal. On appeal by the Crown against the court's decision that it lacked such jurisdiction:—

Held, that the Court of Criminal Appeal could under section 6 (1) of the Ordinance pass the appropriate sentences on the two counts on which the judge had omitted so to do. Where the sentence passed on the appellant at the trial had been quashed the words of the subsection in their ordinary and natural meaning conferred power on the Court of Criminal Appeal to substitute a proper sentence for that which had been quashed, which could only be done by passing sentence on the remaining good counts.

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* *Present*: LORD REID, LORD TUCKER, LORD DENNING, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

Rex v. *O'Grady* (1941) 28 Cr.App.R. 33 and *Reg.* v. *K. G. Sediris* (unreported, Ceylon Court of Criminal Appeal, March 5, 1956) approved.

Judgment of the Court of Criminal Appeal of Ceylon reversed, and case remitted to that court for such action as they might consider appropriate in the circumstances.

Appeal (No. 12 of 1960), by special leave, from a judgment and order of the Court of Criminal Appeal of Ceylon (Basnayake C.J., Pulle and H. N. G. Fernando JJ.) (January 26, 1959), in so far as that court (having quashed the conviction of the respondent for murder) refused to apply the provisions of section 6 (1) of the Court of Criminal Appeal Ordinance for the purpose of passing sentence on the respondent in respect of his convictions on the two other counts.

The following facts are taken from the judgment of the Judicial Committee: In an indictment dated April 8, 1958, the respondent was charged jointly with his son in the first count that on or about July 27, 1957, they did murder one Sembakutti Kandapodi and thereby committed an offence punishable under section 296 of the Penal Code of Ceylon. The second count charged them at the time and place aforesaid and in the course of the same transaction with shooting one Palipody Nagamany with a gun and causing him hurt with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Palipody Nagamany they would have been guilty of murder, and that they thereby committed an offence punishable under section 300 of the Penal Code. The third count charged them at the time and place aforesaid and in the course of the same transaction with shooting at one Eliyathamby Palipody with a gun with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Eliyathamby Palipody they would have been guilty of murder, and thereby committed an offence punishable under section 300 of the Penal Code.

The two accused were tried at a session of the Supreme Court of Ceylon in its Criminal Jurisdiction for the Eastern Circuit at Batticaloa on September 8, 1958, and following days.

On September 12, 1958, after the judge's summing-up the jury retired, and on their return to court were asked with regard to each separate count whether they were unanimously agreed on their verdict in respect of each of the accused, and by their foreman answered on each count that they found both accused guilty.

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singham.

The judge thereupon said: "Inform the verdict to the "accused. Tell the first accused that I sentence him to rigorous "imprisonment for life. I sentence the second accused for "rigorous imprisonment for life." The verdict and sentence were formally recorded as follows:

"The unanimous verdict of the jurors sworn to try the matter "of accusation in this case is that the prisoners (1) P. Edirimana-"singham and (2) E. Gopalapillai are guilty of the offences as set "out in counts (1), (2) and (3).

"Sgd.
"Foreman."

"Sgd. O. W. Wanniachy
"Clerk of Assize, S.C.
"Batticaloa.

"On this indictment the sentence of the court, pronounced "and published this day, is that the prisoners (1) P. Edirimana-"singham and (2) E. Gopalapillai be kept in rigorous imprison-"ment for life.

"Sgd. O. W. Wanniachy
"Clerk of Assize, S.C.
"Batticaloa."

A sentence of rigorous imprisonment for life exceeded the maximum permitted by the Code for the offences charged in counts 2 and 3.

On January 26, 1959, on appeal to the Court of Criminal Appeal by both accused, the appeal of the second accused was dismissed but the appeal of the first accused (the present respondent) against the verdict and sentence on the first count of the indictment was allowed on the ground that the verdict was not warranted by the evidence and a verdict of acquittal in his case was directed to be entered in respect of that charge. The jury's verdict against the respondent on the second and third counts was not challenged by counsel on the appeal.

The Court of Criminal Appeal, having quashed the conviction of the respondent on count 1, held they had no jurisdiction under section 6 (1) of the Court of Criminal Appeal Ordinance, 1938, to pass the appropriate sentences on counts 2 and 3 on which the jury's verdict of guilty stood.

The Crown now appealed against the decision of the Court of Criminal Appeal that they had no jurisdiction under section 6 (1) to pass such sentences.

1960. Dec. 5, 6. *F. H. Lawton Q.C.* and *T. O. Kellock* for the Crown The question is as to the effect of section 6 (1) of the Ceylon Court of Criminal Appeal Ordinance, which is identical in terms with section 5 (1) of the English Criminal Appeal Act, 1907. There is a section of a similar kind in the criminal appeal legislation of Ghana, Nigeria, Hongkong and New Zealand, and possibly in other parts of the Commonwealth. The Court of Criminal Appeal in Ceylon took the view in this case that it had no jurisdiction to pass sentence in circumstances in which, in *Rex* v. *O'Grady*,[1] the Court of Criminal Appeal in England, and in *Reg.* v. *K. G. Sediris*,[2] the Court of Criminal Appeal of Ceylon in 1956, following *O'Grady's* case, has passed a sentence. The point does not seem to have been argued in the English Court of Criminal Appeal. If the judge neglects to pass a sentence, then on the Ceylon view in the present case, an appellant, if he is successful on the count on which sentence was passed, must go free.

The submission is that the Ceylon Court of Criminal Appeal Ordinance does in fact give the court power to do the very thing which the Court of Criminal Appeal in this case refused to do. The crucial words in section 6 (1) are " the court may either " affirm the sentence passed on the appellant at the trial or pass " such sentence in substitution therefor as they think proper." " Affirm " the sentence means affirm the totality of the punishment, despite the quashing of the conviction on one count, which the accused was ordered to undergo. If the crucial words of section 6 (1) are construed in that way, then the rest of the section fits in, because in " in substitution therefor " " therefor " must relate back to the sentence passed on the appellant at the trial. It would appear to be a matter of grammatical construction. What in fact is being said is that the sentence will stand on the other counts and it becomes the totality of sentence.

O'Grady's case [3] appears to be the only case directly in point. These powers under section 5 (1) of the English Act are rarely exercised, and, indeed, in *Reg.* v. *Lovelock* [4] Lord Goddard C.J. expressed the view that section 5 (1) had never in fact been used. There is, however, a note appended to the reports of that case to the effect that Lord Goddard's comment is not accurate, and that the section has been used before. Section 251 of the

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[1] (1941) 28 Cr.App.R. 33, C.C.A.

[2] Unreported, C.C.A.Cey., March 5, 1956.

[3] 28 Cr.App.R. 33, 40.

[4] [1956] 1 W.L.R. 1217, 1218; [1956] 3 All E.R. 223; 40 Cr.App.R. 137, C.C.A.

Criminal Procedure Code of Ceylon (c. 16 of the 1938 Revision of the Legislative Enactments) provides that "If the accused is "convicted the judge shall either forthwith or before the close of "the sessions pass judgment on him according to law." Once the record has been made up there is no power to alter the sentence. [Reference was also made to *Rex* v. *Grubb*,[5] *Rex* v. *Hervey and Goodwin*[6] and *O'Connell* v. *The Queen*.[7]] At present under the Criminal Appeal Act of 1907 the general sentence has certainly been accepted for many years as being a good sentence—it is not a nullity. "Affirm the sentence passed . . . "at the trial" covers exactly this sort of situation. Here it purports to be on the face of it a general sentence—a sentence on the indictment as a whole. Section 6 (1) is designed to deal with one sentence, or, alternatively, with the totality of punishment. The Court of Criminal Appeal misconstrued the section; on a proper construction of it that court had power in the circumstances of this case to pass a sentence; it should have followed *O'Grady's* case[8] and its own earlier decision.

E. F. N. Gratiaen Q.C. Ceylon, *Walter Jayawardena* and *Miss M. K. de Silva* for the respondent. So far as concerns the original criminal jurisdiction of the Supreme Court, a general sentence, in the sense of one sentence intended by the judge to relate to more than one conviction, is illegal having regard to the fact that the functions and procedure of the Supreme Court in Ceylon are regulated by statute. In respect of each conviction there has to be a separate sentence—and it is provided by section 17 (1) of the Criminal Procedure Code that they shall run consecutively unless the judge directs otherwise. As a matter of construction of section 6 (1); if it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some charge, has been properly convicted on some other charge of the indictment, the court may either affirm the sentence passed on the appellant at the trial in respect of that conviction or pass such sentence in substitution therefor—for that sentence passed on the appellant at the trial in respect of that conviction. Section 6 (1) (and section 5 (1) of the English Act) were intended to deal with a case where in fact there were separate sentences in respect of each conviction.

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[5] (1945) 61 T.L.R. 288; 30 Cr. App.R. 148, C.C.A.

[6] (1939) 27 Cr.App.R. 146, 148, C.C.A.

[7] (1844) 11 Cl. & F. 155, H.L.

[8] 28 Cr.App.R. 33.

As to a general sentence, see *O'Connell's* case,[9] which was considered by the House of Lords in *Castro* v. *The Queen.*[10] The English Court of Criminal Appeal has twice since *O'Grady's* case [11] given rulings on the assumption that what was laid down in *Castro's* case is still law. The court has expressly laid down that the only sentence which could survive the quashing of one conviction would be a so-called general sentence, which on analysis can fairly be interpreted as several separate sentences.

The main submission with regard to the particular conviction in the present case is that, having regard to the requirements of the Ceylon Code of Criminal Procedure, this was not a general sentence at all; it was a sentence passed only on the murder count. *O'Grady's* case [12] is not a persuasive authority because there was no discussion on the point. [Reference was also made to *Grubb's* case [13] and to *In re Hastings.*[14]] In *Lovelock's* case [15] what was substituted was a higher sentence for the sentence expressly passed on the count on which he had been convicted; that case is distinguishable. Section 6 (1) can only properly apply not to rectify an omission but to deal with the propriety of a sentence which has been expressly passed in respect of that particular conviction. "In substitution for" means in substitution for exactly the same sentence which there is power to affirm, namely, the sentence in respect of that conviction. "The sen- "tence" must have the same meaning in a number of situations. Where the conviction has been quashed the sentence passed in respect of that conviction disappears. In 1938 the situation in Ceylon was quite different from that in England in 1907; very much stronger words would be necessary to include within the wording of section 6 (1) an intention on the part of the legislature that a particular sentence passed in respect of a particular conviction can survive the quashing of that conviction. Subsection (2) of section 6 supports this submission; "sentence passed at the "trial" in both subsections (1) and (2) of section 6 means in relation to the particular count. [Reference was made to *Reg.* v. *Adair* [16] and to Archbold's Criminal Pleading, Evidence and Practice, 34th ed., para. 632.]

The word "may" in this context means imperative. On the word " may " see *MacDougall* v. *Paterson*,[17] *Julius* v. *Lord Bishop of Oxford*[18] and Chitaley's Criminal Procedure Code of India, vol. 1, p. 187, s. 35, and pp. 197–198. There ought to be some remedy for such a situation as the present, but it is not one which is likely to recur. Once the Court of Criminal Appeal had quashed the conviction of the appellant on the murder charge it was on any view of the matter functus in respect of the sentence. That particular sentence cannot survive the quashing of the conviction and is therefore not available for affirmation. Very strong language would be required to effect that.

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[9] 11 Cl. & F. 155.
[10] (1881) 6 App.Cas. 229, 235, H.L.
[11] 28 Cr.App.R. 33.
[12] Ibid.
[13] 61 T.L.R. 288; 30 Cr.App.R. 148.
[14] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707; 42 Cr.App.R. 132, D.C.
[15] [1956] 1 W.L.R. 1217.
[16] [1958] 1 W.L.R. 786; [1958] 2 All E.R. 629, C.C.A.

[*Reg.* v. *Bertrand*,[19] recently followed in *Attorney-General for Ceylon* v. *Perera*,[20] was referred to.]

Jayawardena following. Section 6 (1) of the Court of Criminal Appeal Ordinance is not applicable to enable the Court of Criminal Appeal to pass a sentence in respect of a count on which no sentence was passed by the trial judge.

Lawton Q.C. in reply. The Court of Criminal Appeal Ordinance ought to be construed against the background of the very wide powers which the court already had under section 355 of the Criminal Procedure Code.

" Sentence " does not necessarily mean, in ordinary judicial usage, sentence on each count: *In re Hastings*.[21] The words " sentence passed at the trial " in section 6 (2) can in fact refer to something which is quashed by the Court of Criminal Appeal. It is an embarrassing situation that there are two judgments of the Court of Criminal Appeal of Ceylon, the one holding that it has jurisdiction to pass sentence, the other that it has not; and this particular provision applies in other parts of the Commonwealth; in England it has caused a certain amount of embarrassment because the power has in fact been exercised without any question.

1961. Jan. 17. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts set out above and continued: It is clear from the above narrative of events that the trial judge passed sentence on the respondent on one count only and that no question of the effect of what is generally referred to as a " general sentence," i.e., a sentence intended by the judge to cover more than one count, arises in the present case. Such a sentence, which is sometimes to be found in cases in England both before and since the establishment of the Court of Criminal Appeal and the Indictments Act of 1915, appears to be unknown in Ceylon having regard to the provisions of the Criminal Code and may well be illegal, but it is not necessary further to explore this question as no such sentence was in fact imposed in this case.

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[17] (1851) 11 C.B. 755.

[18] (1880) 5 App.Cas. 214, 224, H.L.

[19] (1867) L.R. 1 P.C. 520, 530, P.C.

[20] [1953] A.C. 200; [1953] 3 W.L.R. 238, P.C.

[21] [1958] 1 W.L.R. 372.

In Ceylon, where the trial judge has omitted to pass sentence forthwith, he may of his own motion or at the instance of the prosecution pass sentence at a later date, but not after the close of the sessions. The relevant part of section 251 of the Criminal Procedure Code is as follows: "251. If the accused is convicted "the judge shall either forthwith or before the close of the "sessions pass judgment on him according to law." Accordingly, the sessions having closed no question of remitting the case to the trial judge for sentence arose on the appeal.

The Attorney-General on behalf of the prosecution obtained special leave by Order in Council of August 12, 1959, to appeal against the decision of the Court of Criminal Appeal.

The sole question in the appeal is whether or not the Court of Criminal Appeal were right in holding that section 6 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, does not give them jurisdiction in a case such as this to impose the appropriate sentences on those counts of an indictment on which the judge has omitted so to do.

[His Lordship stated the terms of section 6 (1) of the Ordinance (set out in the headnote) and continued:] The Court of Criminal Appeal accepted the argument of counsel for the present respondent that the subsection only conferred power on the court to pass sentence in substitution for the sentence passed by the trial judge, and that when the trial judge has passed no sentence at all the question of substitution does not arise. After referring to certain English decisions, and in particular *Rex* v. *O'Grady*,[1] the Chief Justice, delivering the judgment of the court, said they were unable to accept *O'Grady's* case as having any persuasive force as no reasons were given in that case for what seemed to them a disregard of the words of section 5 (1) of the English Criminal Appeal Act of 1907, which are identical with those of section 6 (1) of the Ceylon Ordinance

The judgment proceeded: "In the instant case as the learned "judge has not passed any sentence at all on the second and "third charges we are unable to pass a sentence in substitution "of that passed at the trial. The Ordinance does not empower "this court to supply the omission of the trial judge."

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[1] (1941) 28 Cr.App.R. 33, C.C.A.

Their Lordships, with respect, feel unable to accept this interpretation of the section. It is in terms dealing with a case where an appellant has not been properly convicted on some charge or part of an indictment. This applies to count 1 in the present case. The conviction and sentence thereon no longer stand, but the court is empowered to substitute for that which has disappeared such sentence as may be warranted in law by the verdict on the charge or part of the indictment on which the appellant has been properly convicted. This, in their Lordships' view, can only mean that in place of the sentence that has been quashed the court can pass the sentence appropriate to the convictions on the remaining counts on which the appellant has been convicted but not sentenced. The section refers to " the sentence " passed on the appellant at the trial." Where the court affirms such sentence the application of the subsection may be restricted to cases where there has been a general sentence, but where the sentence passed on the appellant at the trial—in this case rigorous imprisonment for life—has been quashed, the words of the subsection in their ordinary and natural meaning appear to their Lordships to confer power on the Court of Criminal Appeal to substitute a proper sentence for that which has been quashed, which can only be done by passing sentence on the remaining good counts. This was the course adopted in *O'Grady's* case [1] in this country and their Lordships see no reason to suppose that this was done per incuriam.

It is not necessary to express any opinion as to whether or not the subsection warrants the court in increasing a sentence passed at the trial on some other count with regard to which there has been no appeal against sentence. Their Lordships prefer the view taken by the Court of Criminal Appeal in Ceylon in the unreported case of *Reg.* v. *K. G. Sediris* [2] to that reached in the present case.

For these reasons their Lordships will humbly advise Her Majesty that this appeal be allowed and that the case be remitted to the Court of Criminal Appeal in Ceylon for such action as they may consider appropriate in the circumstances.

Solicitors: *T. L. Wilson & Co.; Goodman, Derrick & Co.*

C. C.

[1] 28 Cr.App.R. 33.

[2] Unreported, C.C.A.Cey., March 5, 1956.

[HOUSE OF LORDS.]

IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND) LTD. APPELLANTS;
AND
PIERSON (VALUATION OFFICER) . . RESPONDENT.

H. L. (E.)*
1960
April 27;
June 23.

Rating—Assessment—Rateable value—Advertising right—Ratepayer granted licence to erect advertising sign—Subsequent erection of sign—"Structure"—Basis of assessment—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*b*)*—Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 56.

By an agreement of June 21, 1955, a company was granted the exclusive right of fixing and exhibiting upon certain premises a "flashing neon advertising sign" and to make all necessary connections for its working. The agreement provided that the sign and apparatus were to remain the property of the company. Pursuant to the agreement the company erected the sign and it was in existence on April 12, 1956, the date when the company was assessed in respect of the "right" which they had obtained under the agreement. It was conceded that the right was a "separate hereditament" for the purposes of section 56 of the Local Government Act, 1948.[1] The rateable value was assessed at £165. The company contended that the assessment should be in the sum of £150. The question was whether the rateable value should be determined under section 56 of the Act of 1948 and section 22 (1) (*b*) of the Rating and Valuation Act, 1925, on the basis of the right granted to the company by the agreement without taking into account the value of the work subsequently done. It was conceded that the advertising sign constituted a "structure":—

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD COHEN and LORD DENNING.

[1] Local Government Act, 1948, s. 56: "Where the right to use "any land (including any hoarding, frame, post, wall or structure "erected or to be erected on the land, "and including also any wall or other "part of a building) for the purpose "of exhibiting advertisements is let "out or reserved to any person other "than the occupier of the land, or, "when the land is not occupied for "any other purpose, to any person "other than the owner of the land, "that right shall be deemed for "rating purposes to be a separate "hereditament in the occupation of "the person for the time being en"titled to the right, and shall be "included in the valuation list as a "separate hereditament accordingly, "and, notwithstanding anything in "section 3 or section 4 of the Adver"tising Stations (Rating) Act, 1889, "in estimating the value of the land "for rating purposes no account shall "be taken of any value or, as the "case may be, of any increased value "arising from the use of the land "for the purpose of exhibiting adver"tisements in accordance with that "right."

H. L. (E.)

1960

IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND) LTD. *v.* PIERSON.

Held (Lord Denning dissenting), that on the true construction of section 56 of the Local Government Act, 1948, the "right" which was deemed for rating purposes to be a separate hereditament was the right which was let out or reserved to use any land in its extended meaning for the purpose of exhibiting advertisements; and that to ascertain the nature of that right it was necessary to look at the terms of the document under which the grant was made or reserved, the value of the hereditament being the value of the right so granted or reserved. Its value must be ascertained as at the date of the proposal, and the grant had its value irrespective of whether it was in fact exercised, since it was the grant which is the rateable hereditament, not the exercise of it, and that, accordingly, the company was liable to be rated at the lower figure of £150.

Decision of the Court of Appeal [1959] 1 W.L.R. 761; [1959] 3 All E.R. 313 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 28, 1959, whereby an appeal by the respondent valuation officer on a case stated by the Lands Tribunal (Erskine Simes Q.C.), pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, was allowed and the decision of the Lands Tribunal was reversed. By its decision the Lands Tribunal had allowed an appeal by the appellants, the Imperial Tobacco Company (of Great Britain and Ireland) Ltd., from a decision of the Valuation Court for the West Riding of Yorkshire and had reduced the rateable value of the hereditament in question, described in the valuation list as "advertising right," from £165 to £150.

By an agreement dated June 21, 1955, between the Bradford Corporation and the appellants, the Imperial Tobacco Company (of Great Britain and Ireland) Ltd., by their authorised agents, it was provided that the corporation agreed "to grant to the "company the exclusive right of fixing and exhibiting upon the "premises of the corporation at the junction of Forster Square "Canal Road and Bolton Road in the City of Bradford (hereinafter called 'the said premises') a flashing neon advertising "sign reading 'Player's Please' to be erected in the position "shown in the rectophot attached hereto and to be operated by "an automatic time switch Together with all necessary rights "(a) to connect such sign to the switchboard and meters and to "the main electric cable in the street (b) to erect and maintain "a permanent scaffold and iron ladder."

Clause 2 provided for the corporation giving to the Imperial

Tobacco Company liberty to enter on the premises to make the necessary fixtures, etc., and do other things necessary for making the sign effective, with liberty to enter for repairing and maintaining the apparatus.

Clause 4: "The corporation will immediately inform the "[Imperial Tobacco] company in the event of the sign requiring "attention or needing repair and the company will keep and "maintain the same securely fixed and in good and substantial "repair to the satisfaction of the corporation."

By clause 5 the corporation was to pay rates and taxes payable in respect of the premises, and the company was to pay any rates which might be imposed solely upon the sign.

Clause 9 provided that the agreement should be for three years certain and that it should then continue until duly determined by notice.

Clause 11: "Upon the determination of this agreement the "said sign and the apparatus used in connection therewith shall "remain the property of the company who shall remove the same "within fourteen days and make good any damage done to the "said premises in consequence of such removal."

Pursuant to that agreement the Imperial Tobacco Company erected the sign and it was in existence on April 12, 1956, the date when they proposed that the assessment of £165 made on them under section 56 of the Local Government Act, 1948, be reduced to £150. The local valuation court confirmed the assessment of £165. The Imperial Tobacco Company appealed to the Lands Tribunal.

It was conceded that the Imperial Tobacco Company was properly rateable in respect of the "right" or "rights" which they obtained by the agreement, and which, for the purposes of section 56 of the Local Government Act, 1948, were to be treated as a "separate hereditament."

The decision of the tribunal contained the following passage: "There is no dispute that the hereditament is properly described "and entered in the valuation list, nor that its rateable value is "to be ascertained under section 22 (1) (*b*) of the Rating and "Valuation Act, 1925.

"The question in dispute is whether the value to be ascer-"tained is that of a right to exhibit advertisements on a structure "to be erected on the land at the expense of the grantee, the "right in fact conferred on the appellants by an agreement dated "June 21, 1955, or that of a right to exhibit advertisements on "a structure erected on the land, which was the position at the "date of the proposal, April 12, 1956.

"It is agreed between the parties that in the former case the "rateable value should be £150, in the latter case £165."

The tribunal reduced the assessment to £150. The ground of its decision was stated thus: "While it is, of course, true that "the value must be ascertained as at the date of the proposals, "it is the value of the grant and not of some other grant. The "grant has its values irrespective of whether it is in fact exercised, and it is the grant which is the rateable hereditament, "not the exercise of the grant. . . . In the present case the "right granted is to exhibit advertisements on a structure to be "erected, and it is that right which in my judgment has to "be valued and the value of the right cannot in my view be "enhanced by the erection of the structure, to do so seems to "me to be in effect valuing a different right, a right to exhibit "advertisements on a structure erected on the land, from that "which is let."

The valuation officer appealed. In the case stated the question for the determination of the court was whether the tribunal had come to a correct decision in law in determining that the rateable value to be ascertained under section 56 of the Local Government Act, 1948, and section 22 (1) (*b*) of the Rating and Valuation Act, 1925, was the right granted by the agreement of June 21, 1955, without taking into account the work done subsequent to that date.

The Court of Appeal reversed the decision of the Lands Tribunal and restored the assessment of the local valuation court.

Lionel Edwards Q.C. and *G. F. Peter Mason* for the Imperial Tobacco Company. The question is: was the right to use the structure ever let out at all by the corporation to the appellant company? If, as was conceded in the Court of Appeal, the sign was a "structure" within the meaning of section 56 of the Act of 1948, nevertheless the right to use the chattels of which it was comprised was never "let out" by the corporation to the company, but only the right to use the corporation's wall to which the sign was affixed. In other words, what is rateable is the advertising right and *not* the right to use the structure on which the advertisement is placed.

Unless the respondent can establish that the appellants' sign and framework became "land" within the meaning of the Act, the right to use which was let out by them to the appellants, the respondent fails in limine, for otherwise the situation envisaged by the use of the word "where" in section 56 has never arisen. The sign and framework remained the property of the appellants throughout. A cannot let out to B the right to use B's own property. All that A has or could let out to B is a right over A's own land. The corporation could only have acquired some proprietary right to the structure here if it had become part and parcel of the land: see *per* Lord Macnaghten in *Leigh* v. *Taylor*.[2] The appellants' chattels remained their own property at all material times, and the corporation were never entitled to any interest in this sign so as to give them a right to let it out to the appellants, albeit that they were entitled to impose conditions as to its user when it was brought on their land.

In both instances where the word "advertisement" is used in section 56 it is used in conjunction with the word "exhibiting." Accordingly, "advertisement" in this section connotes something visible. The most important parts of the apparatus in question are the wooden letters and neon tubing, and it is those objects which are the "advertisement" within the meaning of section 56. The respondent's construction of this section leads to the startling proposition that what is rateable here is a right to use an advertisement for the purpose of exhibiting itself.

Advertisements include various things which are protected by law: trademarks, copyright pictures, registered designs. In these circumstances section 56 should not be so construed that it would result in the occupier of land letting out to the would-be advertiser an advertisement which was solely the advertiser's property. The reasonable construction of section 56 is this: the right to use the visible advertisement itself can never be let out and, therefore, it is never rateable. The physical objects on the land are rateable only if they are let out to the advertiser, and they can only be let out if they are part and parcel of the land which the occupier occupies.

Mason following. The issue is correctly stated by the Lands Tribunal: "The question in dispute is whether the value to be "ascertained is that of a right to exhibit advertisements on a "structure to be erected on the land at the expense of the "grantee, the right in fact conferred on the appellants by an "agreement dated June 21, 1955, or that of a right to exhibit "advertisements on a structure erected on the land, which was "the position at the date of the proposal, April 12, 1956." The subject-matter of assessment is the incorporeal right to use any " land " as defined in section 56. After the word " land " come the words " . . . any hoarding, frame, post, wall or structure . . ." It is plain that all the words in parenthesis govern the word " land " and not the word " right," and, accordingly, the time to assess the content of that right for rating purposes is the moment it is created and not some subsequent time. Even if this structure is " land " within the meaning of section 56, the agreement would seem to contemplate a structure erected by the grantee: see *per* Lord Evershed M.R.[3] Further, the right to use this structure exists quite apart from its exercise—the right has a value from the moment of the grant irrespective of the fact that it may never be exercised. At that date the structure may not have been erected and it is therefore illogical to increase the assessment on its erection. The respondent is endeavouring to get the best of both worlds.

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[2] [1902] A.C. 157, 162; 18 T.L.R. 293, H.L.

The respondent's case has always contained the fallacy that this right is enhanced by the erection of the structure. But the value of the right is arrived at by reference to the terms of the agreement. One cannot " inspect," " repair " or " test " a right. Those words are apt in relation to corporeal things and not incorporeal things. The maxim rebus sic stantibus has no application here. On the respondent's argument the rateable value would change on any change in the nature of the structure. But that cannot be so in relation to a continuing right such as the one in question.

Maurice Lyell Q.C. and *J. R. Phillips* for the valuation officer. To justify his assessment the valuation officer has to satisfy himself that the right exercised by the appellants is one let out or reserved to a person who is not the general occupier of the land. The extent of the concession made by the appellants in the Court of Appeal was that the physical object placed on the corporation's building was a " structure " within the meaning of section 56 and was therefore also " land " within the meaning of the section. The crux of this case is whether the right to use that structure fixed to another's building can be said to be a right let out by the general occupier of the building. The appellants, by April 12, 1956, plainly had the right of property and of use in this structure, and this was given to them by the corporation under the agreement—no right exists in the appellants save by virtue of the grant by the corporation. It follows, therefore, that all the material words of section 56 are satisfied. It was the right to use the structure which, on April 12, 1956, was to be deemed for rating purposes to be a separate hereditament: see *per* Romer L.J.[4]

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[3] [1959] 1 W.L.R. 761, 765, 766.

Phillips following. On the assumption that the "right" obtained by the company under the agreement was a separate hereditament for the purposes of section 56 of the Act of 1948, it was plainly an incorporeal hereditament, but its value has, nonetheless, to be assessed in accordance with section 22 (1) (*b*) of the Rating and Valuation Act, 1925. Under that section it has to be assumed that the right is vacant and to let and its value must be determined as at the date of the proposal. In the present case, at the date of the proposal, April 12, 1956, it was a relevant consideration that the structure which supported the advertisement had been erected, and, accordingly, the valuation officer in answering the question how much would a person pay in respect of this hereditament was justified in determining that the appellants would pay more for it than if the structure had not been erected.

Edwards Q.C. in reply. The fallacy that has run throughout this case is the failure to distinguish between the incorporeal hereditament in question here and the corporeal hereditament which is normally rateable. It is plain that what is rated under section 56 is an incorporeal right. It is the right let out which is rated. In the present case it was let out by the agreement of June 21, 1955, and before the ink was dry on that document the appellants possessed all the rights that they ever had in respect of this advertisement. All that the appellants did by erecting the structure was to exercise those rights.

Their Lordships took time for consideration.

1960. June 23. VISCOUNT SIMONDS. My Lords, on September 13, 1957, the Valuation Court for the West Riding of Yorkshire confirmed the assessment of a certain hereditament described in the Valuation List for the Bradford County Borough Rating Area as "Advertising Right" with a rateable value of £165. The appellants, the Imperial Tobacco Company, had proposed that it should be reduced to £150. From this decision the appellants appealed to the Lands Tribunal, which allowed the appeal, reducing the rateable value to £150. The respondent, the valuation officer, appealed to the Court of Appeal, which restored the original assessment. A final appeal is brought to your Lordships' House, which is asked once again to reduce the assessment. The sum involved in the present case is trifling, but it is said that the principle involved is important and affects a great number of other cases. That the question is one of some difficulty may be inferred from the fact that your Lordships are in favour of reversing the unanimous decision of the Court of Appeal.

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[4] [1959] 1 W.L.R. 761, 767.

My Lords, I have already said that the hereditament in question is described as "Advertising Right." It is correctly so described, and I think that, if that description is firmly kept in mind, the difficulty in the case disappears.

What, then, was the right which fell to be rated? It was created by an agreement made on June 21, 1955, between the Corporation of Bradford and the appellants under which the former granted to the latter "the exclusive right of fixing and "exhibiting upon the premises of the corporation at the junction "of Forster Square Canal Road and Bolton Road in the City of "Bradford a flashing neon advertising sign reading 'Player's "'Please,'" which was to be erected in a certain position and to "be operated by an automatic time switch. Together with all "necessary rights (a) to connect such sign to the switchboard and "meters and to the main electric cable in the street (b) to erect "and maintain a permanent scaffold and iron ladder." The agreement contained a number of ancillary provisions, including a provision that the sign and apparatus were to remain the property of the appellants, who were to remove it within 14 days of the termination of the agreement. It was to remain in force for three years and thereafter until determined by either party giving three months' notice. The rent payable by the appellants was £150 per annum.

This, then, was the right and, since the rent was fixed by parties bargaining at arm's length, there could be no apparent reason for saying that £150 was not the rateable value of the hereditament for the purpose of section 22 (1) (*b*) of the Rating and Valuation Act, 1925. How, then, does it come about that the Court of Appeal has rejected this figure and admitted an assessment of £165? My Lords, I must confess that I find the argument and even the form of question to which it is directed somewhat elusive. The appellants duly entered on the land of the corporation and, as they were entitled to do, affixed on a wall, the property of the corporation, their neon sign reading "Player's Please." It appears to have been in neon tubing fixed to mahogany letters, which were mounted on runner bars, themselves fixed to the wall by heavy channel brackets. They also erected a scaffold and ladder for the purpose of servicing the sign. In fact, to put it shortly, they exercised the right conferred by the agreement in the manner that they found convenient, and it is the fact that they did so that has led to this contest and dictated the form of question which was stated for the decision of the court by the Lands Tribunal. It was whether the tribunal came to a correct decision in law in determining that the rateable value to be ascertained under section 56 of the Local Government Act, 1948, and section 22 (1) (*b*) of the Rating and Valuation Act, 1925, was that of the right granted by the agreement of June 21, 1955, without taking into account work done subsequent to that date.

The tribunal in so deciding this question had first to consider the terms of section 56 of the Act of 1948, to which I now call attention. Into the law of rating advertising stations, which had always been a matter of some difficulty, section 56 introduced a new concept. It provided, so far as material, as follows: " Where " the right to use any land (including any hoarding, frame, post, " wall or structure erected or to be erected on the land, and " including also any wall or other part of a building) for the purpose of exhibiting advertisements is let out or reserved to any " person other than the occupier of the land, or, when the land " is not occupied for any other purpose, to any person other than " the owner of the land, that right shall be deemed for rating " purposes to be a separate hereditament in the occupation of " the person for the time being entitled to the right, and shall " be included in the valuation list as a separate hereditament " accordingly . . ." Nothing, I think, could be clearer than that it is the right let out or reserved to a person other than the occupier which is deemed to be a separate hereditament in the occupation of the person for the time being entitled to the right or, applying the general to the particular, than that from the moment that the agreement of June, 1955, became operative, the right thereby created was deemed to be, and therefore was, a separate hereditament in the occupation of the appellants. Whether it was exercised or not, and, if exercised, whether on a mean or lavish scale, it was the same right, no more and no less, and fell to be valued accordingly. That is why I said, at the outset of this opinion, that it was essential to look only at the right and turn one's eye from the physical aspect of the method of its exercise. In particular, it seems to be wholly irrelevant whether the apparatus by means of which the sign is exhibited can properly be called a "structure." Some concession or admission to this effect appears to have caused some confusion in the Court of Appeal. I am prepared to say it might be so described. It does not, in my opinion, touch the issue.

My Lords, the view that I have tried to express was put so cogently by the tribunal that at the risk of repetition I will quote two sentences from an admirable judgment: "It is, I think, "clear," says Mr. Erskine Simes, "from the use of the word "'that' that the right which is deemed for rating purposes to "be a separate hereditament is the right to use any land in its "extended meaning for the purpose of exhibiting advertisements "which is let out or reserved, and to ascertain what that right is "one must, I think, look at the terms of the document by which "the grant is made or reserved and that the value of the hereditament is the value of the right so granted or reserved. While "it is, of course, true that the value must be ascertained as at the "date of the proposal, it is the value of the grant and not of some "other grant. The grant has its value irrespective of whether "it is in fact exercised and it is the grant which is the rateable "hereditament, not the exercise of the grant." I agree.

A different view was taken in the Court of Appeal, by the learned Master of the Rolls (Lord Evershed) with great doubt and hesitation, but firmly by Romer and Sellers L.JJ. My Lords, I think that the error of their judgments flows from the failure to observe the nature of the right that was created by the agreement. Thus Sellers L.J. says [1]: "In my opinion these factors "and considerations establish that the Imperial Tobacco Com"pany were in occupation of a separate hereditament used as "of right consisting of the whole structure as erected and they "are therefore liable to be rated thereon at the agreed figure of "£165." But the appellants are not for rating purposes in occupation of a hereditament consisting of a structure. Whether there is a structure there or not, they are rateable in respect of a right which is deemed to be a separate hereditament in their occupation. Romer L.J., too, as I think, has allowed his mind to be diverted from the right itself to the manner in which it may for the time being be exercised. Thus he says [2]: "If I am "correct in thinking that the 'right' which, on April 12, 1956, "was to be deemed for rating purposes to be a separate here"ditament was the right to use for the purpose of exhibiting

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[1] [1959] 1 W.L.R. 761, 768.

[2] Ibid. 767.

" advertisements the structure which the company were then " using, it follows that the case stated must be answered in " favour of the appellant [respondent]." But the right does not vary from day to day according to the apparatus which is used by the appellants for their advertisement. It is irrelevant what was the structure which the appellants were " then using " and it is, I think with the greatest respect, this fundamental error which runs through the judgments of the Court of Appeal.

I do not doubt that the result at which I have arrived marks a departure from the usual course of rating law, but the language of the relevant section is unambiguous, and I do not feel justified in ascribing to it any other than its natural meaning. It is some satisfaction to me that the very experienced tribunal (Mr. Erskine Simes), before which the case first came, being fully aware of the anomalies to which his decision might give rise, nevertheless saw no reason for departing from the plain meaning of the language of the Act.

In my opinion the appeal should be allowed and the decision of the tribunal affirmed. The respondent must pay the appellants' costs here and below.

LORD MORTON OF HENRYTON. My Lords, I entirely agree with the speech which has just been delivered by my noble and learned friend, Viscount Simonds, and I desire only to add a few words.

Section 56 of the Local Government Act, 1948, has already been read. It is to be noted that the only right dealt with by that section is a right which is " let out or reserved " and the relevant words for the present purpose are " let out." Now, the right which was " let out " by the Corporation of Bradford to the appellant company, by the agreement of June 21, 1955, was a right of fixing and exhibiting upon the corporation's premises an advertising sign, to be erected in a certain position and to be operated by an automatic time switch, together with all necessary rights to connect the sign to sources of electricity and to erect and maintain a permanent scaffold and iron ladder. No other right was " let out " to the company. In particular, no new right was " let out " to the company when they erected the " structure " which has already been described. In erecting that " structure " they merely exercised the right which had already been let out to them. That right, and that right only, is within the terms of section 56. As my noble and learned friend has said, it remained the same right throughout, whether it was exercised or not, and fell to be valued accordingly.

Mr. Lyell, for the respondent, endeavoured to persuade your Lordships that the question to be determined is "what is the "rateable value of the right to *use* the structure?" My Lords, in my opinion that question does not arise. It could only arise if the structure had been in the ownership or control of the corporation at the time of the "letting out" and the corporation had "let out" the right to use it.

I would allow the appeal.

Lord Reid. My Lords, in 1955 the appellants made an agreement with Bradford Corporation under which they became entitled for a rent of £150 per annum to fix an advertising sign on the wall of a building occupied by the corporation and thus to exhibit their advertisement. The appellants had to provide the materials and components and to erect and fix the sign at their own expense. When erected and fixed the sign was admitted to be a structure.

By section 56 of the Local Government Act, 1948, the appellants' right under this agreement, being a right to use land for the purpose of exhibiting advertisements, is deemed for rating purposes to be a separate hereditament in the occupation of the appellants. The question for decision in this case is the value of that hereditament, that is, the rent at which it might reasonably be expected to let.

Hereditaments are normally corporeal, land; and such hereditaments must be valued in the physical condition in which they are at the relevant date. If that principle were applicable to this case, the respondent would have to take into account not only the value of the use of the wall, £150, but also the letting value of the structure erected by the appellants, which is admittedly £15. So the rateable value would be £165 and this appeal would have to be dismissed.

But this is not an ordinary hereditament. The hereditament created by section 56 is not land but a right to use land, and therefore what has to be valued is not land but the appellants' right to use land. The only right to use land which is let out or reserved to the appellants is that given to them by their agreement with the corporation, and therefore it appears to me that the sole question is what is the value of that right. There is no suggestion that the rent payable under the agreement, £150, is not the true value of the right which the appellants got from the corporation, and, as that is the only right to use land let out to them, it seems necessarily to follow that the rateable value of their hereditament is £150.

But, says the respondent, the appellants' agreement entitles them to use property the annual value of which is £165. So be it. The appellants' first answer is that it is not the agreement which entitles them to use the structure: it is the fact that the structure is their own property. I do not think it necessary to determine that question, and I am content to assume that their right to use the structure for exhibiting advertisements flows from their agreement with the corporation. The better answer to the respondent's argument is, I think, that section 56 does not require the valuation of the property which is being used: it requires the valuation of the appellants' right.

The right to use the wall and the structure put up by the appellants would be worth £165 if both the wall and the structure were supplied by the occupier, the corporation, free of expense to the user. But that is not the right which has to be valued. The right of the appellants is to use the wall and supply and use the structure, and that is obviously a less valuable right than a right to have the structure provided by the corporation; the appellants' right is only worth £150.

No doubt it is unusual—possibly it is unique in rating law—that we do not have to look at the property which is being used. But, in my opinion, that is the result of the provisions of section 56 under which it is the user's incorporeal right which is to be valued. In valuing corporeal hereditaments, land, one takes the land as one finds it. So, also, in valuing an incorporeal hereditament, a right, one must take the right as one finds it. On that basis the appellants' right is only worth £150 per annum. I am therefore of opinion that this appeal must be allowed.

LORD COHEN. My Lords, I agree that this appeal should be allowed for the reasons given by the noble and learned Lord on the Woolsack.

I only desire to add that I think there is a great deal to be said for the view expressed by the Master of the Rolls[3] that the formula in brackets in section 56 of the Local Government Act, 1948, only means that " land " covers whatever is there, or is to be put there as a wall structure or otherwise as part of the grantor's property, but does not include something (albeit in some sense a " structure ") added by the grantee temporarily as a means of exercising the right granted, and intended to be removed by the grantee when the grant determines.

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[3] [1959] 1 W.L.R. 761, 766.

The Master of the Rolls thought that he was precluded from giving effect to this view by an admission made in the course of the argument by Mr. Williams, who then appeared for the appellants. That admission is stated by Romer L.J. as being an admission that the flashing neon advertising sign reading "Player's Please," referred to in the agreement, is a structure within the meaning of, and for the purposes of, section 56. But I do not think Mr. Williams intended to admit more than that the advertising sign was a "structure" within the meaning of that word in section 56. He did not, I think, intend to preclude the appellants from presenting the argument advanced by Mr. Edwards at the hearing which has found favour with your Lordships. As I read the agreement of June 21, 1955, the right thereby let out was the right to erect a physical thing on the premises of the corporation of Bradford (a thing which was to remain throughout the property of the appellants) and to use it for the purpose of advertising. It is this right, and only this right, which had to be assessed as a separate hereditament at the date of the proposal made by the respondent on April 12, 1956, and it is, in my opinion, immaterial that at that date the sign had been erected and may have been a structure within the meaning of that word in section 56. The annual value of that right had been fixed at £150 per annum by agreement between the parties, bargaining at arm's length, and I can see no justification for substituting some other figure for that sum.

Lord Denning. My Lords, the Master of the Rolls said that it was conceded that the framework, which had upon it the sign "Player's Please," was, when erected, a "structure" within the meaning of section 56: and this concession forms the basis of his judgment. I think the concession was rightly made and that your Lordships should proceed on the same basis. This framework with its sign was clearly a structure. It was just as much a structure as an advertisement hoarding. And it was just as firmly fixed. The only difference is that this framework and sign were fastened by bolts to a wall: whereas an advertisement hoarding is supported by posts in the ground.

Such being conceded, it seems to me that we are here concerned with two pieces of "land" within the meaning of section 56. First, with the *wall* of the building itself which is clearly included in the word "land" within the parentheses in section 56; secondly, with this *structure* which is also included in the word "land" as being a structure erected or to be erected on the land. And when we speak of the right to use any "land" in this case, we must be careful to see whether we are speaking of the right to use the *wall*, or the right to use the *structure*, for it must be one or the other.

The crucial question, to my mind, is what is the hereditament which falls to be rated? The Imperial Tobacco Co. say it is only the right to use the *wall*. They say: "We ought only to be rated "on the right to use the wall. That was the only right which "was 'let out' to us. The rateable value of that right was £150 "a year. We should not be rated on the right to use the struc"ture, because it was our own structure. We erected it at our "own cost. It belonged to us. It was not 'let out' to us."

But the valuation officer says that the rateable hereditament is the right to use the *structure*. He says: "The date for taking "the valuation is April 12, 1956. At that date the structure was "completely erected and it was so attached to the building that "it was part of it. It was part of the building of the Bradford "Corporation. The right to use it can properly be said at that "date to be 'let out' to the Imperial Tobacco Co. The rateable "value of that right was £165 a year. That is £150 for the wall "and £15 (5 per cent. on £300) for the structure, making £165 "altogether."

If the words of the section are taken literally, the Imperial Tobacco Co. would, I think, be right. But I am a little suspicious of a literal interpretation in this case, because it leads to such surprising results. It means that the Imperial Tobacco Co. would be liable to pay rates on the right to use the wall, even though they never exercised the right and never erected a structure at all. They do not shrink from this result. They admit it. It suits them to do it. But just see what it means. Under the agreement of June 21, 1955, the Bradford Corporation granted to the Imperial Tobacco Co. the exclusive right of fixing and exhibiting upon the premises of the corporation a flashing neon advertising sign: but the Imperial Tobacco Co. were not bound to exercise that right: and no rent was payable unless and until they did exercise it. The £150 a year was only payable from the date that the sign was erected and ready for use. Suppose that the Imperial Tobacco Co. changed their minds and never erected a sign at all. Could anyone seriously suggest that they had to pay rates on a right which they never exercised and for which they paid no rent? Surely not. Such a suggestion would be so novel and so alien to every concept hitherto entertained about rating that your Lordships should pause long before attributing to Parliament an intention to introduce it.

Another result of the literal interpretation which surprises me almost as much is this: It means that the rateable value of the hereditament depends on who paid the cost of erecting the structure. If the Bradford Corporation put up this structure, the rateable value of the right to use it would be £165, whereas if the Imperial Tobacco Co. put it up, the rateable value would be £150. I must say this is quite contrary to all I have understood about the law of rating. I would associate myself with what Sellers L.J. said about it[4]: "In assessing the right to use any "land and structure it does not seem to me to matter whether "any hoarding or structure is erected and paid for by the occupier "of the land or the person deemed under the section to be in "occupation of a separate hereditament."

Seeing these surprising results of the argument for the Imperial Tobacco Co., I have sought to inquire whether Parliament really intended them: and in this search, I have found much assistance from another observation of Sellers L.J. He said[5]: "The purpose of the section is to place the liability to "rates in respect of the exhibition of advertisements on land, as "defined, directly on the person enjoying the right to advertise "instead of upon the occupier of the land." In order to test the validity of this observation, I would like to remind your Lordships that shortly before 1889 the rating authorities had run into great difficulties about the rating of advertisement hoardings. It was never doubted that such a structure was capable of being rated, provided that it was so attached to the land that it was not a chattel but part of the hereditament itself. But the difficulty was to say: *Who* was liable to pay the rates on it? *Who* was in occupation? Was it the advertising contractor who erected it or the occupier of the land who permitted him to put it up? In 1889 Parliament resolved this difficulty by declaring that the occupier of the land was liable to pay rates on the whole hereditament, both the land and the structure as well. He had to pay rates on the increased value of the land. It did not matter who erected the structure. No matter whether it was the occupier or advertising contractor, the increase in rateable value was the same. The method of calculation was described in the 1946 edition of Ryde on Rating in these words: "if the advertising

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[4] [1959] 1 W.L.R. 761, 768.

[5] [1959] 1 W.L.R. 761, 768.

"contractor erects the hoarding for himself, the rent which he "pays is of the same nature as a ground rent, and something may "fairly be added for interest on the cost of erecting the hoarding, "if that hoarding is (as must often be the case) so fixed to the "ground as to form part of the rateable hereditament; for it is "obvious that an advertising contractor would give a higher rent "for an advertising station if the hoarding were already erected, "than he would give if he had to erect the hoarding himself at "his own expense," see Ryde on Rating, 8th ed., p. 97. So if this structure had been erected before 1948, the Bradford Corporation would have been liable to pay the rates in respect of it: and the increase in the rateable value would have been calculated by regarding the £150 as in the nature of a ground rent, and adding something for interest on the cost of erecting the structure, say 5 per cent. on £300: thus giving the increase in rateable value as £165.

Such being the position before 1948, the question is: What was the object of Parliament in enacting section 56? Reading the section as a whole, it seems to me plain that the object was only to alter the incidence of liability; so as to place the liability for rates directly on the advertising contractor instead of the occupier of the land: but not to alter the basis of assessment. That is, indeed, how the valuation officer treated it. In this very case he assessed the rateable value just as it would have been assessed before 1948. He took the rent payable for the site, namely, £150 a year, and added on £15, representing interest at 5 per cent. on £300, the cost of erecting the structure. But instead of this assessment being made on the occupier of the land, as it would have been before 1948 as being the increased value of it, the assessment was now made directly on the person enjoying the right to advertise.

It is said, however, that whatever be the object of Parliament, the words are clear. Whereas in the past the rateable hereditament was the *structure*, now it is the *right*. And this, it is said, has the effect of altering the basis of assessment.

My Lords, I do not myself think there is much difference between rating "the structure" and rating "the right" to use the structure. It seems to me more a matter of words than anything else. Under the general law of rating you never rate the physical thing. You rate the occupier in respect of his right to use it. There are many cases in the books where a contractor has been granted the right to erect a structure on another person's land, and to use it for his own exclusive purposes—such as bookstalls on railway stations or huts on building sites. In such cases the contractor has been held to be in rateable occupation, no matter whether the right is let out to him under a lease, a licence or an easement. In one sense, the rateable hereditament may be said to be "the structure": but more accurately it is "the right to use" it, for that is all the contractor has. The structure must, of course, have ceased to be a chattel. It must have become part of the principal hereditament to which it is attached. Else it could not be rated at all. But, once so attached, the right to use it is properly said to be "let out" to the contractor, and it becomes rateable in his hands. In these circumstances, it seems to me that all that Parliament did by section 56 was to place advertisement structures on the same footing as other structures on the land.

I turn, therefore, to the ultimate question in this case, which is what is the rateable value of this structure, or, to put it more accurately, "the right to use" this structure.

My Lords, the method of ascertaining the rateable value is laid down by statute. It is "the rent at which the hereditament "might reasonably be expected to let from year to year" [section 22 (1) (*b*) of the Rating and Valuation Act, 1925]. You must assume that a hypothetical tenant was negotiating for a tenancy on the date of the proposal, April 12, 1956, and determine what rent he would pay *at that date* for a yearly letting. The date, to my mind, is crucial, and for this reason.

If you assume that a hypothetical tenant was negotiating on June 21, 1955, when the agreement was made, before this structure was erected, he would only be negotiating for the right to use the *wall* of the building. He could not negotiate for the right to use the structure because it was not erected. He would have to reckon that he would himself have to pay the cost of erecting it. On this footing he could reasonably be expected to pay £150 a year, and no more.

But if you assume that the hypothetical tenant was negotiating on April 12, 1956, after the structure was erected, he would then be negotiating for the right to use not merely the wall of the building but the *structure* which was erected on it. He would, of course, pay more because it was already there, and the hypothetical landlord might reasonably expect more because he would have had to bear the expense of erecting it. The cost of erecting the structure, we are told, was £300. The hypothetical tenant might reasonably be expected to pay interest at 5 per cent. on

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that sum, namely, £15. Adding this £15 to £150, the rent which he might reasonably be expected to pay would be £165.

Assuming, therefore, as we must, that the hypothetical tenant was negotiating *on April* 12, 1956, for *the right to use the structure*, it seems to me clear that the rateable value of that right was £165, and I am of opinion that that is the proper figure to take. The contrary view seems to me to place an undue emphasis on the literal meaning of the words of section 56, and to give too little weight to the previous state of the law and the object which Parliament intended to achieve. The true interpretation of a statute can only be achieved by a correct appreciation of its wording, its history, and its purpose: and I think the Court of Appeal achieved it in this case.

I would therefore dismiss this appeal.

Appeal allowed.

Solicitors: *Trower, Still & Keeling for A. W. Martin, Bristol; Solicitor of Inland Revenue.*

J. A. G.

J. C.*

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AUSTIN RICHTER COLEMAN . . . APPELLANT;

AND

EMMA KWALEY SHANG ALIAS EMMA KWALEY QUARTEY . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, GHANA.

Ghana—Administration—Grant of representation—Issue of Marriage Ordinance marriage—Widow of marriage by native customary law—Joint grant—Statutory application of English legislation—"Wife"—"Widow"—Meaning—Marriage Ordinance (Laws of the Gold Coast, 1951, *c.* 127), *s.* 48 (1)—*Courts Ordinance (Laws of the Gold Coast,* 1951, *c.* 4), *s.* 83—*Interpretation Ordinance (Laws of the Gold Coast,* 1951, *c.* 1), *s.* 3 (31) (45)—*Statute of* 21 *Hen.* 8 (1529), *c.* 5, *s.* 2—*Statute of Distribution,* 1670 (22 *&* 23 *Car.* 2, *c.* 10), *s.* 3.

Husband and Wife—Marriage—Polygamous marriage system—Succession to personal property—Marriage valid in locus domicilii—Death of first wife—Marriage to second wife under native law—Ghana.

Privy Council—Fact, question of—Statement in judgment that fact not in dispute—Whether challengeable.

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* *Present*: LORD TUCKER, LORD HODSON and the RT. HON. L. M. D. DE SILVA.

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By the Marriage Ordinance (Ghana), s. 48 (1): "... where any "person who is subject to native law or custom contracts a marriage ... in accordance with the provisions of this Ordinance ... "and such person dies intestate ... the personal property of such "intestate ... shall be distributed or descend in manner following, "viz.—Two-thirds in accordance with the provisions of the law of "England relating to the distribution of the personal estates of "intestates in force on the 19th day of November, 1884, ... and "one-third in accordance with the provisions of the native "customary law ..."

By the Courts Ordinance (Ghana), s. 83: "... the statutes of "general application which were in force in England on the 24th "day of July, 1874, shall be in force within the jurisdiction of the "courts."

By the Interpretation Ordinance (Ghana), s. 3 (31): "'Ordin-"'ance' shall include ... an Act of the Imperial Parliament, "applicable to the Gold Coast and in force ... (45) Words in the "singular include the plural and vice versa."

The appellant, the sole surviving child of a marriage under the Marriage Ordinance between his mother and his father, an Osu man, who died intestate, claimed that he alone was entitled to the grant of letters of administration of the intestate's estate to the exclusion of the respondent, who, after the death of the appellant's mother, had married the intestate in accordance with native customary law:—

Held, that there must be a joint grant to the appellant and the respondent.

The effect of the Courts Ordinance and the Interpretation Ordinance was that the Statute 21 Hen. 8, c. 5, which provided by section 2 that in the case of a person dying intestate administration should be granted to the widow of the intestate, and the Statute of Distribution, 1670, which enacted that the wife of an intestate was entitled to one-third of the personal estate, were included in the definition of "Ordinance" and in force in Ghana. Those statutes were therefore to be construed in their application to Ghana so that words in the singular included the plural unless there was something in the subject or context repugnant to such construction, which was not so here, the subject and context being the distribution of the personal property of an intestate validly married by native law and custom of Ghana which recognised the existence of more than one wife or widow.

Cheang Thye Phin v. *Tan Ah Loy* [1920] A.C. 369, P.C.; *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, P.C. and *Bamgbose* v. *Daniel* [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C. considered.

Further, apart from the Interpretation Ordinance, in dealing with personal property in Ghana of an intestate domiciled and validly married in that country in accordance with its laws the courts of Ghana, in the application of the above-mentioned Imperial statutes to that country, would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana.

In re Goodman's Trusts (1881) 17 Ch.D. 266, C.A.; the *Sinha Peerage Claim* [1946] 1 All E.R. 348 (note) and *Baindail* v. *Baindail* [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A. considered.

There would, accordingly, be a joint grant to the appellant and the respondent on the footing that the latter was the widow of the intestate. She was entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she might be entitled by the relevant native customary law.

While there might be cases in which special circumstances existed which necessitated a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage, there were no such special circumstances in the present case, and there was no valid reason for distinguishing in principle between the children and the widow of the marriage by native customary law.

When the court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before the Board would go behind such a statement in a judgment.

Judgment of the Court of Appeal, Ghana, affirmed.

APPEAL (No. 40 of 1960) from a judgment of the Court of Appeal of Ghana (Van Lare J.A. as C.J., Granville Sharp J.A. and Ollennu J.) (November 23, 1959) allowing an appeal from a judgment of the High Court, Eastern Judicial Division (D. E. Gwira, Commissioner of Assize and Civil Pleas) (March 23, 1959), in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court had made a grant in favour of the appellant who was the plaintiff in the action. The Court of Appeal revoked the grant and ordered that letters of administration be granted jointly to the present appellant and the respondent, who was the defendant in the action. The appellant now sought to restore the judgment of the High Court.

The following statement of the relevant facts is taken from the judgment of the Court of Appeal. The deceased, Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her, all of whom survived him. Later he married the present appellant's mother, Wilhelmina, under the Marriage Ordinance and had five children by her, of whom the appellant was the sole survivor, Wilhelmina having died in 1940. During the lifetime of Wilhelmina the deceased lived and cohabited with the present respondent and had 10 children by her. After the death of Wilhelmina the deceased married the respondent in accordance with customary law.

The above recital of facts could be accepted for the purpose of deciding the important question which arose in this appeal, namely, whether the respondent was entitled either solely or jointly to a grant of letters of administration. They were described in the judgment as facts which were not in dispute. The accuracy of this statement was challenged on this appeal by counsel for the appellant, but, as already stated, the Board accepted them for the purpose of construing the relevant Acts and Ordinances which require to be considered.

The issue for determination at the trial was settled on the summons for directions as follows: "Whether the plaintiff or "the defendant is the proper person entitled to the grant of "letters to administer the estate of the above named deceased." The contest was therefore between the sole survivor of the deceased's marriage under the Marriage Ordinance and the woman whom he had married under customary native law on the death of his former wife.

Section 48 of the Marriage Ordinance, c. 127, was as follows: "(1) Subject to the provisions of the succeeding subsection where "any person who is subject to native law or custom contracts "a marriage, whether within or without (Ghana), in accordance "with the provisions of this Ordinance or of any other enactment "relating to marriage, or has contracted a marriage prior to the "passing of this Ordinance which marriage is validated hereby, "and such person dies intestate on or after the 15th day of "February, 1909, leaving a widow or husband or any issue of "such marriage; (Amended by 13 of 1951, s. 2).

"And also where any person who is issue of any such marriage "dies intestate on or after the said 15th day of February, 1909, "the personal property of such intestate, and also any real "property of which the said intestate might have disposed by "will, shall be distributed or descend in manner following, viz.—

"Two-thirds in accordance with the provisions of the law of "England relating to the distribution of the personal estates of "intestates in force on the 19th day of November, 1884, any "native law or custom to the contrary notwithstanding; and one-"third in accordance with the provisions of the native customary law which would have obtained if such person had not been "married under this Ordinance: Provided—

"(i) That where by the law of England, any portion of the "estate of such intestate would become a portion of the casual

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"hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary "law, and shall not become a portion of the said casual "hereditary revenues;

"(ii) That real property, the succession to which cannot by "the native customary law be affected by testamentary disposition, shall descend in accordance with the provisions of "such native customary law, anything herein to the contrary "notwithstanding."

1961. Jan. 26, 30, 31; Feb. 1. *Ralph Millner* for the appellant. The Court of Appeal proceeded on the footing—as the court of first instance had done—that the issue depended primarily on the question which of the parties was entitled to the greater share on the distribution of the assets. To begin to put her case upon its feet the respondent must not only allege but must prove that she was married according to native law and custom: *Engman* v. *Engman.*[1] It would be within judicial knowledge that such a marriage would require a ceremony of some kind. The respondent has not established that there was a valid marriage according to native law and custom after the death of Wilhelmina, and the Court of Appeal erred in proceeding on the assumption that the marriage was not in dispute.

Secondly, even if a marriage by native customary law is taken to be proved, the respondent is not a "wife of the intestate" within the meaning of section 3 of the Statute of Distribution, 1670. It follows that she is not entitled to any share in the two-thirds of the estate under the provisions of section 48 of the Marriage Ordinance. In the Statute of Distribution the wife is for present purposes the widow of a marriage under the Marriage Ordinance, and that would exclude a wife under a marriage by native law and custom. The main case in this connection is *Bamgbose* v. *Daniel*,[2] a Nigerian case which came before the Board on appeal [3] from the West African Court of Appeal, and in which it was held that the children of valid polygamous marriages were legitimate children entitled to claim under the Statute of Distribution. In the Straits Settlements there appears to be no statutory provision equivalent to section 48 here in issue, and for that reason *Cheang Thye Phin* v. *Tan Ah Loy* [4] is rather out of the range of the present appeal.

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[1] Gold Coast Divl.Ct.Judgmts. (1911–16) 1.

[2] (1952) 14 W.A.C.A. 111.

[3] [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.

[4] [1920] A.C. 369, P.C.

The instant case comes down to a question of construction of section 48 of the Marriage Ordinance and it is not necessary to consider whether a person who contracts a marriage under the Ordinance ceases entirely to be covered by customary law. *In re Otto*,[5] which the Court of Appeal held was wrongly decided, turned on the question whether the deceased could make a will; that does not take the matter any further. The comment on *In re Adadevoh*[6] is the same as is made in the present appeal—that the Court of Appeal just assumed that whether a woman is a widow or not is, as in the case of legitimacy of offspring, decided by the law of the domicile. It is here a question of the construction of section 48 of the Ordinance which has not been considered in any case before; it is plain that the Board were not in fact invited to consider this question of construction in the *Bamgbose* case.[7] [Reference was also made to *Cole* v. *Cole*.[8]]

Next, the Court of Appeal say that on the authorities the question of legitimacy is decided by English law according to the law of the domicile, and they have then, without reason, assumed that because that is so, the question whether a woman is a widow or not must also be decided by the law of the domicile. It does not necessarily follow, however, that the same law should apply. In asking what the English law is, the Court of Appeal was wrong in assuming that any question of status was to be decided by the law of the domicile. In *In re Goodman's Trusts*[9] it was only necessary to determine how the question of legitimacy was decided. English law looks with disfavour on polygamous marriages irrespective of whether they are valid according to the law of the domicile, though for some purposes of English law it does recognise them. There is no authority on the particular point whether a polygamous marriage will be recognised by the courts for the purpose of determining whether a wife of a polygamous marriage is a wife within the meaning of the Statute of Distribution. *Baindail* v. *Baindail*[10] shows that for some purposes English law does recognise polygamous marriages—it is cited in *In re Adadevoh*.[11] There is no general principle on the question of status and the law of domicile and it is open to the Board to decide the matter de novo. [Reference was also made to

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[5] Gold Coast Divl.Ct.Judgmts. (1926–29) 84.

[6] (1951) 13 W.A.C.A. 304.

[7] [1955] A.C. 107.

[8] (1898) 1 Nig.L.R. 15.

[9] (1881) 17 Ch.D. 266, C.A.

[10] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.

[11] 13 W.A.C.A. 304.

Mortimer on Probate Law and Practice, 2nd ed., p. 294, and to *Belshah* v. *Majid*.[12]]

Lastly, even if the Court of Appeal is right in principle, and the respondent is taken to be a wife within the meaning of the Statute of Distribution, the court was wrong in its application of the principle to the facts of this case. There is no evidence that the deceased was an Osu man—merely an allegation, and the court has made an assumption. Also, it cannot be said to be undisputed that the three children of Adeline Johnson survived the deceased, and the Court of Appeal have arrived at a figure on the basis that they are alive. Those children should have been ignored in considering the appellant's interest. The respondent is not a widow entitled to share in any part of the two-thirds.

Joseph Dean and *Miss E. Aryee* for the respondent. The only issue is whether or not the respondent is a proper person to be granted letters of administration; she raises no objection to the grant to the appellant; it is only he who objects to the joint grant. So far as this case is concerned, the English law up to 1925 is governed by the Statute of 21 Henry 8, c. 5, and the Statute of Distribution; the English law after 1925 is governed by the 1925 legislation and the rules made by that legislation. It makes no difference here which principles are applied, pre- or post-1925. The first submission is that, irrespective of the Statute of Distribution, under the Statute of Henry 8 the order made in this case was correct.

There is a general principle that administration follows the interest of the property. Here the Ghana court is considering the law in relation to parties who are domiciled in Ghana, are resident there and whose estates are there, and under the law which they have to apply—the Statute of Henry 8—there is a discretion to grant letters of administration to the widow and such one or more of the next-of-kin as may apply. It is inconceivable that the Ghana court should be obliged merely because of the Marriage Ordinance to say in this case that the respondent has rights as a widow in their law, but in the law of England 400 years ago she would not have been a widow and therefore she is not to be accounted a widow so far as their law is concerned. That is part of the proposition advanced for the appellant, and if it is right of the widow it also applies to the next-of-kin. One is construing here Ghana law, not English law, and in that context the English statutes must be construed against the background

[12] The Times, Dec. 16, 18, 1926; Jan. 14, 1927.

of Ghana and in relation to the general body of Ghana law. It is true that "widow" is in the singular in section 2 of the Statute of Henry 8, but there is no essential repugnance or inconvenience in applying that to a case where there might be more than one widow. Henry VIII had his own technique of polygamy. [*Bamgbose* v. *Daniel*[13] was referred to.]

In English law the principle of domicile as determining status applies just as much to a widow as it does to a child: see the article on The Recognition of Polygamous Marriages under English Law, by W. E. Beckett, in 48 Law Quarterly Review, p. 341, in regard to what it says about this matter. It is only in South Africa that this proposition has been rejected. *Baindail* v. *Baindail*[14] shows that English law recognises the validity of a polygamous marriage valid in the place of the domicile of the parties. It has been expressly decided that the child of a polygamous marriage is legitimate, but Mr. Millner said it has not yet been decided that the wife of a polygamous marriage must be treated as a valid wife. It is submitted that every argument that has been advanced for and against the legitimacy of the child applies to the situation of a wife of a polygamous marriage: what is sauce for the gosling must be sauce for the goose. What was said in *In re Goodman's Trusts*[15] applies equally to the status of a wife as it does to that of a child. If Mr. Millner is right, it might mean that the parties would be married in one country, unmarried in another, and married in a third. For all purposes so far as Ghana is concerned the respondent was the wife of the deceased; there is no authority for the startling proposition that so far as English law is concerned she is not to be treated as his wife.

If that is right as a general principle, it must equally be right in relation to the interpretation of the relevant statutes; it applies equally to the Statute of Henry 8, to the Statute of Distribution, and to the construction of the Marriage Ordinance. Here the respondent is a widow for the purposes of the Statute of Distribution. In *Bamgbose's* case[16] the judgment assumes, without deciding, that they were wives, and it was there said[17]: "It "would be a strange result that in the converse case where a "marriage of the parents was recognised as valid the children "should be deprived of their rights of succession because of a "difficulty in working out the rights of the wife." See also the

[13] [1955] A.C. 107.
[14] [1946] 1 All E.R. 348n.
[15] 17 Ch.D. 266.
[16] [1955] A.C. 107.
[17] Ibid. 120.

Bamgbose case in the court below[18] and *In re Adadevoh.*[19] *Belshah* v. *Majid*[20] is no authority either way—the judge did not commit himself. *Choo Eng Choon, Choo Ang Chee* v. *Neo Chan Neo* (the *Six Widows* case)[21]—the main case referred to in the three relevant appeals to this Board (*Cheang Thye Phin* v. *Tan Ah Loy,*[22] *Khoo Hooi Leong* v. *Khoo Hean Kwee*[23] and *Khoo Hooi Leong* v. *Khoo Chong Yeok*[24]—recognises the practice in the Straits Settlements of accepting polygamous marriages as valid and as entitling the widows, where there are two or more, to their share under the Statute of Distribution. The dissenting judgment in that case has never been followed. *Khooi Hooi Leong's* case[24] is relied on as showing that the law has upheld the recognition of polygamous marriages and, following from that, the application, with such modifications as may be necessary, of the English law of distribution on intestacy. *Cheang Thye Phin's* case[25] and *Khoo Hooi Leong*[26] show that the Board did inferentially uphold the *Six Widows* case.[27]

[Counsel was not required to deal with the question whether the respondent was in fact married under native customary law.]

The part of the Court of Appeal's judgment relating to the children of Adeline Johnson cannot be criticised at all. On any view of this case the order made for joint administration was a perfectly valid exercise of their discretion for the reasons given by the Court of Appeal—the respondent was the appointed representative of the family.

Millner in reply. On the construction of the Marriage Ordinance, and in particular of section 48, the wife and children of the Ordinance Marriage would take two-thirds, and the other one-third would go to the people of the family; the intention of the section as regards the one-third is to provide any such rights or benefit as the respondent and her children may have by native customary law. The Ordinance is dividing it up into two-thirds to the Marriage Ordinance group and one-third to the others. As to the respondent's marriage, there must be evidence of what the native customary law is. [The *Six Widows* case[27] and *Cheang Thye Phin's* case[28] were referred to.]

March 7. The judgment of their Lordships was delivered by

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[18] (1952) 14 W.A.C.A. 111.

[19] (1951) 13 W.A.C.A. 304.

[20] The Times, Dec. 17, 18, 1926; Jan. 14, 1927

[21] (1908) 12 Str.Settlmts.Rep. 120.

[22] [1920] A.C. 369.

[23] [1926] A.C. 529.

[24] [1930] A.C. 346.

[25] [1920] A.C. 369.

[26] [1926] A.C. 529.

[27] 12 Str.Settlmts.Rep. 120.

[28] [1920] A.C. 369.

LORD TUCKER, who stated the facts set out above and continued: The first submission of counsel for the appellant was to the effect that on the proper construction of the Ordinance the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate are his widow whom he had married under the Ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by native customary law are relegated to such share of the remaining one-third as they can establish under that law.

This is the construction which appears to have been put upon the section in some decisions of the courts in Ghana from time to time and would seem to have been adopted by the trial judge towards the end of his judgment where, referring to the present respondent, he said: "her status being that of a wife married "according to native custom cannot override the claim of the "plaintiff."

Their Lordships are unable to accept this construction of the section. In the case of intestacy of a person married in accordance with the Ordinance there are two conditions precedent to the application of the law of England relating to the distribution of the personal estates of intestates in force on November 19, 1884. They are (1) a valid marriage under the Ordinance, (2) the survival of a widow or husband or any issue of such marriage. Once these conditions are satisfied it remains only to see how the two-thirds portion was distributable under English law in 1884. In the present case there was a valid Ordinance marriage between the deceased and Wilhelmina and there is surviving issue of that marriage, viz., the appellant. Wilhelmina had died during the lifetime of the deceased. We find, therefore, both conditions precedent satisfied and it remains only to apply the provisions of the Statute of Distribution (1670), which provides that if a man dies intestate leaving a wife and issue the wife is entitled to one-third of the personal estate and the children to two-thirds. The question then arises whether on the facts in this case the respondent, who was married under customary native law, qualifies as "a wife" within the meaning of that word in the Statute of Distribution as applied to marriages in Ghana which are lawful in that country but were not contracted in accordance with the provisions of the Marriage Ordinance and are potentially polygamous. This leads to the second submission by counsel for the appellant to the effect that the words "wife" and "widow" in an English statute cannot be construed as including the plural as this would be repugnant to the legal conception of marriage in England which does not recognise a potentially polygamous union as a marriage.

Before proceeding to consider this submission it will be convenient to set out parts of the relevant statutes and Ordinances, and it may be observed at this stage that the most immediately relevant statute is 21 Henry 8, c. 5, as this is the statute which provides for the proper person to whom administration should be granted, as distinct from the persons entitled to share in the distribution, but it raises precisely the same question, namely, whether the " widow " referred to in the Statute of Henry 8 or the " wife " mentioned in the Statute of Distribution in the application of these statutes to Ghana includes a " widow " or " wife " of a potentially polygamous marriage.

Section 2 of 21 Hen. 8, c. 5, provides: " in case any " person die intestate . . . then the said ordinary . . . shall grant " the administration of the goods of the . . . person deceased, to " the widow of the same person deceased, or to the next of his " kin, or to both, as by the discretion of the same ordinary " shall be thought good." In England prior to the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in exercise of its discretion granted administration to the widow of the intestate, to the exclusion of the next-of-kin or heir-at-law, except for good cause shown. (See Mortimer on Probate Law and Practice, 2nd ed., p. 293.)

The Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10, s. 3), enacts that " all ordinaries and every other person who by this " Act is enabled to make distribution of the surplusage of the " estate of any person dying intestate, shall distribute the whole " surplusage of such estate or estates in manner and form " following: that is to say, one third part of the said surplusage " to the wife of the intestate."

The Courts Ordinance (Chap. 4 of the Laws of the Gold Coast) provides: Section 83. " Subject to the terms of this or any " other Ordinance, the common law, the doctrines of equity, " and the statutes of general application which were in force " in England on the 24th day of July, 1874 shall be in force " within the jurisdiction of the Courts."

Section 85. " All Imperial laws declared to extend or apply to " the jurisdiction of the Courts shall be in force so far only as the " limits of the local jurisdiction and local circumstances permit, " and subject to any existing or future ordinances of the Colonial " Legislature; and for the purpose of facilitating the application "of the said Imperial laws, it shall be lawful for the said Courts "to construe the same with such verbal alterations, not affecting "the substance, as may be necessary to render the same appli-"cable to the matter before the Court; . . . ."

The Interpretation Ordinance (Chap. 1 of the Laws of the Gold Coast) provides: Section 3. "The following words and expres-"sions shall, if inserted in any ordinance, order, proclamation, "rule, regulation, or bye-law, be understood as hereinafter "defined or explained, unless it be otherwise specially provided, "or there be something in the subject or context repugnant to "such definition or explanation, that is to say:—

"(31) 'Ordinance' shall include . . . an Order of Her "Majesty in Council or an Act of the Imperial Parliament, "applicable to the Gold Coast and in force . . .

"(45) Words in the singular include the plural and vice "versa."

It is no doubt true that Lord Brougham's Act (13 & 14 Vict. c. 21) applied only to enactments after 1850 and so did not include the Statute of Distribution and that the English Interpretation Act, 1889, was not in force in 1874, so that for the purpose of construing the Act of Henry 8 and the Statute of Distribution in an English court prior to 1889 it would not have been permissible as a matter of construction or in accordance with the common law as applied to the distribution of property within the jurisdiction of the English court to read "wife" or "widow" as including "wives" and "widows." But it seems to their Lordships that entirely different considerations arise by reason of the provisions of the Courts Ordinance and the Interpretation Ordinance referred to above, the effect of which is that the Act of Henry 8 and the Statute of Distribution are included in the definition of "Ordinance" as being "Acts of the Imperial Parliament applicable to the Gold Coast "and in force." Those statutes, therefore, are to be construed in their application to Ghana so that words in the singular include the plural unless there is something in the subject or context repugnant to such construction, which is clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognises the existence of more than one wife or widow.

Their Lordships would not, however, desire to rest their decision solely upon the language of the Interpretation Ordinance, more especially as this was not referred to in the judgment of the Court of Appeal in Ghana, who decided the case in favour of the present respondent on broader grounds with which their Lordships are in general agreement. They do not think, however, that the Privy Council judgments referred to in the Court of Appeal, i.e. *Cheang Thye Phin* v. *Tan Ah Loy*[1]; *Khoo Hooi Leong* v. *Khoo Hean Kwee*[2] and *Bamgbose* v. *Daniel*,[3] can be regarded as authorities conclusive in favour of the respondent. In the last-mentioned case the Board was dealing only with the position of children and in their judgment it was expressly stated that they proposed to say nothing as to what rights, if any, widows would have in the event of a claim being made in a case such as that with which they were then concerned, and the following observations of Lord Phillimore in *Khoo Hooi Leong* v. *Khoo Hean Kwee*[4] were quoted: "In deciding upon a case where the "customs and the laws are so different from British ideas a "court may do well to recollect that it is a possible jural con-"ception that a child may be legitimate, though its parents "were not and could not be legitimately married. This principle "was admitted by the canon law which governed western con-"tinental Europe till about a century ago and governed still "later, if it does not govern still, the countries of Spanish "America."

In the case of *Cheang Thye Phin* v. *Tan Ah Loy*[5] the position of secondary wives (called t'sips) as contrasted with principal wives (called t'pais) was the only issue and at the outset of the judgment, delivered by Viscount Finlay, he said[6]: "With regard "to Chinese settled in Penang, the Supreme Court recognises "and applies the Chinese law of marriage. It is not disputed "that this law admits of polygamy. By a local Ordinance the "Statute of Distribution has been applied to Chinese successions, "and the courts have treated all the widows of the deceased "as entitled among them to the widows' share under the "Statute. No question has been raised on the present appeal "as to the propriety of this practice; the only question is "whether Tan Ah Loy was one of the widows."

Nonetheless, having regard to the attitude of the courts of this country to the status of parties validly married by the laws of the country of the domicile as exemplified by such cases as *In re Goodman's Trusts*[7]; *The Sinha Peerage Claim*[8] and *Baindail*

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[1] [1920] A.C. 369, P.C.
[2] [1926] A.C. 529, P.C.
[3] [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.
[4] [1926] A.C. 529, 543.
[5] [1920] A.C. 369.
[6] Ibid. 372.
[7] (1881) 17 Ch.D. 266, C.A.
[8] [1946] 1 All E.R. 348n.

v. *Baindail*,[9] their Lordships are of opinion that in dealing with personal property in Ghana of an intestate domiciled in Ghana, and validly married in that country in accordance with its laws, the courts of Ghana are not precluded from making a grant of letters of administration to a lady who was validly married to the intestate at his death by reason only of the use of the words "widow" and "wife" in the singular in the Act of Henry 8 and the Statute of Distribution. Apart from the Interpretation Ordinance their Lordships would hold that in the application of those statutes to Ghana the courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. In this connection reference may be made to the following observations by Lord Greene M.R. in *Baindail* v. *Baindail*.[10] Referring to a man married by Hindu law in India he said: "what was his "status on May 5, 1939? Unquestionably, . . . it was that of a "married man. Will that status be recognised in this country? "English law certainly does not refuse all recognition of that "status. For many purposes, quite obviously, the status would "have to be recognised. If a Hindu domiciled in India died intes-"tate in England leaving personal property in this country, the "succession to the personal property would be governed by the "law of his domicile; and in applying the law of his domicile "effect would have to be given to the rights of any children of "the Hindu marriage and of his Hindu widow, and for that pur-"pose the courts of this country would be bound to recognise "the validity of a Hindu marriage so far as it bears on the title "to personal property left by an intestate here."

Later on he said[11]: "The practical question in this case "appears to be: Will the courts of this country, in deciding upon "the validity of this English marriage, give effect to the status "possessed by the respondent? That question we have to decide "with due regard to common sense and some attention to reason-"able policy. . . . I think it is certainly a matter to bear in "mind that the prospect of an English court saying that it will "not regard the status of marriage conferred by a Hindu cere-"mony would be a curious one when very little more than a "mile away the Privy Council might be sitting and coming to "a precisely opposite conclusion as to the validity of such a "marriage on an Indian appeal."

[9] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.

[10] [1946] P. 122, 127.

[11] Ibid. 129.

Their Lordships recognise that there may be cases in which special circumstances exist which necessitate a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage as indicated in the passage referred to above in the judgment of the Board delivered by Lord Phillimore, as well as in the passage towards the end of the judgment delivered by Lord Keith of Avonholm in *Bamgbose* v. *Daniel.*[12] There are no such special circumstances in the present case, and their Lordships can find no valid reason for distinguishing in principle between the children and the widow of the marriage which is in question in the present appeal. Difficulties may no doubt arise in the application of this decision in cases where there are more than one widow, both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise. Their Lordships are, for the reasons indicated above, in agreement with the decision arrived at by the Court of Appeal in making a joint grant to the appellant and the respondent upon the footing that the latter is the widow of the deceased. They would, however, observe that the Court of Appeal appears to have gone rather further than was necessary for the decision of the application for a grant of letters of administration in setting out in some detail the shares of those who will be entitled in the distribution. Such matters are more appropriate to administration proceedings, and the appellant contends that there was no evidence or admission that the children of the deceased's first marriage to Adeline are now surviving. Their Lordships do not think that any persons entitled in the distribution should be precluded by the judgment of the Court of Appeal from contending in the appropriate proceedings that their shares of the personal estate are larger than those indicated in the judgment, provided that it must be accepted that the respondent is entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she may be entitled by the relevant native customary law.

Their Lordships made reference earlier in this opinion to the challenge by the appellant to some of the facts which were stated as being "not in dispute." It was said that there was no proper proof of either of the marriages by native customary law, or that the deceased was an Osu man, or that the respondent was validly appointed to represent the family. When the court from whose

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[12] [1955] A.C. 107, P.C.

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judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before their Lordships would be disposed to go behind such a statement in a judgment, or to judge of its accuracy merely from a perusal of the notes taken in the courts of the country from which the appeal comes. There is nothing in the present case to justify their Lordships questioning the accuracy of this statement, subject only to the reservation referred to above as to the effect, if any, of such findings on the shares of those proved to be entitled to participate in the distribution.

For these reasons their Lordships will report to the President of Ghana as their opinion that this appeal should be dismissed, and that the appellant should pay the costs thereof.

Solicitors: *T. L. Wilson & Co.; A. L. Bryden & Williams.*

C. C.

J. C.*
1961
March 6.

ELVAN ROSE . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE BAHAMA ISLANDS.

Crime — Homicide — Diminished responsibility — Direction to jury — Degree of "abnormality of mind" not to be assessed on basis of M'Naughten Rules—Insanity to be considered in broad popular sense—Intention not conclusive of abnormality of mind—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2—*Homicide* (*Special Defences*) *Act,* 1959, *s.* 2 (*Bahama Islands*).

Bahama Islands — Crime — Homicide — Diminished responsibility — Direction to jury—Homicide (*Special Defences*) *Act,* 1959, *s.* 2.

By section 2 of the Homicide (Special Defences) Act, 1959, of the Bahama Islands (identical in terms with section 2 of the English Homicide Act, 1957): "(1) Where a person kills . . . "another, he shall not be convicted of murder if he was suffering "from such abnormality of mind . . . as substantially impaired "his mental responsibility for his acts . . . in doing . . . the

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"killing . . . (3) A person who but for this section would be "liable . . . to be convicted of murder shall be liable instead to be "convicted of manslaughter."

A direction by the judge in dealing with the defence of diminished responsibility at the trial of the appellant, who was convicted of murder and sentenced to death, that the jury were to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the M'Naughten Rules was a serious and vital misdirection. If insanity was to be taken into consideration, as would usually be the case, the word must be used in its broad popular sense. The direction to the jury must always be related to the particular evidence, and the words "borderline" and "insanity" might not in some cases be helpful.

Interpretation of "abnormality of mind" and "mental "responsibility" by Lord Parker C.J. in *Reg.* v. *Byrne* [1960] 2 Q.B. 396 at 403 and 404; [1960] 3 W.L.R. 440, C.C.A. approved.

Reg. v. *Walden* [1959] 1 W.L.R. 1008; [1959] 3 All E.R. 203, C.C.A. considered.

There was a further misdirection which might have been a determining factor in the jury's verdict, when the judge said: "Do "you think that he did that [the killing] under the influence of "this diminished responsibility, or do you think that he knew just "exactly what he was doing? Did he intend to do it? If so, "murder; if not, manslaughter." A man might know what he was doing and intend to do it and yet suffer from such abnormality of mind as substantially impaired his mental responsibility.

Verdict of murder and sentence of death quashed, and a verdict of manslaughter and a sentence of imprisonment for life substituted therefor.

APPEAL (No. 61 of 1960) in forma pauperis from a conviction of murder in the Supreme Court of the Bahama Islands after a trial before Henderson C.J. and a jury (May 14, 1960). The appellant, Elvan Rose, who had no right of appeal from his conviction other than by special leave to Her Majesty in Council, had been sentenced to death.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant was charged and tried together with another man named James Ingraham for the murder of Samuel Otis King on February 17, 1960. Ingraham was also convicted and sentenced to death. He had not appealed. On February 17, 1960, both the accused were prisoners serving sentences in Fox Hill prison where the deceased man, King, was employed as an overseer. At about 3.30 p.m. an assistant turnkey named Gay was knocked unconscious in a corridor of the prison. He did not see who struck the blow, but shortly afterwards both accused were seen bending over him as though searching him. They then went to the south main gate where King was in charge and attempted, without success, to open it. The appellant told King to open it and, when he refused, took out a knife and threatened him with it. King broke away from the appellant who followed him and, after telling him he was going to kill him because he would not give up the keys, stabbed him with a knife inflicting two wounds, one of which was fatal. It was not disputed on the appeal that the accused killed King and that if the jury had been properly directed on the defence of diminished responsibility the verdict could not be questioned.

The relevant statutory provisions in the Bahama Islands were contained in section 2 of the Homicide (Special Defences) Act, 1959, and provided: "2.—(1) Where a person kills or is a "party to the killing of another, he shall not be convicted of "murder if he was suffering from such abnormality of mind "(whether arising from a condition of arrested or retarded "development of mind or any inherent causes or induced by "disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party "to the killing.

"(2) On a charge of murder, it shall be for the defence to "prove that the person charged is by virtue of this section not "liable to be convicted of murder.

"(3) A person who but for this section would be liable, "whether as principal or as accessory, to be convicted of murder "shall be liable instead to be convicted of manslaughter.

"(4) The fact that one party to a killing is by virtue of this "section not liable to be convicted of murder shall not affect the "question whether the killing amounted to murder in the case "of any other party to it."

The language was identical with that of the English Homicide Act, 1957.

There was no dispute that the evidence for the defence (see the judgment of the Board) constituted evidence fit to be considered on the issue of diminished responsibility and the grounds of appeal were that the jury were wrongly directed on that issue.

1961. Feb. 6, 7, 8. *J. T. Molony Q.C.* and *D. A. Grant* for the appellant. There was no dispute as to the killing and no dispute that the evidence tendered by the defence constituted evidence fit to be considered on the defence of diminished responsibility. The broad issue is whether the Chief Justice correctly directed the jury on the matters of law in relation to a consideration of diminished responsibility. The first misdirection objected to [the terms of which are set out in the judgment of the Board, post, p. 506], is the linking of the abnormality which produces diminished responsibility with the M'Naughten Rules. It is wrong to say that the condition of mind which could satisfy the requirements of the statutory defence of diminished responsibility was equivalent to a "borderline" case of insanity under the M'Naughten Rules. The two defences are, and should be kept, quite distinct. When a completely new doctrine is introduced by statute it is wrong to regard it as linked with old doctrine. The section provides for something different from the M'Naughten Rules—a defence of this sort is obviously quite different in character from the plea of insanity. "Abnormality of mind" in the section is a very much wider conception. The only other point is whether the abnormality substantially impaired his mental responsibility for his acts. It is very much a matter which is left to the jury at large.

The first reported case under the English Homicide Act of 1957 is *Reg.* v. *Spriggs*,[1] where it was argued that "had Parlia-"ment intended to limit the defence given by the section to "cases where there was a defect of reason, they would have used the phraseology of the M'Naughten Rules." In that case one finds the approach of Scottish and English law. It is emphasised that what was there stated to the jury was a number of examples as illustrations. The jury have not to find a case to be a borderline case of insanity; the construction now contended for is borne out by the concluding citation from the Scottish case of *H.M. Advocate* v. *Braithwaite*.[2] The Court of Criminal Appeal in *Reg.* v. *Walden*[3] said that Paull J. in his summing-up was not telling the jury that the case depended on it being a borderline case between sanity and insanity; that case was only approved by the Court of Criminal Appeal on the basis that the judge was offering the jury an illustration. Another case in line with those two authorities is *Reg.* v. *Byrne*.[4] The medical evidence there of "partial insanity" is much stronger than abnormality of mind. Every case has to be viewed in the light of the evidence. Borderline cases of partial insanity and cases of substantial impairment of mental responsibility are quite separate and distinct. Partial

[1] [1958] 1 Q.B. 270, 272; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

[2] 1945 S.C.(J.) 55, 57.

[3] [1959] 1 W.L.R. 1008; [1959] 3 All E.R. 203, C.C.A.

[4] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440, C.C.A.

or borderline insanity is something greater than what is necessary to support a finding of impairment of mental responsibility. It is quite contrary to *Byrne's* case[4] that the insanity which is referred to should be that laid down in the M'Naughten Rules. In the present case the Chief Justice wrongly told the jury on two occasions that they should look to see if it was a borderline case of insanity.

The second misdirection complained of was the statement "Do you think that he did that under the influence of this "diminished responsibility, or do you think that he knew just "exactly what he was doing? Did he intend to do it? If so, murder; if not, manslaughter." There is authority to show that though a person intends to commit a crime, that is not inconsistent with his being able to say that his responsibility is diminished: *Reg.* v. *Matheson*[5]; even if there is evidence that the man intended to commit the crime, the defence of diminished responsibility is still open to him.

Each of the above misdirections, whether read together or separately, was prejudicial to a proper consideration by the jury of the appellant's defence, and properly directed they would have acquitted him of murder and convicted him of manslaughter.

Neil Lawson Q.C. and *Mervyn Heald* for the Crown. With regard to the jurisdiction of the Board to order a new trial, see *Reg.* v. *Bertrand*,[6] *In re Dillet*,[7] *Zahiruddin* v. *King-Emperor*[8] and sections 8 and 13 of the Judicial Committee Act, 1833. On the main matter, that of diminished responsibility, there are certain types of crime, particularly murders, which in their very nature and character are suggestive of mental abnormality —where one could say, "well, the person who did this must "have been mad!"—and typical crimes of that nature are the *Matheson*[9] and *Byrne*[10] cases. In a sense that is a useful starting off point, because if this is a matter which ultimately depends on the verdict of the jury, as it does, one of the factors which the jury will or should take into account is this very character of the crime itself.

There are four ingredients of diminished responsibility: (i) The accused person is suffering from abnormality of mind; (ii) the cause of that abnormality has to be one of the various matters set out in the section; (iii) the result of the abnormality of mind thus induced has to be such as to impair mental responsibility; and (iv) the degree of impairment has to be substantial. There was here only a scintilla of a case of diminished responsibility to go to the jury. The whole matter is left on the defence evidence in a state of lack of definition. It is clear that the jury must have rejected Dr. Etheridge's evidence where it conflicted with that of Dr. Podlewski for the prosecution, and if that be so, even if the Board were to come to the conclusion that there were matters in the nature of misdirection or insufficiency of direction, this would not be a case in which the Board would intervene.

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[4] [1960] 2 Q.B. 396.

[5] [1958] 1 W.L.R. 474; [1958] 2 All E.R. 87, C.C.A.

[6] (1867) L.R. 1 P.C. 520.

[7] (1887) 12 App.Cas. 459, P.C.

[8] (1947) L.R. 74 I.A. 80, 88.

[9] [1958] 1 W.L.R. 474.

[10] [1960] 2 Q.B. 396.

The authorities suggest that the problem under the section is a twofold one, and the court is concerned first to find if the first two factors are present—if there is abnormality of mind, and if it is caused by one of the relevant factors. The jury, in considering " abnormality of mind " as such, disassociated from causation problems, will take account of the whole of the facts and the medical evidence and also the nature of the crime itself. It is possible to draw a common-sense distinction between crimes of an atrocious character and crimes which have involved in them the ordinary human elements like jealousy, or the desire of a prisoner to escape. The other factor to be taken into account in considering abnormality of mind is whether or not, apart from the crime, the accused person has in fact exhibited signs of abnormality in his conduct. In the present case it would be fair to say that the crime is not itself of the atrocious character which seems to be removed from ordinary human motivations. So far as abnormality of conduct is concerned, there really was no evidence of abnormality of conduct on the part of the appellant prior to the commission of the crime.

The second approach to the problem is whether there is an impairment of mental responsibility and whether that impairment is of a substantial character. It is the function of the judge to give the jury directions as to what on its proper interpretation the language of the section means, and then it is for the jury on the evidence to decide whether or not those factors were present. The crux of the matter is what is meant by " mental " responsibility." The objective test is being introduced. Mental responsibility related to the crime of murder means, of course, mens rea. The nub of the matter is whether Lord Parker C.J. in *Byrne's* case [11] was right in introducing the concept of will-power into the concept of responsibility as used in the section.

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[11] [1960] 2 Q.B. 396.

This introduction of inability to exercise will-power in determining whether or not one is responsible for what was done is something which is novel. The language used is not "mental incapacity" but "mental responsibility." [Reference was made to *Director of Public Prosecutions* v. *Smith*.[12]] If the matter gets to "intent," then the submission is that intent has nothing at all to do with will-power. The Scottish cases have to some extent been taken up by the Court of Criminal Appeal in this country in dealing with the section, but it is clear that the Scottish courts in applying diminished responsibility are looking at the person's mental condition, his reason, his intellect, in relation to his judgment and not in relation ever to his will-power: *Carraher* v. *H.M. Advocate*.[13] The concept of will-power—ability to control one's act—is to be found in no branch of the law: *Palmer* v. *Palmer*.[14]

Assuming, however, in the present case that will-power is a factor, there is no medical evidence that the appellant was uncontrolled—incapable of, or experiencing difficulty in, exercising control over his will-power. There is no evidence of substantial impairment of mental responsibility, assuming that that was to be treated as having a broad meaning. There is this borderline of insanity evidence before the jury, and the judge was quite right in leaving it to them on that basis. The direction by the Chief Justice in relation to borderline insanity was a good direction; on the true construction of section 2 of the Act mental responsibility has to be considered in relation to the standard of responsibility in actions which the law recognises. The summing-up has to be taken as a whole.

Assuming that the Board is of the opinion that there was misdirection, it is nevertheless not a case where it would interfere. Cases where the Board has interfered on the basis of misdirection all had certain features present, such as a direction which reversed the onus of proof, this being regarded as a fundamental matter and a departure from established principles, or a misdirection which had the effect of withdrawing an issue from the jury, and matters of that kind. A misdirection as such is not a ground for interference unless it has led to such a violation of the principles of justice as to do grave and substantial injustice: *Ex parte Macrea*.[15] It is difficult to escape the conclusion that on a proper direction the jury would have come to exactly the same conclusion. Here there has been no violation of the principles of justice. See also *Stirland* v. *Director of Public Prosecutions*,[16] *Teper* v. *The Queen*,[17] *Chan Kau* v. *The Queen*[18] and *Bullard* v. *The Queen*.[19] Assuming that what has happened here is on a parallel with a withdrawal of an issue from the jury, the last-cited cases show what course the Board would take.

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[12] [1961] A.C. 290; [1960] 3 W.L.R. 546, H.L.

[13] 1946 S.C.(J.) 108, 110, 112, 115, 117.

[14] [1955] P. 4; [1954] 3 W.L.R. 756; [1954] 3 All E.R. 494, C.A.

[15] [1893] A.C. 346, 349; 9 T.L.R. 463, P.C.

Molony Q.C. in reply. If there is an error in the course of the trial it is right to take the course most favourable to the accused person. In *Reg.* v. *Dunbar*[20] a verdict of manslaughter was substituted. See also *Kwaku Mensah* v. *The King*.[21] With regard to the availability of a new trial, in the last 30 years there does not appear to have been any case in which the Board has ordered a new trial save where the court from which the appeal was brought had itself power to grant a new trial. [*Jannokee Doss* v. *Bindabun Doss*[22] was referred to.] As a matter of common law a new trial finds no place in our procedure—it can only be given by statute. There is no machinery in the Bahamas for a new trial. In all the circumstances the Board should take the course of substituting for the verdict of capital murder a verdict of manslaughter.

March 6. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: It will be convenient at this stage to endeavour to summarise the effect of the medical evidence adduced by the defence in support of the plea of diminished responsibility. It is to be found in the evidence of Dr. Mary Etheridge, who had qualified in Paris as a Doctor of Medicine and was a licentiate of the Royal College of Physicians in London and a member of the Royal College of Surgeons. She had specialised in neuro surgery and neuro psychiatry in Paris and served as a specialist in the Royal Army Medical Corps in India during the war. She had also worked at the Hammersmith Hospital and at the National Hospital for Nervous Diseases in London. She had acted as consultant in neurology, neuro surgery and neuro psychiatry at Princess Margaret Hospital and the Bahamas General Hospital.

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[16] [1944] A.C. 315, 320; 60 T.L.R. 461; [1944] 2 All E.R. 13, H.L.

[17] [1952] A.C. 480, 491; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447, P.C.

[18] [1955] A.C. 206; [1955] 2 W.L.R. 192; [1955] 1 All E.R. 266, P.C.

[19] [1957] A.C. 635, 645; [1957] 3 W.L.R. 656, P.C.

[20] [1958] 1 Q.B. 1; [1957] 3 W.L.R. 330; [1957] 2 All E.R. 737, C.C.A.

[21] [1946] A.C. 83, 91; 62 T.L.R. 83, P.C.

[22] (1836) 1 Moo.I.A. 67, 75.

She had examined the appellant and his history and said she found a clear-cut history of delusions and hallucinations. She found indications of possible head injuries which she subsequently verified. In the cases of three of these injuries there was a history of subsequent unconsciousness and amnesia. She caused X-ray photographs to be taken and carried out an examination of his optic nerves. After giving in considerable detail a description in highly technical language, which must have been extremely difficult for the jury to follow or understand, she summarised her conclusions in these words: " With the material at our disposal " we were forced to certain conclusions, and these were: That " we had a man who had given evidence or at least who had " suggested to at least one observer—and I'm talking now about " Cpl. Hepburn—that he was mentally unbalanced, who had " suggested to another observer—and I'm referring now to Dr. " Podlewski—that his condition might be delusional, it might " have suggested a delusional state as he said and had given to " myself evidence of injury to his skull with the possibility—and " in view of his history I would say the probability—of underlying " brain damage as evidenced by his delusional state, his hallu- " cinations and, on at least two occasions, his extremely brutal " and violent behaviour—maniacal behaviour—I would say. If I " had to put a name on it I would call it, with Mr. Adolph Meyer, " post-traumatic constitution, with paranoid developments, the " thing which we call today the punch drunk syndrome."

In cross-examination she was asked: " Q. Dr. would you say " that all this adds up to being insane? A. I didn't say such a " thing. Q. No, I am asking you? A. Then I would say no. " Not insane in the way which I imagine you mean. Q. Well, " you don't think he is insane in any way? A. I didn't say " such a thing. Q. No, I am asking you? A. I showed that he " showed mental trouble, mental disorders, disorders of the intel- " lect, he has periods of insanity. Q. Well, you are saying that " he had periods of insanity? A. Insane in the way that in " general people understand it."

Later on in answer to the question " Do you now say he has " paranoia? " she replied: " I said that Rose has had repeated " injury to his brain which showed that his intellect had been " impaired, which showed that he at many times, and he has " given you evidence of it, has had completely not only diminished " but absent moral responsibility."

The effect of the evidence of Dr. Podlewski, who was recalled in rebuttal by the prosecution, may be summarised by setting out the last two or three questions and answers in his examination-in-chief: " Q. Is it your opinion that this man is sane or insane. " That is, was he sane or insane on 17th February? A. My " opinion is that there is nothing in what I have seen of him to " indicate that he was suffering from any serious mental illness " at this time. Q. Could you say whether or not he was on the " borderline of insanity? A. I could definitely say he was not " on the borderline. Q. I notice you keep saying, doctor, ' any " ' serious mental illness '; would you like to explain that to us? " A. Well, in the legal sense when I say ' serious mental illness ' " I mean the type of mental illness which would substantially " diminish his responsibility for his actions. Q. I see. A doctor " might think that there might be something wrong with him. " Is that what you mean? A. It is a possibility."

It had been elicited in the cross-examination of this witness when he had given evidence earlier in the trial that the appellant had been convicted of murder and sentenced to death in 1957. On that occasion he had made a report on his mental condition. This was put in evidence and showed that the appellant at that time had complained of molestation and annoyance by people who were threatening to kill him. The doctor was unable to ascertain whether this belief was delusional or not, but, if it was, it would be consistent with the existence of paranoia. His sentence was subsequently commuted to life imprisonment.

The above will suffice to indicate the two conflicting medical views of the appellant's condition which the jury were called upon to consider in deciding whether on balance of probability the defence had established the plea of diminished responsibility which would justify a verdict of manslaughter.

The contention of the appellant is that the jury did not have a correct or sufficient direction in law as to the nature of this defence and in particular were misdirected as to the meaning of the words " mental responsibility."

Before turning to the passages of which complaint is made their Lordships desire to emphasise that the Chief Justice was engaged in the difficult task of instructing the jury as to the meaning, and application to the evidence in the present case, of a difficult section which has introduced a novel conception into English criminal law, and, moreover, he was doing this before the Court of Criminal Appeal in this country had given judgment

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in *Reg.* v. *Byrne*.[1] After reading the section of the Act to the jury and explaining the burden of proof the Chief Justice read to the jury the following extract from the summing-up of Paull J. in *Reg.* v. *Walden*, which had received the approval of the Court of Criminal Appeal in England[2]: "There are some cases, you "may think, where a man has nearly got to that condition but "not quite, where he is wandering on the borderline between "being insane and sane, where you can say to yourself, 'Well, "'really, it may be he is not insane, but he is on the borderline. "'. . . He is not really fully responsible for what he has done.' "Now, you may think, and it is entirely a matter for you, that "that is what is meant by those words in the Act . . . 'such "'abnormality as substantially impairs his mental responsibility.' "In other words, he is not really responsible for what he has "done. His responsibility, if not wholly gone, has been "impaired."

The Chief Justice then proceeded as follows: "That, I think, "might help you when you are considering this question of "impaired responsibility. And, since that is supposed to be, or "is said to be a borderline case of sanity or insanity, then it "seems to me that I should explain very briefly what we under-"stand by insanity in law. And that is that the person is so "deranged that he doesn't know what he was doing and he "doesn't know if what he was doing is right or wrong—he's "unable to distinguish."

Then he quoted in full the rule in M'Naughten's case, reading it out verbatim. He observed that it is "not this case, but I "want you to see what insanity is so that you can see whether it "is borderline or not." After quoting it he went on: "'Wrong' "means legally wrong. Do you think here, therefore, that "there was this question of borderline? That's what you've got "to look at. Do you think that Rose was suffering from this "abnormality?"

It is said by counsel for the appellant that Rose's abnormality should not be judged by the test whether it bordered on insanity or not, and that no such test is justified by the language of the section. In any event it is not a conclusive test to be applied in every case. Furthermore, if insanity is to be introduced into the application of the section, there is no justification, he said, for confining it to legal insanity within the M'Naughten definition.

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[1] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440, C.C.A.

[2] [1959] 1 W.L.R. 1008, 1012; [1959] 3 All E.R. 203, C.C.A.

For the Crown it was argued that " mental responsibility " in the section means " mental responsibility in law," i.e., the standard required for a man to be held responsible in law for his acts, and that standard was to be found in the rules in M'Naughten's case because there was no other standard to which it could be referred. It was right, therefore, said the Crown, for the Chief Justice to invite the jury to apply the test of borderline of insanity as defined in the M'Naughten Rules.

Their Lordships cannot accept the Crown's contention. It would be an undue limitation of the wide words of the section. In *Reg.* v. *Byrne*[3] Lord Parker C.J., delivering the judgment of the court, after setting out the matters required to be proved in the defence of diminished responsibility, proceeded: " 'Abnormality of mind,' which has to be contrasted with the " time-honoured expression in the M'Naughten Rules 'defect " 'of reason,' means a state of mind so different from that of " ordinary human beings that the reasonable man would term it " abnormal. It appears to us to be wide enough to cover the " mind's activities in all its aspects, not only the perception of " physical acts and matters, and the ability to form a rational " judgment as to whether an act is right or wrong, but also the " ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental " 'responsibility for his acts' points to a consideration of the " extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of " his ability to exercise will power to control his physical acts."

Later, after referring to the citations from Scots cases in *Reg.* v. *Spriggs*,[4] Lord Parker continued[5]: " They indicate that such " abnormality as 'substantially impairs his mental responsibility' " involves a mental state which in popular language (not that of " the M'Naughten Rules) a jury would regard as amounting to " partial insanity or being on the borderline of insanity."

Their Lordships respectfully accept this interpretation of the words " abnormality of mind " and " mental responsibility " as authoritative and correct. They would not, however, consider that the Court of Criminal Appeal was intending to lay down that in every case the jury must necessarily be directed that the test is always to be the borderline of insanity. There may be cases in which the abnormality of mind relied upon cannot readily be related to any of the generally recognised types of "insanity." If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised that there is no formula that can safely be used in every case—the direction to the jury must always be related to the particular evidence that has been given and there may be cases where the words "borderline" and "insanity" may not be helpful.

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[3] [1960] 2 Q.B. 396, 403.

[4] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

[5] [1960] 2 Q.B. 396, 404.

In the result their Lordships are of opinion that the direction given to the jury by which they were told to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the M'Naughten Rules was a serious and vital misdirection which would, no doubt, not have been given had the Chief Justice had the benefit of Lord Parker's judgment in *Reg.* v. *Byrne*.[6]

There was a further passage in the summing-up which was strongly relied upon by counsel for the appellant. Towards the end of his charge the Chief Justice, referring to the killing, said: "Do you think that he did that under the influence of this "diminished responsibility, or do you think that he knew just "exactly what he was doing? Did he intend to do it? If so, "murder; if not, manslaughter." This was a misdirection. A man may know what he is doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility. This misdirection, coming where it did, may have been a determining factor in the jury's verdict.

There were two other passages which were the subject of complaint, but their Lordships, although appreciating that they were open to criticism, would not have regarded them standing alone as misdirections which could reasonably have affected the jury's verdict. One of these dealt with the appellant's amnesia, which was said to have covered the period from the moment he saw blood when Gay was knocked down until several days later. It is not necessary to set out the passage, but it would seem that the judge had not quite appreciated the use which the defence were making of this amnesia, if it existed.

In the other passage the Chief Justice, in dealing with the case of the appellant's fellow accused, Ingraham, had overlooked the provisions of subsection (4) of the Act and told the jury that if they found that the appellant was suffering from diminished responsibility, and consequently was guilty only of manslaughter, and that Ingraham was acting in concert with him and encouraging him to do what he did, then they should find Ingraham also guilty only of manslaughter.

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[6] [1960] 2 Q.B. 396.

As already indicated, their Lordships would not have regarded these passages by themselves as sufficient to vitiate the verdict against the appellant.

In the event, their Lordships are of opinion that the appellant was deprived of his right to have his defence of diminished responsibility properly considered by the jury and they must consequently humbly advise Her Majesty that the verdict of guilty of murder and the sentence of death passed upon the appellant should be quashed and a verdict of guilty of manslaughter and a sentence of imprisonment for life substituted therefor.

Solicitors: *Blyth, Dutton, Wright & Bennett; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

BARCLAYS BANK LTD. . . . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*

1960
May 10, 11, 12;
June 21.

Revenue — Estate duty — Valuation — Shares — Control of company— Shares held by deceased beneficiary—Further shares held as trustee —Whether register of members conclusive — Whether deceased in control of company—Method of valuation—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 55, 58 (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company — Control — Estate duty purposes — Trustee shareholder — Register of members—Whether conclusive—Finance Act, 1940, *s.* 55.

Meaning of "deemed."

At the date of his death on December 15, 1955, the deceased owned beneficially 1,100 shares in a company. By a settlement made on December 1, 1936, he had settled 3,650 shares in the same

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* *Present:* Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Denning.

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company upon trust for his wife and children, he himself taking no benefit. The deceased had always been a trustee of the settlement. His name appeared as the first of the four trustees' names in the company register, and since Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the company's articles of association, it was he who exercised the powers of voting.[1] The issued share capital of the company had always been 8,350 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital.

The trustees took out a summons to determine whether the deceased had control of the company within the meaning of section 55 of the Finance Act, 1940,[2] in which event the 1,100 shares should be valued for estate duty by reference to their assets value in accordance with section 55 (2), or whether they should be valued by reference to their market value under section 7 (5) of the Finance Act, 1894:—

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[1] Companies (Consolidation) Act, 1908, Table A:—Art. 60: ". . . On "a poll every member shall have one "vote for each share of which he is "the holder."

Art. 61: "In the case of joint "holders the vote of the senior who "tenders a vote, whether in person "or by proxy, shall be accepted to the "exclusion of the votes of the other "joint holders; and for this purpose "seniority shall be determined by the "order in which the names stand in "the register of members."

[2] Finance Act, 1940, s. 55, as amended: "(1) Where for the pur-"poses of estate duty there pass, on "the death of a person dying after "the commencement of this Act, "shares in or debentures of a com-"pany to which this section applies, "then if—(a) the deceased had the "control of the company at any time "during the five years ending with "his death . . . the principal value "of the shares or debentures, in lieu "of being estimated in accordance "with the provisions of subsection (5) "of section 7 of the Finance Act, "1894, shall be estimated by refer-"ence to the net value of the assets "of the company in accordance with "the provisions of the next succeed-"ing subsection. . . . (3) For the "purposes of this section a person "shall be deemed to have had control "of a company at any time if he "then had—(a) the control of powers "of voting on all questions, or on "any particular question, affecting "the company as a whole which if "exercised would have yielded a "majority of the votes capable of "being exercised thereon . . . or if "he could have obtained such con-"trol . . . by an exercise at that "time of a power exercisable by him "or with his consent. . . . (5) Con-"trol of a company which a person "had in a fiduciary capacity shall be "disregarded for the purposes of this "section. . . ."

S. 58: "(4) References in this "Part of this Act to a disposition's "being made by any person, to a "power's being exercised or exercis-"able by any person, . . . include "references to its being made, or "being exercised or exercisable, or "being done, by him and another "jointly or by another at his direc-"tion or by a company of which he "had control within the meaning of "subsection (3) of section 55 of this "Act, whether with or without the "consent of any other person; . . . "(5) References in this Part of this "Act to a person having any power "or control or doing any act in a "fiduciary capacity shall be construed "as references to his having that "power or control or doing that act "in a fiduciary capacity imposed on "him otherwise than by a disposition "made by him and in such a capacity "only."

Held (Lord Reid dissenting), that the deceased had "control "of the company" within the meaning of section 55 (1) of the Finance Act, 1940, since (*per* Viscount Simonds, Lord Cohen and Lord Keith of Avonholm) a person who had power by the exercise of voting rights in accordance with the constitution of a company to carry a resolution in general meeting had on the principle of *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.* (infra) "control" for the purposes of the subsection, it being irrelevant in this context that a shareholder who had the apparent control might himself be amenable to some external control (post, pp. 523, 534, 538), and the "deeming" provision of subsection (3) of section 55 was expansive of subsection (1), and if a case fell naturally within subsection (1) it was unnecessary to look beyond it (post, pp. 524, 536, 538); (*per* Lord Denning) by virtue of section 58 (4) a person who had control of the company jointly with others had "control" of the company for the purposes of section 55. If he holds the joint holding in a fiduciary capacity only, it does not count. But if he holds it beneficially, or is himself the founder of the joint holding, having created it by his own disposition, then it counts as giving him control just as if he were a single owner, for "control" in this Act means real control and not apparent control (post, pp. 543, 544).

Inland Revenue Commissioners v. *J. Bibby & Sons Ltd.* (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167, H.L.; *Inland Revenue Commissioners* v. *Silverts Ltd.* [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491, C.A.; and *Shields (John) & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners*, 1950 S.C. 441; 29 T.C. 475 applied.

Per Lord Reid. "Control" in the present context means real control and not apparent control. The deceased did not have real control of the majority of votes because he was not entitled to cast the trust votes without the consent of his co-trustees. And in the circumstances, section 58 (4) has no application, since it can only be applied if there can be found a reference to one of the three matters which it specifies (post, pp. 528–531).

Quaere. Whether section 55 applies to a registered shareholder who is a bare trustee (post, pp. 532, 536, 544).

Decision of the Court of Appeal [1959] Ch. 659; [1959] 3 W.L.R. 240; [1959] 3 All E.R. 140 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Holroyd Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 21, 1959, allowing an appeal by the respondent commissioners from an order of the Chancery Division (Danckwerts J.) dated December 17, 1958, in favour of the appellants upon an originating summons issued pursuant to section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, for the determination of the question how a holding of 1,100 fully

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paid shares in a company called T. Shipside Ltd. comprised in the estate of Tom Shipside deceased ought to be valued for the purposes of estate duty in respect of his death on December 15. 1955.

The deceased, Tom Shipside, died on December 15, 1955, having, by his will dated December 18, 1952, appointed the appellants, Barclays Bank Ltd., to be his executors and trustees. Probate was granted to them on March 24, 1956. The estate of the deceased included at his death 1,100 fully paid ordinary £1 shares in T. Shipside Ltd. registered in the sole name of the deceased, and these shares he owned beneficially. By a settlement dated December 1, 1936, the deceased settled 3,650 fully paid ordinary £1 shares in the company upon trust for the benefit of his wife and his children, he himself taking no beneficial interest. The deceased and two other persons were the original trustees, but as a result of appointment made on November 30, 1948, when one of the original trustees retired, the deceased and three other persons became the trustees and remained so until the deceased's death. The 3,650 shares were registered in the company's register of members in the names of the four trustees, the name of the deceased appearing as the first holder. The company had been incorporated under the Companies Acts, 1908 to 1917, and Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the articles of association. The deceased was therefore the person with the right to exercise the votes.

The issued share capital of the company had always been 8,350 ordinary £1 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital. It being uncertain whether the deceased had control of the company so as to affect the valuation of the 1,100 shares for estate duty, the appellants took out a summons to determine whether, upon the true construction of section 55 of the Finance Act, 1940, the principal value of the 1,100 shares should be estimated in accordance with the provisions of section 55 (2) of the Act of 1940, or in accordance with section 7 (5) of the Finance Act, 1894. If the former method, which required the value of the shares to be estimated by reference to the net value of the company's shares, were adopted, the burden of estate duty would be higher than if the valuation were made under section 7 (5) of the Act of 1894, which provided for a valuation by reference to the market value of the shares.

B. L. Bathurst Q.C. (*Viscount Bledisloe*) and *John Mills* for the appellants. The Crown contend that the mere fact that for the period of five years before his death Tom Shipside's name appeared as the first of the four trustees' names in the company register entails that the 3,650 settled shares have to be taken into account in considering whether the deceased had control of this company. In the appellants' submission the deceased never had control of the powers of voting within section 55 (1) (*a*), since he could not exercise the votes in respect of the trust shares unless all his co-trustees were unanimous. The concept of a "senior trustee" is unknown: see article 53 of Underhill's Law of Trusts and Trustees, 11th ed., pp. 379, 380. It is the duty of a trustee to consult his co-trustees. The deceased was never in a position to exercise freely in any manner he thought fit his votes in respect of the trust shares. He had not "the control "of powers of voting on all questions" within the meaning of section 55 (3) (*a*). The relevant question is what degree of *powers* of voting on all questions did the deceased possess, and not what *degree* of control of the company did he possess as a result of holding the trust shares.

Section 55 (3) (*a*) is a defining provision. If it is an extending provision (as Romer L.J. held [3]), then one must first exhaust the content of subsection (1) (*a*) and only have recourse to subsection (3) (*a*) if subsection (1) (*a*) does not apply. It follows that section 55 (3) (*a*) cannot have reference to voting powers exercised by the deceased in respect of his own shares, for that contingency is covered by section 55 (1) (*a*). Suppose A holds 49 per cent. of the shares of a company registered in his own name as beneficial owner and another 2 per cent. registered in the name of X, his nominee. On the assumption that the two subsections are to be read separately, A would not have "control" of the company in question within subsection (1) (*a*), since he only has 49 per cent. of the shares.

As to the casting of the votes in respect of the trust shares, the voice which is heard is the unanimous voice of the trustees. If they are not unanimous, either the voice is silent or it is the voice of the court. In no case is it the voice of Tom Shipside. Accordingly, to say that in these circumstances he has "control" is fanciful.

The Crown contend that the deceased had control of this company with his joint trustees under section 58 (4). Before this subsection can operate it is necessary to find a disposition within the meaning of Part IV of the Act, that is, sections 43 to 49 inclusive. "Disposition" is referred to in sections 44 to 48. As to "powers," see section 47 (1) (*c*), section 48 (2) and (3) and section 55 (3) (*a*) and (*b*). Section 58 (4) is very obscure. It is submitted that the present case does not fall within it.

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[3] [1959] Ch. 659, 674.

As to the authorities, *B. W. Noble Ltd.* v. *Inland Revenue Commissioners* [4] concerned the taxation of a company and decided that the words "controlling interest in the company" in section 53 (2) (*c*) of the Finance Act, 1920, meant the interest of a shareholder who could control the company in general meeting. The plain object of that section was to prevent a company from evading payment of its fair share of profits tax. *British American Tobacco Co.* v. *Inland Revenue Commissioners* [5] concerned the levying of national defence contributions under sections 19 and 20 of the Finance Act, 1937, and all it decided was that, if a company in its unfettered power could control another company, it had a controlling interest in that other company. In *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[6] the question was the extent of a company's liability to excess profits tax, and whether the directors had a controlling interest in the company, and not whether a particular individual had control. The House of Lords held that in section 13 (9) of the Finance (No. 2) Act, 1939, "controlling interest" referred to the voting powers of the directors and not to their beneficial interest in the company. *Inland Revenue Commissioners* v. *Silverts Ltd.*[7] and *S. Berendsen Ltd.* v. *Inland Revenue Commissioners* [8] were both cases concerned with profits tax legislation, as was *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners*,[9] where the company's articles were unusual in that there was a provision that the first named of joint holders was to be deemed sole owner in certain circumstances.

The authorities which led the Court of Appeal to decide in the Crown's favour were all concerned with the taxation of a company's profits, and the question which arose in all of them was whether either a director or another company had a controlling interest in the company in question. There was no definition of

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[4] (1926) 12 T.C. 911.

[5] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49, H.L.

[6] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167, H.L.

[7] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491, C.A.

[8] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612; 37 T.C. 517, C.A.

[9] (1950) 29 T.C. 475.

"controlling interest" in any of the relevant statutes; in the *Bibby* case [10] it was held that those words meant voting control. The question in all those cases being the liability of a company to tax, it is not surprising that the courts have held that, in general, the primary question of the meaning of the phrase "controlling interest" must be decided solely by reference to the company's register, but even here there is an exception, since in those cases where a shareholder is another company it has been held that it is legitimate, and indeed necessary to look beyond the register and articles of association to ascertain who controls that other company: see the *British American Tobacco Co.* case [11] and the *Berendsen* case.[12] But the present case raises a different question, namely, did a particular individual control this company. This essential difference was recognised by Lord Evershed M.R. in *Silverts'* case [13] and in *Berendsen's* case.[14] Further, Danckwerts J.[15] has pointed out that for the purposes of sections 55 (5) and 58 (5) of the Act of 1940 it is necessary to investigate beyond the company's register.

Once it is shown that the Finance Act, 1940, requires in certain circumstances an investigation outside the company's register it is only right to inquire who in fact did control the company for the purposes of section 55 (1) (*a*). The fundamental mistake which the Court of Appeal made was to lift certain dicta, particularly in the *Bibby* case,[16] out of their context and apply them to an entirely different type of financial liability. The proper analogy here is the *Berendsen* case [17]: see the observations of Lord Evershed M.R.[18] In the present case Romer L.J.[19] was of opinion that on this argument section 55 (5), as qualified by section 58 (5), was necessarily confined to cases where the majority voting power was in the hands of a sole trustee of a settlement. But this is not so. It is not uncommon for a settlement to provide that one only of several trustees shall have the power to take up a bonus issue or to vote. Such a provision would plainly come within section 58 (5).

In conclusion, once it is held that the *Bibby* case [20] and the *Shields* case [21] have little or no relevance, the matter is simple, because it then becomes unnecessary to consider the connection between subsection (1) (*a*) and subsection (3) (*a*) of section 55. On the other hand, if by virtue of the *Bibby* case [22] and the *Shields* case [23] the word " control " in section 55 (1) (*a*) must be control to be found solely from the company's machinery—the register and articles of association—then it is incumbent to look at section 55 (3) (*a*). Lord Evershed M.R. and Holroyd Pearce L.J. were correct in holding that subsection (3) (*a*) is a defining provision. Further, section 58 (4) supports that view. Lord Radcliffe's exposition of the meaning of the word " deemed " in *St. Aubyn* v. *Attorney-General* (*No. 2*) [24] shows the approach to a " deeming " provision. [Reference was also made to Dymond on Death Duties, 13th ed., pp. 8, 9; *Public Trustee* v. *Inland Revenue Commissioners*.[25]]

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[10] 29 T.C. 167.
[11] [1943] A.C. 335.
[12] [1958] Ch. 1.
[13] [1951] Ch. 521, 532.
[14] [1958] Ch. 1, 24.
[15] [1959] Ch. 341, 353.
[16] 29 T.C. 167.
[17] [1958] Ch. 1.
[18] Ibid. 37.
[19] [1959] Ch. 659, 676, 677.
[20] 29 T.C. 167.
[21] 29 T.C. 475.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown. There are two primary facts: (1) The deceased had a combination of voting power, since (a) he had beneficial rights in respect of 1,100 shares, and (b) he was one of the four registered holders of 3,650 shares subject to a trust, the deceased's name appearing as the first holder in the company's register. It is only by adding together these two blocks of shares that it can be said that the deceased had control. The *Bibby* case [26] was an " addition " case. Accordingly, it cannot be ruled out ab initio as an authority on this question. (2) By virtue of article 61 of the articles of association, in case of joint holders the vote of the senior holder, who was the deceased, he being named first in the register, was to be accepted to the exclusion of the others.

It is submitted: (1) The authorities show that he who has the power to exercise voting rights in accordance with the company's constitution to carry a resolution at a general meeting has a controlling interest notwithstanding that he may be amenable to some external control. (2) The case of a trustee whose fiduciary power must be exercised jointly with his co-trustees falls within this principle. (3) There is no relevant distinction between " control " as used in the Finance Act, 1940, and " controlling " interest." (4) There is nothing in the Finance Act, 1940, which requires any departure from the principle established by the cases that control of voting power according to the company's constitution is sufficient to bring section 55 into operation—that is, section 55 is an extending section. (5) If, contrary to the

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[22] 29 T.C. 167.

[23] 29 T.C. 475.

[24] [1952] A.C. 15, 53.

[25] [1960] A.C. 398; [1960] 2 W.L.R. 203; [1960] 1 All E.R. 1, H.L.

[26] 29 T.C. 167.

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Crown's submission, one is directed to look beyond the register in any case where the registered owner is not the sole beneficial owner, then in this case the deceased had control by virtue of section 58 (4).

It is common ground that the object of section 55 is not to show who has control of a company but to enable one to decide whether X, the deceased, had control. There is plainly more than one test to ascertain whether or not the shares of a company are to be assessed on an assets value basis. A perusal of the scheme of the section shows that there are different tests for different persons to cover different circumstances. This was fully recognised by Lord Evershed M.R. in the Court of Appeal,[27] and see also his Lordship's observations in *Silverts'* case.[28] The Finance Act, 1940, is far wider in its terms than the other Acts which were the subject of the cases cited by the appellants. Accordingly, since section 55 provides a number of alternative formulae to enable one to answer the question whether X had control, it is sufficient for the Crown, or in certain cases the taxpayer (it may suit him, where, for example, the company owns agricultural land or an industrial hereditament), to show that X had control by satisfying the conditions of one of these formulae: see the observations of Lord Radcliffe in *St. Aubyn* v. *Attorney-General* (*No. 2*).[29]

If for the purposes of section 55 both direct and indirect voting power can be taken into account, the fact that the registered voting power or some part of it may be subject to outside control does not prevent reliance being placed on the registered voting power to bring a case within the section. The basic fallacy of the appellants' argument is that they seek to go beyond the register not for the purpose of showing that a third party has control but in order to negative control in the registered shareholder.

On the question whether subsection (3) (*a*) of section 55 is a defining or an extending provision, it is true that the reference to subsection (3) in section 58 (4) supports the view that it is the former, but when the language of subsection (3) (*a*) is contrasted with that of subsection (3) (*b*) it is plain that subsection (3) (*a*) is an extension of subsection (1) (*a*). Further, the phrase "control of a company" in subsection (3) is a well understood expression and the subsection merely adds certain types of control which the legislature thought might not be considered to be included in the natural meaning of those words: see in this connection the observations of Lord Greene M.R. in *In re Parsons* [30] on the phrase "competent to dispose" in section 5 (2) of the Finance Act, 1894. *Public Trustee* v. *Inland Revenue Commissioners* [31] is of no assistance, for that case was concerned with whether sections 1 and 2 of the Finance Act, 1894, were exclusive. That is quite different from the problem here.

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[27] [1959] Ch. 659.
[28] [1951] Ch. 521, 532.
[29] [1952] A.C. 15.

On the hypothesis that subsection (3) (*a*) is an exhaustive definition, it is submitted that the words "control of voting "power" refer to voting power which is controlled either by virtue of the share register or by external means—the ability to cast, or the ability to cause a third person to cast, votes. There may be a combination of voting powers, and in those circumstances the contention that subsection (3) (*a*) has reference only to external control cannot be supported in view of subsection (5), which would be an unnecessary and, indeed, inappropriate provision if that were the case.

Section 58 (4) is another extending provision. It deals expressly with joint acts, joint dispositions and joint powers. It can be applied to trustees thus: either the first named trustee in the register has control of voting under subsection (3) (*a*) or, if that be wrong, the control of voting resides in the first named jointly with the other named trustees. In that case the joint names control the first named. That is the only alternative. Here, the trustees have power to direct the registered holder how to vote, in which case section 58 (4) provides that since the power of voting is exercisable by the first named holder jointly with his co-trustees the power is to be treated as his; accordingly, he is given by virtue of this subsection control over his own legal voting powers. It is true that section 58 (4) refers to joint acts "or "joint powers" and, the Crown contend, for joint control. But "control" in this context is nothing more than the power to direct the registered holder how he shall vote.

There is no relevant distinction between "control," as that word is used in the Act of 1940, and "controlling interest." "Controlling interest" only differs from "control" in that prima facie it allows of the argument that "interest" presupposes beneficial interest. But that contention was disposed of in the *Bibby* case.[32]

It was suggested that the authorities on which the Crown rely

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[30] [1943] Ch. 12, 15; 59 T.L.R. 19; [1942] 2 All E.R. 496.

[31] [1960] A.C. 398.

[32] 29 T.C. 167.

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were distinguishable in that they were not concerned with estate duty nor the Act of 1940. It is true that they concerned legislation dealing with profits tax and excess profits tax, but that is not a vital distinction. There is no difference in principle between "control" for the purposes of estate duty and "controlling interest" in relation to profits tax and excess profits tax, especially since these cases equate "controlling interest" with "control."

There are only four cases which concern trustee shareholders: *Inland Revenue Commissioners* v. *F. A. Clark & Son Ltd.*,[33] *Bibby's* case,[34] *Shields'* case[35] and *Silverts'* case,[36] of which the two vital cases for present purposes are *Bibby*[37] and *Silverts*.[38] As to *Clark's* case,[39] see the observations of Lord Evershed M.R. in *Berendsen's* case.[40] It can be regarded either as a "bare trustee" case or as a decision in line with the *British American Tobacco Co.* case,[41] namely, of indirect control through another company. In the *Bibby* case[42] the Crown was concerned to argue that indirect control ought to be taken into account in the same way as in the *British American Tobacco Co.* case,[43] but this argument was rejected by the House of Lords, Lord Russell of Killowen observing that for the purposes of section 13 of the Finance (No. 2) Act, 1939, "controlling interest" was to be determined by the voting power of the company's directors and not by their beneficial interest in the company. The appellants' argument involves reading into section 55 (3) that the deceased had free and unfettered powers of voting, but there is no authority to support such a construction of the subsection and, indeed, the opinions in the *Bibby* case[44] are against making such an implication in this type of case. It would be impossible in every case to enter into an investigation to ascertain whether there was any limitation on a shareholder's right to vote.

Silverts' case,[45] unlike *Shields'* case,[46] is closely akin to the present case on its facts, and the principle of that case[47] and the *Bibby* case[48] should be applied here.

B. L. Bathurst Q.C. (*Viscount Bledisloe*) in reply. The Crown contend that by giving the word "control" in section 55

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[33] (1942) 29 T.C. 49.
[34] 29 T.C. 167.
[35] 29 T.C. 475.
[36] [1951] Ch. 521; 29 T.C. 491.
[37] 29 T.C. 167.
[38] [1951] Ch. 521.
[39] 29 T.C. 49.
[40] [1958] Ch. 1, 33.
[41] [1943] A.C. 335.
[42] 29 T.C. 167.
[43] [1943] A.C. 335.
[44] 29 T.C. 167.
[45] [1951] Ch. 521.
[46] 29 T.C. 475.
[47] [1951] Ch. 521.
[48] 29 T.C. 167.

(1) (*a*) its ordinary meaning that subsection can be operated without recourse to subsection (3) (*a*). But the fallacy in that argument is that the Crown do not give "control" its ordinary meaning but an artificial meaning distilled from *Bibby*[49] and allied cases. To give "control" its ordinary meaning in the present context connotes finding the person who has the unfettered control of the company, that is, the person who is free to cast a majority of the votes as he chooses or who can direct others how those votes are to be cast. As to subsection (3) (*a*), Romer L.J.[50] was plainly of the opinion that it was not apt to cover the case of a registered beneficial owner. Further, for the purposes of section 55 (5), read in conjunction with section 58 (5), it is submitted that it is permissible to take cognisance of the fact that the deceased was merely one of four joint holders and that he was not a free and unfettered voter in respect of the trust shares.

The authorities do not assist as they are concerned with different words in different statutes. The present case is concerned with a claim for estate duty and it is contrary to the ordinary meaning of the word "control" to say that the deceased had control within the meaning of section 55.

It would be wrong to extend the ambit of subsection (4) of section 58 to cases to which it does not expressly refer.

It was suggested that the subject as well as the Crown might wish to take advantage of section 55, and reference was made to the cases of agricultural land and industrial hereditaments. But it is pertinent to point out that those examples are taken from the Finance Act, 1954, which amended section 55 of the Act of 1940, since it was found in some instances to work very harshly against the subject. At the date of Tom Shipside's death the Act of 1940 stood unamended and it is difficult to find any instance under the original statute where the subject would wish to claim to come within the section.

Their Lordships took time for consideration.

June 21. Viscount Simonds. My Lords, this appeal once more demands your Lordships' consideration of section 55 and section 58 of the Finance Act, 1940, and it is not surprising that it raises questions which to me at least appear to be of outstanding difficulty.

At the date of his death on December 15, 1955, Tom Shipside, whom I will call "the testator," was the registered holder of 1,100 fully paid ordinary shares of £1 each of T. Shipside Ltd. Of these shares he was the beneficial owner. At all times the issued ordinary share capital was 8,350 £1 shares. On December 1, 1936, the testator settled 3,650 of these shares upon trusts for the benefit of his wife and children, himself taking no beneficial interest. The original trustees were the testator and two other persons, but upon the retirement of one of them the testator, in exercise of a power reserved to him by the settlement, appointed two more persons to be trustees. Thus at his death there were four trustees registered as the holders of the 3,650 shares, and as his name appeared first in the register he was under the articles of association of the company entitled to vote in respect of them. He was therefore entitled to vote in respect altogether of shares amounting to more than half the issued share capital of the company.

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[49] 29 T.C. 167.

[50] [1959] Ch. 659, 674.

The question then arose whether the 1,100 shares which passed on his death should be valued for estate duty in accordance with section 7 (5) of the Finance Act, 1894, that is, by reference to their market value, or with section 55 (2) of the Finance Act, 1940, that is, by reference to the estimated value of the assets of the company. Upon a summons issued for the determination of this question Danckwerts J. decided in favour of the former method, the Court of Appeal of the latter. It is necessary then to set out and examine closely the relevant sections of the 1940 Act. They are as follows:

"55.—(1) Where for the purposes of estate duty there pass, "on the death of a person dying after the commencement of this "Act, shares in or debentures of a company to which this section "applies, then if—(*a*) the deceased had the control of the com-"pany at any time during the five years ending with his death . . . "the principal value of the shares or debentures, in lieu of being "estimated in accordance with the provisions of subsection (5) "of section seven of the Finance Act, 1894, shall be estimated by "reference to the net value of the assets of the company in "accordance with the provisions of the next succeeding sub-"section." (Subsection (2) of section 55 contains provisions for ascertaining the value of the shares by reference to the net value of the assets.) "(3) For the purposes of this section a person "shall be deemed to have had control of a company at any time "if he then had—(*a*) the control of powers of voting on all "questions, or on any particular question, affecting the company "as a whole which if exercised would have yielded a majority

" of the votes capable of being exercised thereon . . . or if he " could have obtained such control . . . by an exercise at that time " of a power exercisable by him or with his consent. (4) . . . " (5) Control of a company which a person had in a fiduciary " capacity shall be disregarded for the purposes of this section. " (6) . . . (7) . . .

" 58.—(1) . . . (4) References in this Part of this Act to a " disposition's being made by any person, to a power's being " exercised or exercisable by any person, or to any other act's " being done by any person, include references to its being made, " or being exercised or exercisable, or being done, by him and " another jointly or by another at his direction or by a company " of which he had control within the meaning of subsection (3) " of section fifty-five of this Act, whether with or without the " consent of any other person; references importing an omission " on the part of any person in relation to any such matter as " aforesaid shall be construed in like manner; and references in " relation to any such matter as aforesaid to its being made, or " being exercised or exercisable, or being done or omitted, with " the consent of any person include references to its being " made, or being exercised or exercisable, or being done or " omitted, at his request or with or subject to his acquiescence. " (5) References in this Part of this Act to a person having any " power or control or doing any act in a fiduciary capacity shall " be construed as references to his having that power or control or " doing that act in a fiduciary capacity imposed on him otherwise " than by a disposition made by him and in such a capacity only."

The first question—much discussed, though the answer to it may not be decisive—is whether section 55 (3) is an exhaustive definition of the words occurring in section 55 (1), " control of the " company," or is an expansive provision, extending the scope of those words beyond their natural meaning. I respectfully suggest that this is a problem which ought not to be allowed to arise, for, profoundly difficult as the drafting of a Finance Act must be, it should be possible at least to indicate clearly into which category such a section as section 55 (3) falls. That the problem does arise in the present case is apparent, for different views are taken upon the question in the Court of Appeal.

I do not think that much assistance is to be got from the solution which has been given to similar questions in other cases, such as *In re Parsons* [1]; *St. Aubyn* v. *Attorney-General* (*No.* 2) [2];

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[1] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496, C.A.

[2] [1952] A.C. 15; [1951] 2 All E.R. 473, H.L.

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or *Public Trustee* v. *Inland Revenue Commissioners*.[3] The answer must depend on the construction of the particular sections under review in the context of the whole Act in which they are found.

In the present case I agree with Romer L.J.[4] in thinking that the so-called "deeming" provision of subsection (3) is expansive of subsection (1) and that, if a case falls naturally within subsection (1), it is unnecessary to look beyond it. I bear in mind what Lord Radcliffe said in *St. Aubyn's* case[5] about the word "deem" but nevertheless regard its primary function as to bring in something which would otherwise be excluded. I agree, too, with the learned Lord Justice in thinking that the words in subsection (3) "control of powers of voting on all questions" are singularly inapt to describe the right of a registered shareholder to vote in respect of shares in his name.[6] They are, on the other hand, apt enough if they are intended not to cover such a case but to supplement it. It is said that the reference to subsection (3) in section 58 (4) points in the other direction, but it is, I think, possible that section 58 (4) looks rather to the extended meaning of control given by subsection (3) than to its natural meaning given by subsection (1).

As I have said, I doubt whether the answer that is given to this primary question is conclusive of the problem raised in this appeal, but it leads me to examine it upon the footing that I must ask whether the testator being under the constitution of the company entitled to vote in respect of both the 1,100 and the 3,650 shares "had the control of the company" within the natural meaning of those words. My Lords, in *B. W. Noble Ltd.* v. *Inland Revenue Commissioners*,[7] the words "controlling "interest in the company" occurring in the Finance Act, 1920, were said by Rowlatt J.[8] to mean the interest of one "whose "shareholding in the company is such that he is the shareholder "who is more powerful than all the other shareholders put "together in general meeting," in other words, one who can, by his votes, control the company in general meeting. His opinion was approved in later cases in this House, see *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*[9] and *Inland*

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[3] [1960] A.C. 398; [1960] 2 W.L.R. 203; [1960] 1 All E.R. 1, H.L.

[4] [1959] Ch. 659, 674; [1959] 3 W.L.R. 240; [1959] 3 All E.R. 140.

[5] [1952] A.C. 15, 53.

[6] [1959] Ch. 659, 674.

[7] (1926) 12 T.C. 911.

[8] Ibid. 926.

[9] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49, H.L.

Revenue Commissioners v. *F. A. Clark & Son Ltd.*[10] I see no difference between the natural meaning of the two phrases "having a controlling interest in the company" and "having "control of the company," though it might be desirable, and in the case of the latter phrase was found to be so, to give an extended meaning to the words. If so, I think that your Lordships should accept the guidance given by this House in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[11] That case determined that control must be ascertained by reference to the company's constitution and that it is irrelevant that a shareholder who has the apparent control may himself be amenable to some external control. I need not repeat what was said by the noble and learned Lords who took part in that appeal. What they said applies with equal force to cases arising under section 55 of the Finance Act, 1940. The Scottish case *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners* [12] applied the same principle to somewhat different circumstances: so did *Inland Revenue Commissioners* v. *Silverts Ltd.*[13] Nor need anything be said about *Berendsen's* case,[14] which did no more than affirm the obvious distinction between the cases already cited and that in which shares are registered in the name of a limited company.

I come to the conclusion, without recourse to the expansive provision of subsection (3), that the testator had control of T. Shipside Ltd. If I found it necessary to look at the later subsections I could not come to a different conclusion. For, unless subsection (3) is to be interpreted as excluding from the category of persons having control a person who obviously has control by virtue of shares standing in his own name, the same result must follow. It is not the necessary or natural consequence of an extended meaning being given to a phrase that it should lose its natural one. It is easy to see that the legislature might wish to block a means of escape from the new method of valuation imposed by the section while retaining in its fullness the natural meaning. I see nothing inconsistent in saying that anyone, who by reason of his apparent voting power has the majority of votes, controls the company, but adding that he also shall be deemed to control the company who can by any means procure the exercise of a majority of voting power.

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[10] (1942) 29 T.C. 49.

[11] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

[12] 1950 S.C. 441; 29 T.C. 475.

[13] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491, C.A.

[14] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612; 37 T.C. 517, C.A.

Mention should perhaps be made of subsection (5) which provides that control of a company which a person has in a fiduciary capacity is to be disregarded for the purpose of the section. This provision is, so far as the present case is concerned, neutralised by section 58 (5) which excludes its operation where the fiduciary capacity arises from a trust established by the person having control. But it would seem to have been unnecessary to make this provision, if it was not intended that, where subsection (3) was invoked, the revenue authorities should not look behind the apparent to the real power.

I do not think it necessary to refer to the difficult subsection (4) of section 58. For it cannot upon any construction assist the respondents.

In the view that I take the appeal should be dismissed with costs.

LORD REID. My Lords, this case is concerned with the proper basis of valuation for estate duty of 1,100 shares in T. Shipside Ltd. which belonged to the late Tom Shipside who died on December 15, 1955. This company had been formed in 1917 to take over a motor business carried on by the deceased. Eight thousand three hundred and fifty shares were issued, of which he originally held 4,750. In 1936 he made a settlement of 3,650 of these shares on members of his family, retaining no beneficial interest for himself. But he was a trustee of this settlement and there were also three other trustees at the relevant time.

The question is whether Tom Shipside had control of the company before his death within the meaning of section 55 of the Finance Act, 1940. If he had, his 1,100 shares must be valued by reference to the value of the assets of the company in manner provided by the 1940 Act. If he had not, they must be valued in the ordinary way under the Finance Act, 1894. The former method produces a larger valuation.

I shall not set out more than a few of the provisions of the 1940 Act. I think that it is quite clear that the purpose of that Act is to prevent a person from diminishing the value of his property for estate duty by erecting a screen between himself and his assets in the form of a company of which he retains control but the constitution of which contains convenient restrictions so that, if there are say 1,000 shares, each share valued in the ordinary way is worth less than 1/1,000 part of the value of the net assets of the company. There are so many possible variants of such a scheme that the provisions of the Act had to be elaborate, and it may be that the statutory provisions sometimes go beyond what is necessary to counteract schemes of this kind. But if the meaning of any particular provisions is in doubt, I would incline to that meaning which can reasonably be related to the apparent purpose of the Act.

The deceased is said to have had control of the company because he was in a position to cast at a general meeting a majority of the votes, 4,750 out of a total of 8,350. He had unrestricted power to vote in respect of his own 1,100 shares and he had, in fact, the right to vote in respect of the 3,650 trust shares. The names of all four trustees appeared on the company's register but his name came first, and a provision in the articles entitled him for that reason to vote, if he chose to do so, personally or by proxy. If he did not choose to vote, then the second named trustee would be entitled to vote. The deceased had not an unrestricted power to vote in respect of these 3,650 shares. It was his duty to obtain the concurrence of the other three trustees, and, if they objected to the way in which he proposed to vote, it is admitted that they could obtain from the court a direction as to how the votes should be cast and, if necessary, an injunction to prevent the deceased from voting as he proposed. But it is argued that that is all irrelevant, that if he chose to break the law and suffer the consequences the company must receive his vote, and that for the purposes of this legislation he was just as much in control of the company as if he had had unrestricted power to vote in respect of these shares.

No one doubts that control means voting control—control of the majority of votes at a general meeting. If a person owns the majority of the shares and holds them in his own name there is no difficulty. But there are other possibilities. He may be in real control, although he does not hold the majority of shares in his own name, because he also has a legal right to direct another shareholder how he shall vote and can in this way control a majority of the votes. On the other hand, he may be only in apparent control because, although in fact he is the person who casts the votes, as to some or all of these votes he may be bound to vote as directed by someone else or he may be bound to obtain the consent of someone else. The question is whether, in the context which I shall now quote, control means real control, or apparent control, or whether, as the Crown contend, it means both, so that the Crown have an option: these provisions can be enforced against a person's estate if he had either real or apparent control. The appellants contend that control means real control and that the deceased did not have real control of the company because he was not entitled to cast the 3,650 votes without the consent of the other three trustees.

I must now turn to the relevant provisions of the Act of 1940. Section 55 (1) provides that shares in or debentures of a company shall be valued by reference to the net value of its assets if— "(*a*) the deceased had the control of the company at any time "during the five years ending with his death; . . ."

Section 55 (3) then provides "For the purposes of this section "a person shall be deemed to have had control of a company at "any time if he then had—(*a*) the control of powers of voting on "all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a "majority of the votes capable of being exercised thereon: or "(*b*) . . . or if he could have obtained such control . . . by an "exercise at that time of a power exercisable by him or with his "consent."

With these must be read section 58 (4): "References in this "Part of this Act to a disposition's being made by any person, "to a power's being exercised or exercisable by any person, or "to any other act's being done by any person, include references "to its being made, or being exercised or exercisable, or being "done, by him and another jointly or by another at his direction "or by a company of which he had control within the meaning "of subsection (3) of section fifty-five of this Act, whether with or "without the consent of any other person; references importing "an omission on the part of any person in relation to any such "matter as aforesaid shall be construed in like manner; and "references in relation to any such matter as aforesaid to its "being made, or being exercised or exercisable, or being done "or omitted, with the consent of any person include references "to its being made, or being exercised or exercisable, or being "done or omitted, at his request or with or subject to his "acquiescence."

I have quoted this subsection in full because it is said to be unusually obscure. I do not find any of these provisions particularly obscure if each is taken by itself. What is wrong is that they will not fit together.

The leading provision requires that the deceased shall have had "control" of the company. As the word "control" was the basis of a new scheme of taxation, and was a novelty in estate duty legislation, I would have expected to find it defined in the Act, but unless section 55 (3) is intended to be a definition it stands undefined. One difficulty about accepting this subsection as a definition is that it uses the word "deemed" and that is not a word generally used to introduce a definition. But the draftsman clearly thought that it was a definition because section 58 (4) contains the words "a company of which he had control within "the meaning of subsection (3) of section 55," and I am not persuaded that I must reject this view by reason of the phraseology of the subsection. The word "deemed" has often given trouble, and I would adopt what Lord Radcliffe said about it in *St. Aubyn* v. *Attorney-General* (*No. 2*)[15]: "The word 'deemed' is used a "great deal in modern legislation. Sometimes it is used to "impose for the purposes of a statute an artificial construction "of a word or phrase that would not otherwise prevail. Some- "times it is used to put beyond doubt a particular construction "that might otherwise be uncertain. Sometimes it is used "to give a comprehensive description that includes what is "obvious, what is uncertain and what is, in the ordinary sense, "impossible." I think that the last sentence fits this case. Subsection (3) contains three parts—(a), which could appropriately be called a definition, and (b) and the concluding part which are extensions, and the composite character of the subsection may explain, if it does not excuse, the use of the word "deemed."

When I look at subsection (3) I find that it specifies various ways in which a person can have real control or power to acquire it, but I find no sign of apparent control without real control being sufficient. The first words of subsection (3) (*a*) make it plain to my mind that the Crown can go behind the register of shareholders and prove that the deceased, though not actually the holder of certain shares, had control of their votes. I find it inconceivable that any draftsman would have used the elaborate phraseology of this paragraph if all that he meant to say was the right to cast a majority of votes: to speak of control of powers of voting which if exercised would have yielded a majority seems to me clearly to include a case where the deceased controlled the voting power of another shareholder by having a right to direct him how he was to vote, so that if he exercised that control he could command a majority. And section 58 (4) confirms this because, inter alia, it makes an act done by another person at his discretion equivalent to the deceased's own act.

I would have been surprised if this legislation had not contained provisions of that kind: if it only dealt with apparent control—if it made the number of shares held by the deceased in his own name the criterion—the door would be wide open for evasion either by putting shares in the name of a nominee or by making some more elaborate arrangement by which the votes of another shareholder could in fact be controlled. And I would reach the same result—that control primarily means real control—if section 55 (3) is not a definition. I say " primarily " because I have still to deal with the Crown's argument that control has a double meaning, and covers both real and apparent control.

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[15] [1952] A.C. 15, 53.

But before I leave subsection (3) (*a*) there is another difficulty. Suppose the deceased held 20 per cent. of the shares in his own name and was able to control the votes of another shareholder who held 35 per cent. Obviously the two should be added together to show what is the fact—that the deceased controlled the company. If subsection (3) (*a*) is a definition then the difficulty is not great. Control of powers of voting is more appropriate language where the control is of other people's powers. But a person could be said to control his own power of voting if, in fact, he had an unrestricted right to cast his own votes as he chose. But I do not think that he could be said to control his own power of voting if in fact he had no right to vote without someone else's consent.

The difficulty appears to me to be much greater if the subsection is not a definition but an extension of subsection (1). Then subsection (3) would only deal with control of other people's power of voting. The shareholder's right to cast his own votes would be dealt with under subsection (1). If the deceased held a majority of shares in his own name he would on this view have control under subsection (1): if he controlled sufficient shares in the hands of others to form a majority, then he would have control under subsection (3). But if, as in the example I have given, his own shares had to be added to those which he controlled to give a majority, I cannot find anything in the section which directs them to be added together. That confirms me in my view that subsection (3) was intended to cover the whole matter, that is, to be a definition, and that there cannot be a case to which subsection (1) applies but subsection (3) does not.

Up to this point the argument for the appellants in my view succeeds: the deceased did not have real control of the majority of votes because he was not entitled to cast the trust votes without the consent of his co-trustees. But section 58 (4) nullifies that reason in all cases to which it applies. Looking to its terms and context I have no doubt that if it had been properly drafted it would have applied to this case. I can imagine no reason why there should be any distinction between this case and those to which it clearly does apply. But that is not enough in a taxing Act. A person cannot be taxed by implication: the words used must be sufficiently wide on a fair interpretation to cover his case. This subsection is so drafted that it can only be applied if you can find a reference to one of the three matters which it specifies. The reference must be, for example, to a power being exercised or exercisable by a person—not merely to a power. And wherever you find such a reference you are directed to write in " or by him " and another jointly or . . . whether with or without the consent " of any other person." If you cannot write that in you cannot apply the subsection. There are many places in this Part of the Act where that can be done; there is one in the concluding part of section 55 (3). But I cannot find any reference which, when expanded as section 58 (4) directs, would affect this case: there is no reference of this kind in section 55 (1) or section 55 (3) (*a*). The latter subsection requires that the deceased should have " had control of powers of voting," and these words would have to be expanded by adding " by himself or by him and another " jointly or . . ." But in my opinion " control of powers of " voting " is not a reference to " a power's being exercised or " exercisable by any person " or " an act's being done by any " person." So I find myself compelled to hold that section 58 (4) does not apply.

Some importance was attached in argument to two provisions which deal with trustees. Section 55 (5) provides: " Control of a " company which a person had in a fiduciary capacity shall be " disregarded for the purposes of this section." But, as one might expect, section 58 (5) provides that this is not to apply where the fiduciary capacity was imposed on a person by himself. So in this case section 55 (5) does not apply. And I can draw no general conclusion from these provisions because section 55 (5) is another example of a provision which will not fit together with the rest. Let me suppose that a person owns 25 per cent. of the shares himself and has been made trustee by another for a further 30 per cent. Without section 55 (5) he has control on any view. He alone decides how to cast 55 per cent. of the votes. And if section 55 (5) only means what it says it does not help him: he does not have control in a fiduciary capacity because in that capacity he only has 30 per cent. of the votes. But plainly he ought to be protected by this subsection. I would leave that muddle to be cleared up when that became necessary.

I turn now to the argument that in any event these provisions also apply where the deceased had only apparent control. I cannot find anything in these numerous and elaborate provisions which appears to be directed against the estate of a person who only had apparent control, and it does not seem necessary to apply them in that case to achieve the objects of the Act. Moreover, this case shows that the result of so applying them would be capricious. Once section 58 (4) is out of the way it is admitted that Mr. Shipside's estate would have escaped if the names of the trustees had been placed on the register in a different order, and the trust votes had always been cast by one of the trustees whose name preceded his on the register. The order in which the trustees cause their names to appear does not seem a very solid ground for imposing additional taxation on the estate of one of them.

This argument is really based on the grounds of decision of this House in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[16] That was a case of excess profits tax, and the question was whether the directors had a " controlling interest " in the company. The total holdings of the individual directors were less than 50 per cent., but three of the directors who were brothers were trustees of a family settlement, and adding the trust shares to the directors' individual holdings produced a majority and so a controlling interest. So individually and jointly the directors did have real control of the company: the trustee directors did not require to get the consent of anyone else before the votes of the trust shares were cast. But that was not the reason given in the speeches in this House. In rejecting the argument for the unsuccessful party that controlling interest meant beneficial interest, their Lordships undoubtedly held that the register alone could be looked at, and the fact that a registered shareholder might be subject to outside control was irrelevant.

But I do not see how that can be applied to this case unless, indeed, it were held that this rule is of such general application that even under the Act of 1940 only the register can be looked at. Neither party has argued that, and there are numerous provisions in the Act of 1940 which, in my opinion, clearly entitle the Crown to go behind the register and prove that the deceased had control although he was not the holder of a majority of the shares. If it were not so there would be such an easy and obvious method of evasion that an amending Act would immediately be necessary. And if under this Act the Crown can go behind the register, what ground is there for applying the rule in *Bibby's* case [17] to prevent the shareholder from doing the same?

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[16] 29 T.C. 167.

Moreover, the rule in *Bibby's* case [18] is not absolute. An earlier decision of this House (*British American Tobacco Co.* v. *Inland Revenue Commissioners* [19]) shows that it does not apply where a shareholder is another company: it is then permissible to go behind the register and inquire who controls that company. And it is at least doubtful whether it applies where a registered shareholder is a bare trustee, for that matter was expressly reserved in this House.

I must confess that I find this reservation difficult to understand. The question was one of construction—What is the meaning of " controlling interest " ? Once it was held that it did not mean beneficial interest I would have thought it must mean either the power to cast a majority of votes according to the register, or the power to cast a majority taking into account votes of other shareholders which one or more directors have a right to require to be cast as they prescribe. To say that it means the latter where the other shareholder is a bare trustee, but the former in all other cases, seems to me perilously like legislating. There may be good reason for the distinction, but I am as yet unable to see how it can be reached by a process of construction, particularly as the dividing line between a bare trustee and a trustee not quite bare seems to be a narrow one.

In my opinion we ought not to attempt to apply the rule in *Bibby's* case [20] to cases under the Act of 1940. We cannot be bound to do so. In however general terms a rule may be stated, we cannot be bound to apply it in a different field if it is inappropriate there, and I think that it is inappropriate here. We are only dealing here with the power of a single individual to control votes, and that does not seem to involve a particularly difficult inquiry. Moreover, we cannot, in my judgment, apply the rule to the Crown, the Act contradicts it in too many places: and if we did, the door would be wide open for evasion. And if we cannot apply it to prevent the Crown from going behind the register, I see no reason to apply it to prevent the taxpayer from doing the same. I must admit that I feel no great urge to extend a rule which was not necessary for the decision of *Bibby's* case,[20] which has given rise in later cases to much fine-spun argument and subtle distinction, and which would make tax evasion all too easy if it were not buttressed by an illogical exception.

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[17] 29 T.C. 167.

[18] Ibid.

[19] [1943] A.C. 335.

[20] 29 T.C. 167.

Lord Cohen. My Lords, the respondents claim that for the purpose of estate duty the shares held by the late Tom Shipside in a company known as T. Shipside Limited should be valued on an assets basis in accordance with section 55 (1) of the Finance Act, 1940, as amended by a later Act, on the ground that, as they contend, the deceased had the control of the company at some time within the five years ending with his death.

The issued capital of the company at all material times was 8,350 ordinary shares of £1 each, and each such £1 share carried one vote. The deceased owned beneficially only 1,100 shares, but as trustee with three co-trustees he held 3,650 shares, so that if these trustee shares ought to be aggregated with his personal holding for the purpose of determining whether he controlled the company within the meaning of section 55, he held more than half the issued share capital.

It remains to add that under the articles of association, "In "the case of joint holders the vote of the senior who tenders a "vote, whether in person or by proxy, shall be accepted to the "exclusion of the votes of the other joint holders, and for this "purpose seniority shall be determined by the order in which the "names stand in the register of members."

Danckwerts J. rejected the respondents' contention on the ground that under section 55 it is the duty of the court to investigate the true position of the deceased shareholder, and that if his power to control the majority of the voting power in the company in question was dependent on the exercise of votes held by him and others as trustees, he could not be said to control the company since he was bound to vote only on the unanimous decision of himself and his co-trustees.

The decision of Danckwerts J. was reversed by the Court of Appeal. Their Lordships differed somewhat in their construction of section 55 but were agreed that the material factor determining the question of control was voting power as laid down in the articles of association of the company and that, as under the articles the deceased was entitled to cast a majority of the votes, he had the control of the company within the meaning of section 55 (1).

Our attention was not called to any authority as to the meaning of "control" in section 55 (1), but we were invited to look at a number of authorities as to the meaning of the phrase "controlling interest" in certain Finance Acts dealing with the assessment of liability to profits tax and excess profits tax. None of these Acts contained any provision defining what was meant by the words "controlling interest," but the courts laid down that (1) a person who has power by the exercise of voting rights in accordance with the constitution of a company to carry a resolution at a general meeting has a controlling interest within the meaning of that phrase in the Acts in question, and (2) it is immaterial whether or not his exercise of that voting power can be controlled either by co-trustees or through appropriate proceedings by order of the court.

The decision of this House in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[21] clearly establishes the first of these propositions. In that case the directors in their own right held less than a majority of the voting powers, but three of them as trustees held enough shares to make up the balance, and it was held that their votes in respect of the joint holding should be aggregated with the individual holdings of the directors in determining whether the directors had a controlling interest. As Lord Russell of Killowen said: "the words 'controlling interest' mean "'controlling voting power': that is the interest in view, not "beneficial interest." But as the trustees were all directors the House did not have to consider what the position would be if only one of the trustees had been a director of the company. This kind of question arose in the Court of Session in *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners*.[22] In that case more than half the share capital of a company was held by the trustees of the will of a former governing director of the company. The voting rights in respect of these shares resided under the company's articles of association in the trustee first named on the company's register, except on the occurrence of an event which at the material time had not happened. The trustee whose name appeared first on the register was never a director of the company, and it was held that in these circumstances the directors did not have a controlling interest in the company, notwithstanding that one of the other trustees was a governing director of the company and might have secured for himself the majority of the voting powers. This decision is, of course, not binding on your Lordships, but I respectfully agree with it and, in my opinion, the second of the propositions I have stated is a reasonable deduction from it.

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[21] 29 T.C. 167, 178.

[22] 1950 S.C. 441.

Some reliance was placed by the appellants on the decision in your Lordships' House in *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners.*[23] In that case it was held that in determining whether company A held a controlling interest in company C, it was permissible to take into account indirect control through company B. In my opinion, this decision does not conflict with the decision in *Bibby's* case.[24] In *Inland Revenue Commissioners* v. *Silverts Ltd.*[25] the present Master of the Rolls (Lord Evershed) considered at length the relationship between the decisions in *Bibby's* case [26] and the *British American Tobacco* case,[27] and I agree with him that there is no conflict between the two. He summed up his conclusion of the point in these words [28]:

"In our opinion, this result involves no conflict with the "*British American Tobacco* case.[29] Although (as already stated) "the formula 'controlling interest' ought to be treated as being "used in the same sense in both the Act of 1937 and of 1939, "namely, in the ordinary sense of the English language, yet (as "observed by Romer J.) the questions posed in the *British* "*American Tobacco* case [30] and in the *Bibby* case [31] were different. In neither case was the question the general one 'who "'controls the company?' In the *British American Tobacco* "case [32] the question was whether (in the ordinary and proper "sense of the words) company A held a controlling interest in "company C, though the control was exercised not directly but "indirectly through the agency of company B. If the question "were raised under some other taxing provision 'Has company B "'a controlling interest in company C?', an affirmative answer "to that question might be given consistently with the affirmative "answer to the first question in the *British American Tobacco* "case.[33] So in the *Bibby* case [34] and in the present case, the "question 'Have the directors a controlling interest in the com"'pany?' falls to be answered, aye or no, without regard to the "possible question (if asked) whether some other person or body "has (indirectly) a controlling interest in the same company."

If, therefore, section 55 (1) had spoken of the deceased having a controlling interest in a company and had stopped there, the decisions I have cited would be conclusive in the respondents' favour. The appellants, however, say that the wording used in section 55 (1) is " control of " and not " controlling interest in." If that were all, I should be content to say that it seems to me to be a distinction without a difference, but the section goes on in subsection (3) to specify in what circumstances for the purposes of the section a person is to be *deemed* to have had control of a company. It is said that subsection (3) is a definition section, and that the deceased did not fall within any branch of that definition. The use of the word " deemed " seems to me inappropriate to a definition section, and I should be inclined to agree with Romer L.J. that it is supplementary to or expansive of subsection (1) and not merely expository thereof. If that be the correct view, I should, for the reasons I have already given, be of opinion that the present case falls within subsection (1). But even if I am wrong and subsection (3) is to be treated as an exhaustive definition, I should still be of opinion that this appeal fails for the reasons given by the Master of the Rolls. He sums them up in four paragraphs, and I would respectfully adopt what he there says.[35]

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[23] [1943] A.C. 335.
[24] 29 T.C. 167, 178.
[25] [1951] Ch. 521.
[26] 29 T.C. 167, 178.
[27] [1943] A.C. 335.
[28] [1951] Ch. 521, 532.
[29] [1943] A.C. 335.
[30] Ibid.
[31] 29 T.C. 167, 178.
[32] [1943] A.C. 335.
[33] Ibid.
[34] 29 T.C. 167, 178.

Lord Bledisloe relied on subsection (5) of section 55 as showing that the court had to look behind the register to decide whether control was held in a fiduciary capacity; but, in my opinion, that subsection does not assist him since it is quite consistent with the view that the register is the determining factor in deciding whether a deceased had control.

The respondents relied in the alternative on subsection (4) of section 58. Like the Master of the Rolls, I find that subsection difficult to construe, and am glad to have reached my conclusion independently of it.

One matter has given me some anxiety and that is the effect of your Lordships' decision in this case on a case where a majority holding in a company is registered in the name of B, who is a bare trustee for a deceased A. Lord Greene M.R. was of opinion in *Bibby's* case[36] that the controlling interest in such a case would be held to be in A. With that view I sympathise, but their Lordships preferred, in *Bibby's* case,[37] to reserve that case for decision when the point should arise. It is probably best to take the same course now.

Finally, let me cite the observations made in *Bibby's* case[38] by my noble and learned friend on the Woolsack: " Those who by " their votes can control the company do not the less control it

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[35] [1959] Ch. 659, 671, 672.

[36] 29 T.C. 167, 173, C.A.

[37] Ibid. 181, 184, 185, H.L.

[38] Ibid. 184, 185.

"because they may themselves be amenable to some external "control." Despite the change in language in section 55, these words seem to me applicable to the present case, and for the reasons I have given I would dismiss the appeal.

Lord Keith of Avonholm. My Lords, it is common ground that the company in which the deceased held shares at his death was a company to which section 55 of the Finance Act, 1940, applied, and the sole question is whether the deceased had control of the company within the meaning of that section at any time during the five years ending with his death.

Control might arise in various ways under the section, but the only control which the Revenue claims that the deceased had is voting control in the affairs of the company. The shares which the deceased held beneficially were insufficient to give him voting control, but if it is permissible to consider the voting power which he had as the senior, by virtue of order of registration in the register of members, of four joint holders of shares under a settlement made by the deceased, and to add this voting power to that which he had in respect of the shares held beneficially, then he had clear voting control.

If the judgment of this House in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[39] applies, there is only one answer. He had full voting control. But that decision was given with reference to a different statute, the Finance (No. 2) Act, 1939, concerned with excess profits tax, and the matter under consideration was "controlling interest" of directors in their company. There was no elaboration of the words "controlling "interest" as there is of "control of a company" in the Act of 1940, and the words had be construed standing as they were by themselves, except for the general context provided by the subject-matter of the statute.

In the present case Danckwerts J., whose judgment has been reversed by the Court of Appeal, found himself able to distinguish the case of *J. Bibby & Sons*[40] on the ground that, in the statute then under consideration, there were no provisions which required investigation, as here, beyond and outside the mere position of the shareholder on the company's register. In the present case he found in sections 55 (5) and 58 (5) provisions which called for investigation of the real situation outside the statutory machinery for administration of company control. So examining the matter

[39] 29 T.C. 167, 178.

[40] Ibid.

he found the control to reside in the four trustees who held the shares under the settlement, and not in the senior of these four persons as entered in the company's register.

I find, however, in these provisions indications more adverse to the appellants than favourable to them. If under the settlement the shares settled had been an absolute majority of the shares of the company it seems clear, in my opinion, that the voting power thus exercisable should be treated as showing control by the settlor if he had that control by virtue of being, or becoming, sole trustee, or being entered in the register of the company as the senior of the shareholders in whose names the trust shares were registered. In such a case there seems no room for the consideration that appealed to Danckwerts J. that the control exercisable by the settlor is not his free and unfettered power to vote but a power exercisable only on the unanimous decision of the four registered shareholders. Section 58 (5) would be meaningless on that view. In effect, it says that fiduciary shares shall not be disregarded for the purposes of the statute where they give control of the company and were created by the person having that control.

Control from outside is thus not, in my opinion, an answer to the Revenue, where the settlor has controlling voting power in respect of fiduciary shares. Nor is there anything in the statute that suggests that outside control is to be regarded where the holding of fiduciary shares is less than sufficient to give, of itself, voting control in the company. It is, I think, a possible construction of subsection (5) of section 58 that control of a company which a person had in a fiduciary capacity does not mean absolute control in a fiduciary capacity, but control which a person can exercise by the use of fiduciary shares, so that, when added to the shares held by him beneficially, they give him voting control. But apart from this construction, I think that once appeal to outside control is rejected there is no answer to the contention that this case is governed by the judgment in *J. Bibby & Sons'* case.[41] It would be a most anomalous position if fiduciary shares were to be taken into account where they were a majority of the shares issued by the company and were to be rejected when they were a minority.

If the Act of 1940 had been passed after the judgments in this House in the cases of *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*[42] and *J. Bibby & Sons*[43] it may be that the Act would have taken a different form. It seems, however, to have anticipated some of the problems that were discussed in these and kindred cases, and to have met them by the terms of section 55 (3). It is, however, only by a forced construction that subsection (3) could, in my opinion, be taken to apply to the exercise of voting power in respect of shares held either in a beneficial, or in a fiduciary, capacity. I incline, therefore, to the view that subsection (3) is not a definition of the meaning of "control of a company" under subsection (1) but an extension of the meaning under that section. On either view, however, the appellants, in my opinion, must fail. If it is a definition section it must cover direct voting power in respect of shares held beneficially, if only on the principle that the greater must include the less. And if it includes such voting power it must equally, on the ratio of *J. Bibby & Sons*,[44] include voting power exercised through the holding of fiduciary shares.

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[41] 29 T.C. 167, 178.

[42] [1943] A.C. 335.

[43] 29 T.C. 167, 178.

Reference was made to section 58 (4) of the statute. This is a somewhat obscure provision, which I am inclined to read as meaning broadly that anything done relevant to the statute is to be treated as done by a person, whether done by him alone or jointly with another, or by another at his direction, or by a company of which he has control within the meaning of section 55 (3). In the matter of control of a company under section 55 it excludes a defence that control by an individual must be exercisable by him directly and personally. I find it unnecessary, however, to examine this provision more closely, for it has no relevance, in my opinion, to the facts of this case.

I would dismiss the appeal.

LORD DENNING. My Lords, Tom Shipside died on December 15, 1955. The question is whether, during the last five years before his death, he "had the control of" a company called T. Shipside Ltd.: for the amount of estate duty depends on it. T. Shipside Ltd. had issued in all 8,350 shares. Up till 1936 Tom Shipside held 4,750 of these shares. That is 57 per cent. So he undoubtedly at that time had control of the company. But in 1936 he settled 3,650 of the shares on his wife and children: and it is said that by this settlement he deprived himself of the control of the company. He may have deprived himself of control *in law*—that we have to consider—but it is open to question whether he deprived himself of control *in fact*: for he named, as trustees of the settlement, himself Tom Shipside, his wife Mary Shipside, and his solicitor, Mr. Eccleston. Some years later, in 1948, his solicitor retired from the trust: and he and his wife appointed two new trustees, namely, his son Thomas William Shipside, and a trusted adviser, Mr. Hopkins. These family arrangements may have been significant in law, but the Master of the Rolls doubted their significance in fact. "It appears to "me," he said,[45] "at least highly likely that the conduct and "management of the company's affairs remained (and may even "have been intended to remain) after the settlement exactly the "same as it had been before."

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[44] 29 T.C. 167.

The contention of Barclays Bank, the executor of Tom Shipside's estate, was simply this: Whereas Tom Shipside had control of the company before 1936, he ceased to have control after 1936 because he was then only one out of three or four trustees. It is nothing to the point, so it is said, that he, his wife and son were counted among these trustees. He could not vote on any question without the concurrence of his co-trustees: and if he was minded to vote contrary to their wishes, they could get an injunction to stop him.

To this the Commissioners of Inland Revenue made answer that, when the 3,650 shares were registered in the books of the company, in the names of the trustees of the settlement, Tom Shipside was the first name recorded in the register: and the company under its articles was bound to accept his vote to the exclusion of the votes of the other trustees. The company could not be expected to inquire whether he had obtained the concurrence of his co-trustees, or whether any injunction had been granted against him. It had to accept his vote, when tendered for the joint holding of 3,650 shares, just as it had to accept his vote for his sole holding of 1,100 shares. So he had control, say the commissioners, by reason of being first-named on the register. If he had put the name of his wife or son first on the register (as he might easily have done) it would have made all the difference. He would not then have had the control of the company.

My Lords, I find those arguments on either side equally unattractive. I feel like exclaiming "A plague on both your "houses!" The argument of the executor means that a man who holds a majority of shares can always rid himself of the control of a company by making his wife, or some other member of his family, a joint holder with himself of the shares. The argument of the commissioners means that a man, who is a joint holder of shares with his wife, has control if he puts his own name first on the register, but not if he puts his wife's name first. I do not think that Parliament intended to enact anything so haphazard or so open to abuse. It must have intended to deal with joint holdings of shares: and the only place where it has done so is section 58 (4) of the statute. It seems to me that a reasonable interpretation of that subsection will cure all the difficulties presented by the rival contentions. This point—the "new point" raised by the Crown for the first time in the Court of Appeal—is, to my mind, the answer to the difficulties. But I cannot explain it without first making a survey of section 55.

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[45] [1959] Ch. 659, 673.

Section 55 is dealing with the position of a person who has died—"person" in the singular, not in the plural—and it is, to my mind, both intelligible and comprehensive when it is applied to a man's own holdings of shares without regard at this stage to his joint holdings. It contains a definition, or what I regard as a definition, of the circumstances in which a person will be held to have had control of a company. The definition is given in section 55 (3). The word "deemed" there simply means "held." The subsection is to be read as if it said: "For the "purposes of this section a person shall be *held* to have had "control of a company at any time if . . ." You must remember that the draftsman here is seeking to explain, not the meaning of a single word, but the meaning of the entire phrase: "a person" who "had the control of a company at any time." A very natural way of explaining such a phrase is to use words to convey what it is to be *understood* to mean; or *considered* to mean; or, if you like, what it is to be *deemed* to mean; for the purposes of the section. If you should try to explain the phrase yourself, you will, I suggest, soon find yourself slipping into the words of the draftsman here or something very like them. "Deemed" is not used in the technical sense which a lawyer uses when he "deems" black to be white. It is used in the sense which an ordinary man uses when he "deems" a spade to be a spade. The Shorter Oxford Dictionary says that the ordinary current sense of "deem" is "to form the opinion, be of opinion; to "conclude, consider, hold."

Furthermore, the draftsman has himself shown that he intended it to be a definition. In section 58 (4) he speaks of "a company of which he had control within the meaning of "section 55 (3)." Clearly the draftsman there regards section 55 (3) as giving a *meaning* to the phrase: "a person who had control "of a company." Surely, when one gives a meaning to a phrase, one defines it.

I do not see that any difficulties arise from regarding section 55 (3) as a definition. Quite the reverse. The words used are apt to cover all the many cases of a single holder, which Parliament must have intended to cover. A man has control of a company not only when he has the majority voting power by means of shares in his own name; but also when he has it by means of shares in the name of a nominee; and also when he has it by means of some shares in his own name and others in the name of a nominee.

Naturally enough, too, the legislature had to deal with the case where a man holds shares in a fiduciary capacity as being a sole trustee for others. Such shares, which he holds as trustee, may be so numerous as by themselves to give him control: or, although not numerous, they may, when added to others which he holds beneficially, be sufficient to tip the scale and give him control. Section 55 (5), as I read it, provides that such control, gained by reason of a trustee holding, is not to count for the purposes of this section. He has, then, control only in a fiduciary capacity: and such control is to be disregarded.

But stay a moment. Suppose that he himself, although a trustee of the shares, was really the founder of the trust—put up the money for it, so to speak—so that he is sole trustee of his own funds, settled maybe on his wife and family. Where that happens, he is, often as not, wearing a cloak marked "trustee" as a cover for his own dispositions. Parliament has, in section 58 (5), thought of this also. It says shares so marked by him as "trustee" are to count as if they were his own. If he gains control by means of trustee shares created by himself—by his own disposition—he has control of the company.

So Parliament seems have thought of most, if not all, contingencies affecting a single holder. But suppose a man is not sole owner of shares, but is only joint owner: or is not sole trustee, but is jointly trustee with others. A good instance is where a man founds a trust and puts the shares, not into his own name alone as trustee, but into his own name jointly, let us say, with the name of his wife and others whom he knows will carry out his wishes. All of them are trustees but no one can doubt that the founder has in practice control of the company just as much as if he was sole trustee. Has not Parliament dealt with joint holdings?

I am clearly of opinion that Parliament has considered joint holdings and provided for them. It has done so in section 58 (4). It says that whenever the Act refers to a "disposition," "power," or "any other act" being made, exercised or done *by any person*, it includes cases when it is made, exercised or done *by him and another jointly*. The subsection does not in terms say that when the Act refers to "control being had" by any person, it includes control which is had by him and another jointly. But it is, to my mind, sufficiently comprehended. The phrase "control being had" is ejusdem generis with the phrase "power "being exercised," and it is, I think, included in the generic words "any other act being done." "Control" is for many purposes used as synonymous with "power," and Parliament must have intended to put them both on the same footing. A good illustration is section 55 (5) which says that "control" which a person had in a fiduciary capacity shall be disregarded. That must have been intended to cover, not only the case when the majority voting power is in the hands of a sole trustee, but also the far more common case when settled shares are held by two or more trustees jointly. And it can only cover that case if "control" is comprehended within section 58 (4) as well as "power." Take also the concluding words of section 55 (3). It includes the words "power exercisable" by a person. It shows that *potential* control by one person *jointly* with another is to be regarded as giving him control of the company for the purposes of the section. If *joint potential* control is enough, should not *joint actual* control suffice?

These considerations lead me to the conclusion that, as a consequence of section 58 (4), a man who has control of a company *jointly* with others has control of the company for the purposes of section 55 and his assets must be valued accordingly. If he holds the joint holding in a fiduciary capacity only, it does not count. But if he holds it beneficially, or is himself the founder of the joint holding, having created it by his own disposition, then it counts as giving him control just as if he were a single owner. This seems to be a sensible and just conclusion and to be in conformity with the intention of Parliament. It means that Tom Shipside in this case had control of the company—not by virtue of the mere chance that his name came first on the register—but by virtue of the fact that he was the founder of the settlement and one of the joint holders of it.

My Lords, I am almost shy of attaching so much weight to section 58 (4): for I am well aware that the Master of the Rolls found it inelegant and obscure. Its language was, he said, almost offending. And even Romer L.J. found it bewildering. So be it. If it is to be approached literally, I would find the same. But where I differ is that I think we should not place so much emphasis on the literal wording of it. We should seek rather to find the object which Parliament had in mind when it enacted it. And this I have no doubt about. The object was to make sure that, whenever the Act referred to a single person doing something or other, it covered him also when he was one of several doing it jointly. Seeing that is its object, I would do my best to effectuate it, even in a taxing statute, especially when the contrary view leads to such untoward results.

If I were wrong in my interpretation of section 58 (4), then I would have been in favour of allowing the appeal: for I agree with my noble and learned friend, Lord Reid, in thinking that "control" in this Act means real control and not apparent control. I am not prepared to subscribe to the view that a man who is a nominee or a bare trustee has control of a company. It seems to me, as it did to Lord Greene M.R. and his brethren in the Court of Appeal in *Bibby's* case[46] that in such a case the control would naturally be said to be in the beneficial owner and not in the nominee or bare trustee. Nor am I prepared to subscribe to the view that, on a joint holding, the control is in the person whose name comes first on the register. I would be in favour of looking beyond the first name on the register so as to see where the real control rests: and I would be prepared to find it in all the joint holders concurrently, as Danckwerts J. did in this very case. I would not, therefore, have found that the deceased Tom Shipside had control of the company but for the provisions of section 58 (4) of the Act: and it is only by virtue of this that I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Gibson & Weldon; Solicitor of Inland Revenue.*

J. A. G.

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[46] 29 T.C. 167, 178.

[HOUSE OF LORDS.]

LORD CITRINE (OWNERS) . . . . APPELLANTS;
AND
HEBRIDEAN COAST (OWNERS) . . . RESPONDENTS.

1959
June 3, 4, 19.

Lord Merriman P.

C. A.

1960
Feb. 22, 23, 24;
March 10.

Hodson, Willmer and Devlin L.JJ.

H. L. (E.)*

1960
Nov. 16, 17;
Dec. 21.

THE HEBRIDEAN COAST.

Shipping—Collision—Damages for detention—Damaged ship owned by public authority—Not profit-earning—No other ship chartered to replace damaged ship—Measure of damages—Assessment of actual loss—Rate of interest on capital.

Ships' Names—The Hebridean Coast.

In 1951 a collision occurred between the *Lord Citrine,* a collier owned by the appellants, and a ship of the respondents, causing damage to the former. The respondents admitted liability for the collision and consented to a reference to assess damages in respect of loss by detention for 11½ days, quantified by the appellants at £2,032 on the basis of the cost of chartering other shipping to replace the *Lord Citrine.* The registrar found that of the sea-borne coal supplied to the appellants during the year in question about half was carried in their own ships, the rest being carried in chartered ships, and that the appellants' ships could not have carried the whole of the sea-borne coal. During the detention period none of the appellants' ships was idle. The appellants were using a number of chartered ships at the time, but no specific ship could be said to have taken the place of the *Lord Citrine.* The registrar held that the appellants had failed to show that they had chartered tonnage to replace the ship and that interest on capital was therefore the only available measure of damages, but he adopted a rate of interest of over 30 per cent. on the agreed value of £207,500, which would produce the sum of £2,032. Lord Merriman P., whose decision the Court of Appeal affirmed, held that interest on the capital value was the true measure of damages, but that the rate adopted was inordinate and should be reduced to 7 per cent. On appeal to the House of Lords:—

Held, that the measure of damages should be based on interest on the value of the ship and not on a calculation of the cost of carrying in chartered tonnage the coal which the *Lord Citrine* would have carried.

It was not proved that the loss of the ship resulted in the appellants having to use chartered tonnage. The finding that none of the appellants' ships was idle did not exclude the possibility that they were not being used to their full capacity and so were able to carry the very small proportion of the total coal carried during the remainder of the relevant period, which the *Lord Citrine* would have carried during the detention period.

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* *Present*: LORD REID, LORD MORTON OF HENRYTON, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST.

Steam Sand Pump Dredger No. 7 (Owners) v. *Greta Holme (Owners)* [1897] A.C. 596; 13 T.L.R. 552, H.L. and *Admiralty Commissioners* v. *Susquehanna (Owners)* [1926] A.C. 665; 42 T.L.R. 639, H.L. applied.

Decision of the Court of Appeal, post, p. 552; [1960] 3 W.L.R. 29; [1960] 2 All E.R. 85 affirmed.

APPEAL from the Court of Appeal (Hodson, Willmer and Devlin L.JJ.).

This was an appeal from an order of the Court of Appeal by which the court unanimously dismissed the appeal of the appellants, the owners of the steamship *Lord Citrine*, a collier, and affirmed the decision of Lord Merriman P., whereby he upheld the motion in objection of the respondents, the owners of the motorship or vessel *Hebridean Coast*, to the registrar's decision and varied that decision. The appellants were the plaintiffs in the action and the respondents were the defendants.

The plaintiffs were the Central Electricity Generating Board established under the Electricity Act, 1957, in place of the Central Electricity Authority, whose general duties and powers were controlled by the Electricity Act, 1947. Section 36 of the latter Act provided that "It shall be the duty of the Central "Authority so to exercise and perform their functions under this "Act, including their functions in relation to Area Boards, as to "secure that the combined revenues of the Central Authority "and all the Area Boards taken together are not less than "sufficient to meet their combined outgoings properly charge-"able to revenue account taking one year with another."

On December 23, 1951, the *Lord Citrine*, which was employed by the Central Electricity Authority in carrying coal for the generation of electricity in the London area, sustained damage as the result of a minor collision off Cromer with the defendants' vessel *Hebridean Coast*, and on March 31, 1952, the defendants admitted liability for this collision.

By an agreement dated July 19, 1955, the defendants' solicitors consented to a reference to assess that part of the plaintiffs' claim which had not been admitted or agreed, and by October 30, 1958, when the reference before the registrar took place, the only item which had not been agreed was that in respect of loss by detention for 11½ days, quantified by the plaintiffs at £2,032. The agreed items covered not only the cost of repairs but the cost of running the ship during the period of detention, and the dispute between the parties was as to the basis upon which the claim for detention should be treated. The defendants contended that since the plaintiffs were not a trading body interest on capital was the right basis, but the plaintiffs contended that their claim was not so limited. In a letter dated June 14, 1954, the plaintiffs stated: " . . . we are unable to agree with your view that the " British Electricity Authority is not a trading body, and that " the *Lord Citrine* is not to be regarded as a profit-earning ship. " However, even if you are right as to this, it is quite clear in " our view that interest on capital value is not the proper basis " for the allowance for loss of use but that our clients must then " be entitled to recover the cost of chartering other shipping space " to carry the coal which the *Lord Citrine* would have carried if " she had not had to be stopped for repairs. . . . Since it was, " as stated above, essential that all the coal allocated should be " carried, as this was in fact done, and as the Authority's own " ships could not have done it in any case, the lay-up of the *Lord* " *Citrine* necessarily involved extra chartering for which they " have had to pay. Although the exact replacement ships cannot " be identified in the circumstances, it seems to me that the " amount of our clients' loss on a chartering basis can doubtless " be arrived at roughly by calculating what quantity of coal she " would have carried during the detention period from the average " cargoes on the six voyages (of which you have particulars) and " from the times occupied by those voyages (of which you also " have particulars) and ascertaining the cost of hiring other ships " to carry that quantity. . . ."

The facts found by the registrar were as follows: For the year in question the National Coal Board provided only 87 per cent. of the quota allocated to the plaintiffs. The quantity short-delivered was no less than 1¼ million tons. Of the coal delivered, 25 per cent. was sea-borne, and of that fraction 45–50 per cent. was carried in the plaintiffs' own vessels, while the remaining 50–55 per cent. was carried in chartered tonnage. The plaintiffs' own ships could not have carried the whole of the sea-borne coal actually received. Ten large vessels were regularly employed by the plaintiffs on long-term charters, while other vessels were employed as required on short-term or on " spot " charters. None of the plaintiffs' own vessels was idle during the detention period, and if the *Lord Citrine* had not been under repair she would not have been idle. At no time during the winter of 1951–52 were the plaintiffs not chartering vessels additional to the long-term charter vessels; but no specific vessel could be said to have taken the place of the

Lord Citrine during the detention period in order to carry the coal which she would have carried if she had not been under repair. It was cheaper for the plaintiffs to carry coal in their own vessels than in chartered vessels, and there was no question of the plaintiffs chartering their own vessels or sub-chartering the chartered vessels to anyone else. While it was customary to build up stocks of coal at each station during the summer and to run down stocks in the winter, the situation in the winter of 1951–52 was normal, and there was no under-stocking or over-stocking at all.

In his report the registrar held that the plaintiffs had failed to show that they had chartered tonnage to replace the *Lord Citrine*, and that interest on capital was therefore the only available measure of damages, but he adopted a rate of interest on the agreed value of £207,500 which would produce the sum of £2,032 claimed by the plaintiffs on the basis of the charter of alternative tonnage. This rate amounted to over 30 per cent.

The defendants on this motion asked that the registrar's decision be varied on the grounds that: (a) the registrar was wrong in law in that after disallowing the plaintiffs' claim, based on charter rates less savings, he awarded them such a rate of interest as to produce the same result; (b) he failed to distinguish between a profit-earning vessel and a non-profit-earning vessel; (c) in fixing the rate of interest he improperly had regard to evidence concerning profit-earning vessels, and (d) he misdirected himself in awarding a rate of interest of over 30 per cent., which was grossly excessive and contrary to the practice of the court.

Waldo Porges Q.C. and *R. F. Stone* for the plaintiffs.
Kenneth Carpmael Q.C. and *Peter Bucknill* for the defendants.

The following case was referred to in argument, in addition to those cited in the judgment: *Admiralty Commissioners* v. *Chekiang (Owners)*.*

Cur. adv. vult.

1959. June 19. LORD MERRIMAN P. read the following judgment, in which he stated the facts found by the registrar, holding them justified by the evidence, and continued: It is well settled that the fact that a ship is owned by a public authority, or is not "profit earning," does not disentitle the owner from claiming damages; and that such damages are not merely nominal: *The Greta Holme*.[1] If it is necessary to charter alternative tonnage to replace the damaged vessel, the amount chargeable for the period may be recovered. Alternatively, if the owners are able to provide a substitute out of their own resources, as in the case of the spare lightship (see *The Mediana* [2]), an amount may be recovered for the notional hire of the substitute as special damage. Failing any other measure, damages may be computed at a reasonable rate of interest on the value of the vessel, after taking depreciation into account, for the period during which the owner is deprived of her services.

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* [1926] A.C. 637; 42 T.L.R. 634.

[1] [1897] A.C. 596; 13 T.L.R. 552.

The registrar held that if the plaintiffs have to show that they chartered other tonnage to replace the *Lord Citrine* he did not think that they had succeeded in doing so; though it seemed to him quite likely that they did in fact do so. On the contrary, he held that he was driven to the conclusion that interest on capital was the only available measure of damages, however artificial and unsatisfactory it might be. But he was prepared to adopt the rate of interest on the agreed value of £207,500 which would produce the figure claimed on the basis of the charter of alternative tonnage, namely, £2,032. On this basis the rate of interest works out at over 30 per cent.

I agree with the finding that the plaintiffs did not succeed in showing that they had chartered tonnage to replace the *Lord Citrine*, but I disagree with the suggestion that it is quite likely that they did so; and I do not approve of the allowance of the identical sum of £2,032 by way of interest on her capital value.

The plaintiffs' case is based mainly on one passage in Lord Warrington's speech in *The Ikala*,[3] in which it was the loss incurred by a profit-earning ship that was in question. Having expressed the clear opinion that the evidence was not sufficient to establish that the appellants found it necessary to provide extra tonnage equivalent to 13 days' use of their injured vessel and that in consequence of such necessity they did in fact provide it, Lord Warrington proceeded as follows [4]: "But this does not dispose of the question. Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the *Strathfillan*, the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention."

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[2] [1900] A.C. 113; 16 T.L.R. 194; 44 S.J. 259.

[3] [1929] A.C. 196.

[4] Ibid. 211.

But he held, agreeing with the Court of Appeal, that the evidence was not sufficient to justify the inference in question.

It is true, as the registrar points out, that the view of the facts which had prevailed up to the time when the case was heard in the House of Lords, and on which Lord Warrington held that the inference could not be drawn, turned out to be erroneous. Accordingly, *The Ikala*[5] affords little or no guidance as to the kind of evidence which would support such an inference.

In substance it was sought to apply this passage in Lord Warrington's speech by the argument that having regard to the percentages of coal carried in the plaintiffs' own colliers, and in chartered vessels respectively, it followed that whatever quantity of coal was actually received by the plaintiffs during the year, the necessary inference was that of the total amount the proportion carried by chartered vessels, as against the proportion carried by the plaintiffs' own colliers, was increased by the *Lord Citrine* being detained for the 11½ days.

In my opinion, however, it is vital to recall the observations of Lord Dunedin and Lord Sumner in *The Susquehanna*.[6]

In his opinion in that case Lord Dunedin emphasises[7] the difference between special damage which must be averred and proved and general damage, the quantification of which is a jury question. Lord Sumner, having commented that the whole suggestion of chartering at the time of the detention was pure speculation, pointed out[8] that as the Admiralty, the owners of the damaged vessel, had got through their work without her, they could not get damages based on the use of a stand-by when, in fact, they did very well without one; and he added[8]: "In no "case can this be matter of presumption." With this he contrasted[9] cases in which the principle of *The Greta Holme*[10] might be applied with such rates of interest and depreciation as the evidence might justify.

Moreover, in his opinion in *The Greta Holme*,[10] Lord Herschell drew a marked distinction between the cost of hiring an alternative dredger and the loss of the interest on the money spent on the purchase of the damaged vessel. This distinction clearly emerges in the following passage[11]: "If the appellants had hired "a dredger instead of purchasing one, and had during the months "they were deprived of its use been bound to pay for its hire,

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[5] [1929] A.C. 196.
[6] [1926] A.C. 655; 42 T.L.R. 639.
[7] [1926] A.C. 655, 661, 662.
[8] Ibid. 663.
[9] Ibid. 664.
[10] [1897] A.C. 596.
[11] Ibid. 605.

"it cannot be doubted that the sums so paid could have been "recovered. How can they the less be entitled to damages "because, instead of hiring a dredger, they invested their money "in its purchase? The money so invested was out of their "pockets, and they were deprived of the use of the dredger, to "obtain which they had sacrificed the interest on the money "spent on its purchase. A sum equivalent to this, at least, they "must surely be entitled to."

In this passage Lord Herschell was clearly laying down that the loss of interest on the capital value was a measure of damages essentially different from that which would have been recoverable had the plaintiffs been able to prove special damage in hiring another dredger.

In my opinion, having regard to the evidence it is not legitimate to infer that the coal which might otherwise have been carried by the *Lord Citrine* during the 11½ days was carried by chartered tonnage; or, if so, that it was necessary to do so. Certainly there is no evidence that there was any special chartering for the purpose; or that such "spot" charters as were made for special deliveries had any connection with the detention of the *Lord Citrine*.

To my mind, the fair inference from the evidence as a whole is that such coal as was carried in chartered vessels during the 11½ days was carried in this way in the normal course, and that there was no necessity, as a matter of business, to make any special arrangements to replace the *Lord Citrine* for that period.

It seems to me that, having rightly rejected that particular head of special damage, it was wrong in principle for the registrar to award the identical amount by way of interest on the capital value. The two measures of damage are quite distinct, and should not be confused.

Admittedly the question of the rate of interest to be allowed on capital is a matter for discretion, but the rate at which the present award works out seems to me to be inordinate.

It was agreed that 5 per cent. is usually allowed, but there is at least one reported instance of the allowance of 7 per cent., *The Marpessa*.[12] I think that this is a case in which a generous rate is justified. Accordingly, I allow the appeal, and vary the registrar's award by substituting for the sum of £2,032 interest at the rate of 7 per cent. on the agreed depreciated value of £207,500 for 11½ days.

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[12] [1907] A.C. 241; 23 T.L.R. 572.

C. A.
1960
The Hebridean Coast.

On December 17, 1959, the plaintiffs applied to Lord Merriman P. to amend his award so as to include therein a sum of £214 17s. 2d. in respect of depreciation, which was agreed between the parties to be a valid item of claim, but which had not been drawn to the attention of Lord Merriman P. on the motion in objection. This application was refused on the ground that the item should have been mentioned on that motion.

The plaintiffs appealed against the award of Lord Merriman P.

Sir David Scott Cairns Q.C., *Waldo Porges Q.C.* and *R. F. Stone* for the plaintiffs.

Kenneth Carpmael Q.C. and *Peter Bucknill* for the defendants.

The following authorities were referred to in argument, in addition to those cited in the judgment: Roscoe on The Measure of Damages in Actions of Maritime Collisions, 3rd ed., pp. 99, 104; *Strand Electric and Engineering Co. Ltd.* v. *Brisford Entertainments Ltd.*[1]; *Admiralty Commissioners* v. *Valeria (Owners)*[2]; *The Soya*[3]; *Sunley & Co. Ltd.* v. *Cunard White Star Ltd.*[4]

Cur. adv. vult.

1960. March 10. The following judgments were read.

Hodson L.J. stated the facts and continued: The defendants have sought to criticise these findings of fact upon the footing that the witnesses who spoke to them were not in a position to know and indeed admitted that the details of the chartering and the working out of the programme for the winter 1951–52 were not known to them. This court should, however, in my opinion deal with the appeal on the basis of the facts as found and not on some other basis which may or may not be more favourable to the defendants.

The registrar held, and the President confirmed, that the plaintiffs had failed to show that they had in fact chartered other tonnage to replace the *Lord Citrine*.

The amount of coal involved which would have been carried by the *Lord Citrine* during the detention period, about 5,000 tons, was relatively small in proportion to the amount involved in the winter programme, about 5,000,000 tons, and the plaintiffs were unable to show that they chartered any other tonnage to replace the *Lord Citrine* during the period. I do not see any ground for interfering with the concurrent findings of the President and the registrar to this effect. The plaintiffs, therefore, fail to prove as an item of special damage that they have had to charter other space to replace the *Lord Citrine*.

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[1] [1952] 2 Q.B. 246, C.A.; [1952] 1 T.L.R. 939; [1952] 1 All E.R. 796, C.A.

[2] [1922] 2 A.C. 242.

[3] [1956] 1 W.L.R. 714, C.A.; [1956] 1 Lloyd's Rep. 557; [1956] 2 All E.R. 393.

[4] [1940] 1 K.B. 740, C.A.

The contention of the plaintiffs was, however, that although they could not point to exact replacement of ships, yet it must necessarily follow that the *Lord Citrine's* coal was carried on such hired ships and damages should be measured on such basis. The plaintiffs contend that, even if they cannot establish replacement, hire charges are the appropriate basis for fixing general damages having regard to the operations of the authority which I have described. They say that they are for the purposes of this argument a commercial organisation and they ought to be treated in the same way as if they were a profit-making concern. They rely in particular on *The Ikala*,[1] a case which arose from a collision involving the plaintiff's vessel in 13 days' detention and had a long and chequered career, culminating in the Court of Appeal.[2] They sought to bring themselves within the language of Lord Warrington of Clyffe when he said[3]: "Though there was no "sufficient positive evidence of any chartering effected for the "purpose of supplying the tonnage lost by the detention of the "*Strathfillan*, the circumstances proved might have been such "that the tribunal would have been justified in drawing the "inference that a proportion of the chartered tonnage did in fact "supply the tonnage lost by the detention."

The President dealt with this submission as follows[4]: "In "my opinion, having regard to the evidence it is not legitimate "to infer that the coal which might otherwise have been carried "by the *Lord Citrine* during the 11½ days was carried by chartered "tonnage; or, if so, that it was necessary to do so. Certainly "there is no evidence that there was any special chartering for "the purpose; or that such 'spot' charters as were made for "special deliveries had any connection with the detention of the "*Lord Citrine*." In my judgment the President was right in this conclusion.

Lord Sumner, in the same case, pointed out[5] that it has to be proved that, in doing a shipowner the wrong of laying his ship

[1] [1929] A.C. 196.

[2] (1929) 35 Ll.L.Rep. 191, C.A.

[3] [1929] A.C. 196, 211.

[4] Ante, p. 551; [1959] 3 W.L.R. 569, 574.

[5] [1929] A.C. 196, 205.

idle at the time in question, work which she would otherwise have done during the time went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay. It is true that at the end of the day the plaintiff obtained judgment against the *Ikala* for a substantial sum,[6] but it was on the basis that she had not proved that she had chartered to replace but had given sufficient evidence to enable her value as a freight-earning ship—the amount of profit she may be presumed to be earning—to be ascertained so as to find out what 13 days' loss of that capacity is.

That was a case of a ship, not only a profit-earning ship but one earning enormous profits during war time, as the judgment of Scrutton L.J.[7] given in its last stage shows. The *Lord Citrine*, on the other hand, though a trading ship in one sense, is not and can never be a profit-earning ship "taking one year with "another," any more than the dredger in *The Marpessa*.[8]

The registrar having reached his conclusion, with which I agree, that the plaintiffs were not able to prove that they had chartered other tonnage to replace the *Lord Citrine*, reached the further conclusion, with which I also agree, that the *Lord Citrine* was not a vessel of a kind in regard to which rates of freight for comparable ships could be directly available as a measure of damages. Accordingly, he was driven to the conclusion that interest on capital was the only available method by which he could assess the damages.

In this I think he was right; but he was clearly wrong in producing the same result as if the plaintiffs had succeeded in their claim put forward on an owner's profit basis by awarding the same sum on an interest basis of about 30 per cent., which is on the face of it an inordinate rate. There is nothing in the speech of Lord Hailsham in *The Ikala*[9] or the judgment of Scrutton L.J. in the same case[10] which lends support to the view that the rate of interest can be adjusted so as to produce a figure which the plaintiffs have failed to establish by another route. As the President pointed out,[11] the two measures of damage contended for are quite distinct and should not be confused. I agree, therefore, with the President that the rate of interest must be at a reasonable rate. He fixed 7 per cent., saying that a generous rate was justified, and there is no cross-appeal against his decision by the defendants. The appeal of the plaintiffs should, in my judgment, be dismissed.

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[6] 35 Ll.L.Rep. 191, C.A.

[7] Ibid. 192–195.

[8] [1907] A.C. 241; 23 T.L.R. 572.

[9] [1929] A.C. 196, 197–201.

[10] 35 Ll.L.Rep. 191, 192–195, C.A.

[11] Ante, p. 551; [1959] 3 W.L.R. 569, 575.

The plaintiffs having sought to sustain the decision of the registrar on the basis that they were entitled to general damages on the basis of those awarded in *The Ikala*, or, alternatively, as interest at 30 per cent., and the defendants contending that the interest basis was right but the rate was inordinate, no sum for depreciation was added to that awarded for interest. This omission was only drawn to the attention of the President after the judgment had been given, and he subsequently refused to amend his award. Mr. Carpmael, on behalf of the defendants, has consented to a figure for depreciation being added to that for interest, on the basis of *The Marpessa*[12] (see the judgment of Sir Gorell Barnes P.[13]), and leave to appeal out of time against the subsequent refusal of the President to amend his award has been given. The figure to be paid out of court, therefore, will be increased by £214 17s. 2d. The plaintiffs must, however, pay the costs not only of the appeal but any additional costs occasioned by the supplemental notice of appeal.

WILLMER L.J. The witnesses could not point to any specific charter of any particular vessel as having been effected for the purpose of replacing the *Lord Citrine*. Nonetheless it was submitted that, since all the coal forthcoming was in fact carried, it was a necessary inference that the loss of carrying capacity caused by the detention of the *Lord Citrine* could only have been made good by the use of a chartered vessel which would not otherwise have been required.

It must be emphasised that the plaintiffs' claim for the cost of hiring alternative tonnage to do the work of the *Lord Citrine* was a claim for special damage. Although the plaintiffs are not engaged in trading for profit, there can be no objection in principle to such a claim. The right of a non-trading corporation to claim for the cost of hiring another vessel to do the work of the damaged vessel was specifically recognised by Lord Loreburn L.C. in *The Marpessa*.[14] But such a claim for special damage must be strictly proved and must be causally connected with the collision. As was said by Viscount Sumner in *The Ikala*[15]: "It "has to be proved that, in doing the shipowner the wrong of "laying his ship idle at the time in question, work, which she

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[12] [1906] P. 14, 95; affd. [1907] A.C. 241; 23 T.L.R. 572.

[13] [1906] P. 14, 28.

[14] [1907] A.C. 241, 244.

[15] [1929] A.C. 196, 205.

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"would otherwise have done during the time, went undone to "his measurable loss or was only done by resorting to other "expedients at a measurable outlay."

The first question on this appeal, therefore, is whether it was proved that the plaintiffs did in fact charter other tonnage in consequence of the *Lord Citrine* being laid idle during the period of the repair. The registrar thought not. He said in his reasons: "I do not think that if the plaintiffs have to show they chartered "other tonnage to replace the *Lord Citrine* they have succeeded "in doing so." The President came to the same conclusion.[16] The evidence to my mind falls far short of proving that other tonnage was chartered to replace the *Lord Citrine*. The carrying capacity lost by reason of the detention of the *Lord Citrine* amounted to no more than about one-thousandth part of the tonnage that had to be carried during the six-monthly period. There is nothing to show that that proportionately trifling loss was not easily absorbed by the work of the other vessels which the plaintiffs had at their disposal. Records produced by the plaintiffs showed that several of the ships at their disposal were in fact not engaged in carrying cargoes for substantial periods during the relevant six months. The witnesses called were quite unable to explain the reasons for these periods of apparent idleness. No doubt it was their misfortune that they were being asked about these details nearly seven years after the events took place, and it is easy enough to excuse and sympathise with their inability to remember. This, however, is no substitute for proof, and I can only say that in my judgment there was no proof that any tonnage had to be chartered to replace the carrying capacity lost by reason of the detention of the *Lord Citrine* or that the over-all tonnage of coal during the relevant period could not have been carried without such additional chartering.

I am clearly of opinion, therefore, in agreement with both the registrar and the President, that the claim for special damage on the basis of chartering alternative tonnage fails. The plaintiffs are left, accordingly, with a claim for general damages—for it has been conceded throughout that they are entitled to something by way of general damages for the laying up of their ship. The registrar, having held that the claim for special damage failed, proceeded nevertheless to award identically the same sum as claimed. This he described as interest on capital—which would involve a rate of interest of approximately 30 per cent. It appears to me that the registrar did not have in mind the distinction between general damages and special damage, and in this I think he fell into the same error as that of his distinguished predecessor, which was criticised by Viscount Dunedin in *The Susquehanna.*[17] He proceeded as if there had been proof of special damage, whereas he should have dealt with the question of general damages as a jury question. This is what the President did. Taking the view that a fair way of assessing general damages was on the basis of interest on capital, he held that the rate awarded by the registrar was inordinately high, and himself awarded a sum based on interest at the rate of 7 per cent., to which was added a further sum to cover maintenance and consumption of stores during the agreed period of 11½ days.

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[16] Ante, p. 551; [1959] 3 W.L.R. 569, 573.

In this court it has been argued that, even assuming no special damage was proved, the sum awarded by the registrar was a fair figure, in all the circumstances, as an award of general damages, and should not have been disturbed by the President. The argument put forward has been that the plaintiffs were deprived of the use of a valuable chattel, and the best way of estimating the value to them of that chattel is by reference to the market rates of freight prevailing at the time for comparable ships in comparable employment. Putting it in another way, it was said that the *Lord Citrine* was worth to her owners what it would cost to replace her by hiring at current rates. As to this argument, it must first be pointed out that, even if it is sound, it will not justify the figure claimed, namely, £2,032. For this figure, being based on the cost of hiring another vessel, takes no account of the wages, insurance and stores that would have to be paid for if the plaintiffs were running their own vessel. If allowance were made for these items, as it was eventually admitted by counsel for the plaintiffs that allowance should be made, the figure of £2,032 is immediately reduced to something in the neighbourhood of £1,500. But this figure at least, it was contended, should properly be awarded by way of general damages.

The argument for the plaintiffs on this aspect of the case was based largely on the decision that was ultimately arrived at in *The Ikala*,[18] after the case had been remitted to the registrar by the House of Lords, and especially on the judgment of Scrutton L.J. in the Court of Appeal.[19] There is a certain superficial similarity between the facts of that case and the facts of the present case, in that, whereas the *Lord Citrine* was one of a fleet of vessels carrying coal for her owners, the damaged vessel in the other case was one of a fleet of vessels carrying oil for her owners. But there, as it seems to me, the similarity ends. The owners of the vessel concerned in *The Ikala*[20] were a company trading for profit, and the loss that was being claimed was the loss of a profit-earning vessel. Moreover, whereas in the present case we are dealing with a period of peace time, when conditions of trading were more or less normal, the casualty in the case of *The Ikala*[20] occurred in the year 1917, at the height of the German submarine campaign, and at a time when any serviceable vessel—and not least an oil-carrying vessel—was a chattel of immense value from the use of which enormous profits could be earned. I can, therefore, derive no assistance from the fact that in the very exceptional circumstances of that case a very exceptional sum was awarded by way of general damages for loss of use of the vessel concerned.

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[17] [1926] A.C. 655, 662.

[18] 35 Ll.L.Rep. 191, C.A.

[19] Ibid. 192–195.

Even assuming that a sum in the neighbourhood of £1,500 would be an appropriate amount to award by way of general damages for the loss of use of a profit-earning vessel comparable to the *Lord Citrine*, it does not seem to me that this helps very much in assessing the amount which ought to be awarded in this case. The *Lord Citrine* was not a vessel trading for profit. The evidence given in the case did not disclose anything which would make it possible to assess what proportion of the notional figure of £1,500 would represent the profit element, with which I would include overhead and management expenses which, in the case of a vessel trading for profit, would be expended solely for the purpose of making such profit. How much would be left after making a deduction in respect of this element is a matter of pure conjecture.

In these circumstances I am of the opinion that the only proper approach to the problem which has to be solved in this case is to consider what are the elements of loss which the plaintiffs have in reality sustained by reason of the detention of the *Lord Citrine*. For it is an elementary proposition that the plaintiffs are entitled to recover as damages what they have in fact lost, neither more nor less. Looking at the problem in this way, it seems to me that the real elements of the plaintiffs' loss may be summarised as follows: (1) Crew's wages thrown away during the period while the vessel was out of use: (2) Proportionate part

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[20] [1929] A.C. 196.

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of annual cost of insurance during the same period: (3) Proportionate part of annual depreciation: (4) Proportionate part of annual maintenance and repair expenses: (5) Proportionate part of annual consumption of stores during ordinary use of the vessel: (6) Lastly—and this is the only other possible element of loss that I can think of in the case of a vessel not engaged in trading for profit—some allowance to cover the fact that the capital invested in the vessel was rendered infructuous while she was out of use. Now as to these elements, the cost of wages and insurance thrown away has already been allowed in full under other items of the claim. As to depreciation, the President did not allow anything in respect of this item, but it has been conceded in this court by counsel for the defendants that some allowance for depreciation ought properly to be made. There is no difficulty with regard to the figure, for it is not in dispute that the annual rate of depreciation was £6,820, of which the proportionate part attributable to 11½ days would be £214 17s. 2d. With regard to maintenance charges and consumption of stores attributable to the detention period, the sum awarded by the President includes allowances in respect of these items, the amounts of which are not in dispute. The only remaining matter, namely, the loss due to the capital invested in the vessel being rendered temporarily infructuous, is covered by the President's award of 7 per cent. on the agreed capital value. It might well be thought that this allowance erred, if anything, on the generous side, seeing that, according to the information given to us, the plaintiffs were able at the material time to borrow money at an appreciably lower rate. Be that as it may, it seems to me that, subject to the addition of an agreed sum in respect of depreciation, which is conceded by the defendants, the President's award fully covers the plaintiffs in respect of all the elements of loss which they can fairly claim to have sustained.

I do not think that this case raises any question of principle, other than the principle that a plaintiff claiming general damages is entitled to be awarded such sum as will fairly compensate him for the loss which he has actually sustained. This, as has been said, is a jury question. There is no special sanctity about any particular method of arriving at the appropriate sum. Every case must be judged on its own facts. But the method adopted by the President, that is, a calculation based on a fair rate of interest on capital value together with a due allowance for expenses thrown away, has repeatedly been approved by the House of Lords for use in appropriate cases. This method was foreshadowed in *The*

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Greta Holme[21]; it was applied in *The Marpessa*,[22] and again in *Admiralty Commissioners* v. *Chekiang* (*Owners*)[23]; and it was again referred to with approval by all the members of the House in *The Susquehanna*.[24] It appears to me to be an appropriate method for assessing the plaintiffs' loss in the present case, and I cannot see that the President in adopting this method was guilty of any error of principle.

It follows that in my judgment the amount awarded by the registrar was excessive and was rightly reduced by the President. Subject to the addition of the agreed sum for depreciation I am of the opinion that the President's award should be affirmed.

DEVLIN L.J. It is well established that the owner of a ship which is damaged and detained for repairs can recover from the wrongdoer the cost of a substitute ship if he hires one during the period of detention and if it is reasonable that he should do so. Money paid out for this purpose can be claimed in the action as special damage or as moneys numbered. If he does not hire a substitute ship, he can recover as general damages compensation for the loss of the use of his vessel during the period of detention.

In this case the board as owners claim in the first instance a sum as special damages. The board do not claim that they hired a vessel in substitution for the damaged vessel, the *Lord Citrine*. But what was described in the evidence as "the "vagaries of shipping caused by bad weather" required the board to take vessels from time to time on spot charter. The case for the board is that although they cannot show an exact replacement of the *Lord Citrine*, the missing tonnage was made good by spot charter: in short, that the casualty was one of the "vagaries" which caused the board to charter tonnage which would not otherwise have been required. The board submit, therefore, that an appropriate charge for substitute tonnage can be calculated and recovered as special damage. They rely on a passage in the speech of Lord Warrington of Clyffe in *The Ikala*,[25] which is as follows[26]: "Though there was no sufficient positive evidence of "any chartering effected for the purpose of supplying the tonnage "lost by the detention of the *Strathfillan*, the circumstances "proved might have been such that the tribunal would have "been justified in drawing the inference that a proportion of the

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[21] [1897] A.C. 596; 13 T.L.R. 552.
[22] [1907] A.C. 241.
[23] [1926] A.C. 637; 42 T.L.R. 634.
[24] [1926] A.C. 655; 42 T.L.R. 639.
[25] [1929] A.C. 196, H.L.
[26] Ibid. 211.

"chartered tonnage did in fact supply the tonnage lost by the "detention."

Have they proved the circumstances which would bring them within this dictum? In my judgment they have not. The first essential is that they should prove that some vessels were fixed, either upon spot charter or otherwise, after the casualty was known. There is no evidence that anyone in their office even knew of the casualty, let alone that he took it into account in assessing any additional tonnage which he thought would be required. This is not surprising when one considers what a very small part the detention of the *Lord Citrine* for 11½ days played in the programme. During those days she could have made one voyage and carried 4,171 tons. The tonnage which the board expected to have to lift during the winter period was over 5½ million tons, of which about a quarter went by sea. The casualty to the *Lord Citrine* therefore prevented her from carrying less than ½ per cent. of the programmed tonnage. It is extremely unlikely that any programme of chartering could be so exact as to get within ½ per cent. of the required tonnage. There is no evidence that any part of the million tons or more which went by sea had to be lifted by any particular dates during the winter period. Unless, therefore, the *Lord Citrine* was fixed for a particular voyage and a substitute vessel had to be sent in her place, which is not suggested, the natural thing would be not to replace her at once but to wait and see how the programme worked out, since there might easily have been ½ per cent. surplus capacity anyway. When one learns in addition that during the winter period the board in fact received only 87 per cent. of the allocated quantity, it makes it all the more unlikely that a deficit of ½ per cent. caused any embarrassment.

The board sought to make good the gaps in the evidence by general assertions made by their witnesses, such as: "If one of "those ships falls out, then surely, to carry out that programme, "you must have a ship to replace it." This is not true unless it can be shown either that the chartering made in accordance with the programme was insufficient to lift the coal—unlikely, since there was a deficit in deliveries of 13 per cent.—or that it was accurate to within ½ per cent. Without further details to elucidate it, all the evidence shows is that the board managed to get on sufficiently well without the *Lord Citrine*. As the President says,[27] "there was no necessity, as a matter of business,

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[27] Ante, p. 551.

"to make any special arrangements to replace the *Lord Citrine*." In my judgment, there is no satisfactory proof that tonnage was chartered which but for the casualty would not have been chartered, and I agree with the judgment of the registrar, accepted by the President, that the claim for special damage breaks down.

I turn now to the claim for general damages. The only principle of law that can be laid down is the familiar one that the plaintiff is entitled to be awarded such sum as will fairly compensate him for the loss that he has actually sustained. In the application of this principle to the detention of chattels during repairs, there is no difference between ships and other chattels. In the cases in which this general principle has been applied to ships, various ships of different types have been considered—trading or profit-earning vessels, pleasure vessels, warships, utility vessels such as dredgers and lightships. But that does not mean that there are different rules for different categories of ships. I think with respect that the registrar was wrong in regarding the matter primarily as "a problem of classification." The class of vessel is only one of the matters to be considered. Even the broad distinction between profit-earning and non-profit-earning vessels must be handled with care. The same type of car in the hands of a car-hiring concern has different potentialities from those which it has in the hands of a private owner. Likewise with ships: there are types of vessels, such as pleasure yachts, which are capable of earning a profit in some circumstances but not in others: one must inquire into all the circumstances and in particular into what the owner would probably have been able to do with the ship during the period of detention. I have not, therefore, studied the cases that have been cited to us in order to place the *Lord Citrine* in any particular category of vessel. I have looked for the broad statements of principle which show how the general rule has been made to work. There are, I think, two "working principles" that are relevant to this case.

The first is that where there is "a reasonable certainty of "employment," the owner is entitled to be compensated for the profit he has lost. I take the words I have quoted from the judgment of Bowen L.J. in *The Argentino*.[28] Dicta on causation in damages have multiplied since then, and I think it would now be held sufficient if it were shown that the vessel would probably have earned a profit during the period of detention. It may be sufficient—it is unnecessary on the facts of this case to canvass the matter—to show no more than a real possibility of profit-earning; when making an award the full amount of the profit that could have been earned can then be discounted to allow for the degree of improbability.

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[28] (1888) 13 P.D. 191, 203, C.A.

As Bowen L.J. says,[29] the best evidence that a profit would have been made is when there is an existing engagement that has been lost, but more general evidence will do. A useful, but not obligatory, way of assessing the damage is to take, subject to an allowance for contingencies if need be, an appropriate rate of hire for the period, to deduct from that the costs of earning the hire, so far as they have not been incurred, and award the balance. This is what the registrar aptly describes as "charter "rates less savings." But the profit that is lost need not be wrapped up in hire. It may consist of a loss of profit on the sale of goods that the owner would have carried in his own vessel: see *The Ikala*.[30] I do not see why any other form of productive service that might be open to the ship should not be treated in the same way. The facts in the present case make it akin to that of a manufacturer who carries his raw materials to his factory, and it may be that if the interference with the transport causes the manufacturer to lose a profit on the finished product, he can properly ask for compensation for that, so long as there is a measurable loss. Lord Sumner says in *The Ikala*[31]: "It has "to be proved that, in doing the shipowner the wrong of laying "his ship idle at the time in question, work, which she would "otherwise have done during the time, went undone to his "measurable loss or was only done by resorting to other expe-"dients at a measurable outlay."

The other principle is that the owner of a vessel may get substantial, and not merely nominal, damages notwithstanding that he cannot show any loss of profit. He has lost the use of his vessel; and whether he would have used her for pleasure or business or some other form of service, such as dredging, he is entitled to compensation for the loss of use. Whereas in cases in the former class the award may best be calculated by starting at the top end, as it were, with charter rates or the like and working downwards, cases in this class may best be dealt with by beginning at the bottom, that is by counting the costs. The owner will be entitled to recover running expenses in maintaining the vessel and paying the crew while they are of no use to him. In addition he must have something which in the last analysis can only be a lump sum as compensation for loss of use. In *The Greta Holme*,[32] a case of a dredger belonging to a harbour board, a lump sum was awarded. In later cases more precise calculations have been made based upon various factors. In *The Mediana*,[33] a case of a lightship belonging to a harbour board, the calculation was based on the cost of maintaining a spare lightship for use in emergencies. In *The Marpessa*,[34] another case of a dredger belonging to a harbour board, the calculation was, or should in the opinion of the House of Lords have been, based on the cost of maintaining and working the dredger. That means operating cost and is to be distinguished from the costs thrown away while she was idle; operating cost was taken as a fair measure of the value of the dredger's daily services to the board. In *Admiralty Commissioners* v. *Chekiang* (*Owners*),[35] the case of a warship, the calculation was made on the basis of 5 per cent. on the estimated capital value of the ship at the time of the collision. In *The Susquehanna*[36] the damaged vessel was an oil tanker owned by the Admiralty and used for servicing the Fleet. The case was sent back to the registrar without any precise directions being formulated, but there were several indications in the House of Lords that the calculation might well be based mainly on interest on capital and depreciation. In the judgments in these cases there are many statements that the amount of the sum to be awarded is a jury question. No rules are laid down. In *Admiralty Commissioners* v. *Chekiang* (*Owners*)[37] Bankes L.J. refers to "indications of principles which may be "applied"[38]; and in the same case Lord Dunedin says[39] that there is no absolute rule enjoining that the calculation must be a percentage of capital value.

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[29] 13 P.D. 191, 202.

[30] [1929] A.C. 196.

[31] Ibid. 205, H.L.

This second principle does not mean that the owner of a damaged vessel must inevitably be given something for loss of use. The facts may show that before the casualty occurred the owner was already saddled with the liability to maintain an idle vessel from which he could get no profit or pleasure or other form of service. In such a case, which, as Bowen L.J. says in *The Argentino*,[40] "must necessarily be exceptional," the owner cannot recover more than nominal damages: see *The Black Prince*[41];

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[32] [1897] A.C. 596.

[33] [1900] A.C. 113; 16 T.L.R. 194; 44 S.J. 259.

[34] [1907] A.C. 241.

[35] [1926] A.C. 637.

[36] [1926] A.C. 655.

[37] [1925] P. 80, C.A.; affd. [1926] A.C. 637.

[38] [1925] P. 80, 90, C.A.

[39] [1926] A.C. 637, 642.

[40] 13 P.D. 191, 201, C.A.

[41] (1862) Lush. 568, 574.

The City of Peking.[42] The defendants have not put their case as high as that. It is true that the evidence showed that the board got on satisfactorily despite the temporary loss of the *Lord Citrine*; I suppose that on this it might be contended that the *Lord Citrine* or other equivalent tonnage would have been idle anyway, with the result that no damage has been caused, but it has not been so argued. I think she should be regarded as being in service throughout the period. In every trading fleet a vessel may be idle from time to time; but if the purpose of the fleet is to carry out a programme, and in order to be sure of that the owner has a margin of safety, I think the whole fleet should be regarded as being in service. *The Mediana*[43] and *The Susquehanna*[44] afford sufficient authority for that.

The board invoke the first of the two "working principles" I have stated as being the correct instrument for the measurement of their claim. If they fail on this, the only alternative they have asked for is interest on capital. Under other heads they have recovered all the running expenses thrown away during the period of detention so that the only items of cost remaining are interest and depreciation. The registrar did not take depreciation into account, and owing to a muddle the President was not invited to do so until too late. The payment into court by the defendants in fact allowed for depreciation, and they have now very sensibly conceded it to be payable. But the President was asked, in the alternative to the main claim based on charter rates, only for interest, and he has awarded it at the rate of 7 per cent.

I mention this because I should not wish this decision to be mistakenly cited as an authority for the proposition that the measure of damages in respect of vessels belonging to nationalised industries should inevitably be based on interest and depreciation. Quite apart from any question of profit making, if damages had been sought in some ampler form, as in *The Marpessa*[45] or *The Mediana*,[46] they might have been obtained. But the case was not presented in that way.

Consequently the appeal fails unless the board can establish their claim on the basis of charter rates less savings. This claim succeeded before the registrar, in substance though not in form, because he gave them the amount claimed, though under the description of interest on capital, the rate on this footing working out at over 30 per cent. I respectfully agree with the President

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[42] (1890) 15 App.Cas. 438.

[43] [1900] A.C. 113.

[44] [1926] A.C. 655.

[45] [1907] A.C. 241.

[46] [1900] A.C. 113.

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that this is wrong. At 30 per cent. it includes a large profit element and so could be justified only if profit could be justified; and if profit could be justified, it only confuses the matter to call it interest. Interest is to be awarded where profits could not be made and where the loss of use can best be measured by saying that at least the owner has had no return on the capital money invested in the asset. It must therefore be given at an investment rate. The President has awarded 7 per cent. and as an investment rate that has not been attacked.

Before us the board's claim has been presented on the footing that the *Lord Citrine* was a profit-earning vessel and that the rates at which similar vessels were being chartered by the board afford the best evidence of the profit the *Lord Citrine* would have earned. Unless all that I have said so far in this judgment is erroneous, the fallacy in this contention is immediately obvious. The question is not whether the *Lord Citrine* was engaged in trade or is of a type that could be used to make profits; it is whether there is any evidence of a probability, or at the least of a real possibility, that if she was seaworthy during the 11½ days she would have made an actual profit for the board. In my judgment there is not. When damages are awarded for breach of contract, there are many cases in which they are placed upon a notional basis, such as market value, irrespective of what the injured party has actually done. As Scrutton L.J. said in his judgment in *James Finlay & Co.* v. *Kwik Hoo Tong*,[47] there are many instances in English law where the measure of damage does not give the real loss suffered by the party. A hypothetical measure has the advantage of introducing uniformity and of tending to make similar wrongdoers pay alike, irrespective of the behaviour and circumstances of the injured party. But the rule which we are considering is firmly grounded on actual loss and there is no place in it for an assessment based on notional rates. The point is very well put by Lord Merrivale P. in his judgment in *The Susquehanna*.[48] Therefore, the possibility or probability of profit-making must be clearly proved if it is to be allowed for in the damages. I propose to examine in greater detail three of the authorities I have mentioned, two of them in order to show how clearly this point has been established, and the third because it was greatly relied upon by the board in support of their argument.

The Marpessa[49] shows that in a claim for loss of services not sounding in money the profit element cannot be included. The plaintiffs, the Mersey Docks and Harbour Board, were the owners of a dredger which they used in the port of Liverpool. She earned nothing in money, was maintained out of the rates, and did indispensable work of maintenance in the port of Liverpool. She was damaged by the *Marpessa* and disabled for nine days. The claim presented by the owners was for £102 per day, representing the average expenditure in maintaining and working the vessel and included a charge of 25 per cent. for "owners' profits." It appears[50] that the registrar reduced this sum to £35 per day, which covered insurance, wages, supplies, depreciation and an allowance of 7 per cent. calculated on the depreciated value of the ship to cover establishment charges, owners' profits and general damage. This last item was divided as to 4 per cent. for owners' profits and 3 per cent. for general damage and establishment charges. The plaintiffs' attempts to recover a larger sum than the registrar and merchants awarded failed in all three courts. Lord Loreburn L.C., in the House of Lords, said[51] that the award for demurrage should represent the value of the work that would have been done by the dredger during the nine days had she not been disabled. If the plaintiffs had hired another vessel to do the work, they could have recovered the cost of doing it. But as they had not they were entitled to have the cost of maintaining and working the dredger per day and its depreciation, taking the total daily sum as a fair measure of the value of each daily service. But, the Lord Chancellor went on,[52] the plaintiffs had "added an item for owners' profit, which was appropriate "enough if they had paid it to the owner of a vessel which they "hired, but had no place in a claim based on the cost to them- "selves of the services rendered by the dredger. The registrar "allowed them something on this head to which they were not "entitled." The House, however, did not interfere with the registrar's award because, although they thought that in this and other respects it had not been correctly made up, it was substantially sound.

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[47] [1929] 1 K.B. 400, 411, C.A.

[48] [1925] P. 196, 202.

[49] [1906] P. 14, 95.

In *The Susquehanna*[53] the damaged vessel was one of a number of oil tankers belonging to the Admiralty and used for supplying oil to the fleet. Some of these tankers were from time to time let out on charter by the Admiralty for commercial purposes, but there was no evidence that during the period of repairs the damaged vessel could or would have been chartered.

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[50] [1906] P. 14, 19.

[51] [1907] A.C. 241, 244.

[52] Ibid. 245.

[53] [1926] A.C. 655.

The Admiralty claimed damages for loss of use based on the rate that could have been obtained for the tanker on charter and the registrar awarded £200 per day on this basis. It was declared in all of the three higher courts to be the wrong basis. Scrutton L.J. said[54]: "The registrar, as I read his judgment, says the "commercial value of the ship can be got at by seeing for what "sum a ship could be chartered if the Admiralty were ready to "charter, and that the commercial value of any one of them "appears to be a sound basis on which to base an amount for "damages for loss of time; and he does not seem to have taken into "account that in fact there was no probability of that vessel or of "the vessel that substituted her at any time being let on a commercial basis." The function of the tanker in that case was to supply the fleet with oil, just as it was the function of the *Lord Citrine* to supply the board's generating stations with coal. It is, therefore, worth noticing that Lord Sumner looked into the question whether the Admiralty had suffered any damage in this respect. He concluded[55]: "There was no proof that any ship "was without its due supply of oil, when required, or that any "service of any ship was forgone or stinted for want of oil in "consequence of this collision. If this had been so, it could and "should have been proved, for the Admiralty knew the facts. "In no case can this be matter of presumption. Unless such "loss is proved, the reduction of the margin of supply or its total "disappearance is not a head of pecuniary damages, for no actual "harm was done."

The case on which the board rely is *The Ikala.*[56] The owners of the damaged ship, the *Strathfillan*, were oil importers and they both owned and chartered ships for the purpose of importing oil for sale. The case had a complicated history which it is unnecessary to recite; it is sufficient to consider the position as it was presented to the Court of Appeal when it came before that court the second time. As in the present case, evidence was tendered to show that substitute tonnage had been chartered; and as in the present case the point was not proved. In this state of affairs, Scrutton L.J. put the question for consideration as follows[57]: "Assuming you do not prove you have chartered to replace, "have you yet given sufficient evidence to enable her value as a "profit-earning ship—the amount of profit she may be presumed "to be earning—to be ascertained so as to find out what 13 days' "loss of that capacity is?" The evidence showed, Scrutton L.J.

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[54] [1925] P. 196, 208, 209, C.A.

[55] [1926] A.C. 655, 663.

[56] [1929] A.C. 196.

[57] 35 Ll.L.Rep. 191, 194, C.A.

said,[58] that the trade in imported oil was so profitable (this was in 1917) that it paid the plaintiffs to carry on if only by chartering ships at the extraordinarily high rate of £11 10s. a ton deadweight. " There is evidence given," he said,[58] " this evidence as " to the rate per ton that was required for other ships, which " shows that the *Strathfillan* was a very profitable vessel to her " owners." The plaintiffs had put forward a calculation showing a loss of £10,000, but were prepared to accept the sum of £7,150, which the registrar on another basis had thought sufficient, and therefore it was unnecessary for the Court of Appeal to say more than that the £7,150 was not too great a sum to represent the profitability of the vessel during those 13 days. Lawrence L.J. agreed[58] with the judgment of Scrutton L.J. Greer L.J. said that the plaintiffs were entitled to put their case as follows[59]: " For these 13 days we could not get a substitute in the state of " the shipping market, and, therefore, we will ask the owners " of the *Ikala* to pay on the basis of ascertaining what the daily " value of that ship was to us, having regard to the enormous " profits we were making out of these voyages."

I have already stated the only principle that I can extract from this case. It is that, in considering whether or not there is " a " reasonable certainty " or likelihood that a vessel would have earned profits during the period of detention, the court is not restricted to inquiring whether it was likely that the owner could have hired the vessel out at a profit but can inquire also into the profits that would probably have been earned by the carriage of the owners' own goods. It is quite true that in this case in measuring the value of the ship as a profit earner the court took as its guide the sums that would have to be paid as hire for the chartering of a similar ship. It cannot be said that that is a test for universal application; it may or may not be appropriate in other cases. I need not consider that, since before it could be considered as appropriate in this case, it would be necessary for the plaintiffs to prove that but for the detention the *Lord Citrine* would have carried coal in a manner that was profitable to them. There is no evidence to show that.

I do not rest this last assertion simply on the fact that the board is not a profit-making enterprise. The Central Electricity Board may be said to be engaged in trade in a way in which the Mersey Docks and Harbour Board and the Admiralty could not be; and it may be necessary to consider with some care the

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[58] 35 Ll.L.Rep. 191, 195.

[59] Ibid. 196.

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position of a public authority which engages in trade but which Parliament has instructed simply not to make a loss. I am anxious not to determine these larger and important issues unless the facts of this case require that I should. In my judgment they do not. Treating the board as if it were allowed to make a profit from the sale of electricity, there is no evidence that the cost of making electricity was in any way increased (with the consequence that its profits would have been diminished) by the unavailability of the *Lord Citrine* to carry coal. The evidence is that the board was able to transport all the coal that it could buy. There is no evidence of any particular voyage that the *Lord Citrine* was scheduled to make and therefore no evidence that the failure to make it resulted in any measurable loss because coal was not delivered at any particular place or time. The fact that none of the spot chartering is proved to be due to the casualty means that the higher cost of chartered vessels would have been incurred anyway.

Thus, this case on its facts is entirely different from *The Ikala*,[60] where, once the suggestion which had bedevilled the earlier stages of the inquiry that the plaintiffs could only import a limited amount of oil was out of the way, they were able to show that they could buy and sell as much oil as they could carry and make enormous profits on every voyage. Indeed, in its material facts the present case resembles much more closely *The Susquehanna*.[61] In both cases the vessel was owned by a public authority and was of a type that could have been hired out at a profit, but there was no evidence that it would have been. In each case the use to which the vessel was being put was for the service of the undertaking, and in neither case was there any evidence that the undertaking had suffered. While I think that this case should be decided on principle and not by a comparison of its facts with the facts in another case, I am bound to say that I do not see how, consistently with the decision in *The Susquehanna*,[61] this appeal could be allowed.

I agree that it should be dismissed.

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The plaintiffs appealed to the House of Lords.

Ashton Roskill Q.C., *Waldo Porges Q.C.* and *R. F. Stone* for the appellants. It is to be inferred from the facts as found by the registrar and Lord Merriman P. that the appellants did charter tonnage to replace the *Lord Citrine*. If so, the damage sustained is special damage, namely, the cost to the appellants of chartering equivalent shipping space.

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[60] [1929] A.C. 196.

[61] [1926] A.C. 655.

Alternatively, the appellants lost the use of the *Lord Citrine* for 11½ days, even if they did not charter tonnage to replace the ship and, in the circumstances of the case, they are entitled to be compensated in general damages. The best measure of their loss due to the detention of the *Lord Citrine* is the market cost of chartering alternative tonnage. The damages fall to be ascertained by reference to the value of the use of the *Lord Citrine* to the appellants, which is what as a matter of regular practice they are paying for chartered tonnage, less expenses saved.

General damages do not fall to be ascertained by taking the interest on capital value. That method should only be employed as a last resort and, in the circumstances of the present case, it is wholly inappropriate.

This appeal relates primarily to the claim for general damages. This raises a question of principle in relation to loss of the use of vessels by a trading corporation which does not have the making of a profit as the primary purpose for which it trades. The matter must be considered in the light of the social and economic conditions prevailing at the time. In Victorian times it was taken for granted that the only purpose of trading was to make a profit. Such is not now considered to be the only purpose. A purpose may be to render services, and that creates a different situation. There is no difference in law between a profit-earning and a non-profit-earning ship. Any authorities which appear to support such a distinction must be read in relation to their own facts in the light of the social and econonic conditions of the times. The appellant board is not in the same position as the Admiralty, which provides ships for the defence of the realm. See sections 1 and 36 of the Electricity Act, 1947, and the Electricity Act, 1957.

Even if there is any distinction between a profit-earning ship and a non-profit-earning ship, the *Lord Citrine* cannot properly be described as a non-profit-earning ship. And, in any event, the proper measure of general damages is not just interest on capital.

There is evidence that the appellants were chartering tonnage throughout the relevant period. The proper inference from that is that they had more coal to lift than they had ships to lift it. Though this ship fulfilled the particular voyage on which she was engaged, she was not available to take her part subsequently.

If a non-profit-making entity is plaintiff, its right to damages is not affected by its character. The only question is as to the right approach.

The relevant authorities are *Steam Sand Pump Dredger No. 7 (Owners)* v. *Greta Holme (Owners)*[1]; *Mediana (Owners)* v. *Comet (Owners)*[2]; *Mersey Docks and Harbour Board* v. *Marpessa (Owners)*[3]; *Admiralty Commissioners* v. *Susquehanna (Owners)*[4]; *Strathfillan (Owners)* v. *Ikala (Owners) (The Ikala)*[5]; *The Ikala (No. 2)*[6] and *Admiralty Commissioners* v. *Chekiang (Owners)*,[7] where interest on capital was criticised as a factor to be considered in non-commercial transactions. *The Ikala*[8] shows that the prevailing market rate is accepted as a factor in the assessment of damages. The registrar was wrong in adopting the practice deriving from *The Greta Holme*[9] of assessing damages in such cases on the basis of interest on the value of the damaged ship.

On the facts of this case, all the available coal was brought to London, including the coal which the *Lord Citrine* would have brought during the detention period. The findings of the registrar are that the appellants' own ships could not have carried all the coal and other ships were chartered; none of the appellants' ships was idle; the *Lord Citrine*, if not under repair, would have been carrying coal; at no time were the appellants not chartering ships. The registrar, however, went wrong in doubting whether he was entitled to base himself on charter rates and in awarding damages by way of interest on the capital value of the ship, drawing a distinction between a profit-earning body and a non-profit-earning body.

In summary, it is submitted: (1) On the general damages point, the appellants were deprived of one of their ships by the respondents' negligence and the most appropriate way of ascertaining the proper amount of damages is the market value at that time of comparable ships for chartering, namely, their trading value. The assessment of such damages is a jury question and, considering the whole matter as a jury would, the fair method is to have regard to this market value. (2) That approach is reinforced by the fact that comparable ships were regularly chartered by the appellants, and therefore the market value is a practical test and is ascertainable. (3) The appellants do not claim anything by way of general damages beyond the loss which they contend they have suffered. All their ships were in use in the sense that none was laid off. The coal which the *Lord Citrine* would have carried must have been carried either in their own ships or in chartered ships. It could not have been carried in their own ships, because these were already being used to their full capacity. It was more expensive to use chartered ships and at the material time they were continuing to charter other ships. There is no evidence that any of the ships sailed otherwise than with full cargoes. (4) Accordingly, the appropriate inference is that the coal which would otherwise have been carried in the *Lord Citrine* was carried in chartered ships. (5) If the inferences to be drawn from the evidence as a whole do not justify the appellants' contentions upon their claim for special damages, they are yet strong enough to prove that the charter rates less savings are the appropriate measure of general damage. The measure of special damage is the difference in cost between carrying the coal in chartered ships and carrying it in the appellants' own ships.

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[1] [1897] A.C. 596, 600–601; 13 T.L.R. 552, H.L.

[2] [1900] A.C. 113, 117; 16 T.L.R. 194, H.L.

[3] [1907] A.C. 241, 244; 23 T.L.R. 572, H.L.

[4] [1926] A.C. 655, 661–662; 42 T.L.R. 639, H.L.

[5] (1927) 28 Ll.L.Rep. 344; [1928] P. 86, C.A.; [1929] A.C. 196, 200, 205, 210–211, 212, H.L.

[6] (1929) 35 Ll.L.Rep. 71, 77; ibid. 191, 194, C.A.

[7] [1926] A.C. 637, 647; 42 T.L.R. 634, H.L.

[8] [1929] A.C. 196.

[9] [1897] A.C. 596.

As to general damages, see *The Susquehanna* [10] and Halsbury's Laws of England, 3rd ed., vol. XI, pp. 217–218, para. 385.

The evidence and the inferences from the evidence displace assessment of damages by interest on capital as the appropriate method. This method should only be regarded as a last resort.

Kenneth Carpmael Q.C., *Peter Bucknill* and *J. Rochford* for the respondents. The appellants did not prove that they chartered any other ship to replace the *Lord Citrine* during the period of detention. Inferences cannot override facts which could or might have been available to be considered in this case but were not established. The evidence left many facts completely unsolved. It is very material to this point that the *Lord Citrine* was not a profit-earning vessel. The ship falls into the same category as the damaged dredger in *The Greta Holme*.[11] The judgments under appeal are in harmony with several decisions in similar cases and do not conflict with any case decided on comparable facts. What Devlin L.J. said in the Court of Appeal in this case was amply justified and no ground has been shown for allowing the appeal.

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[10] [1926] A.C. 655, 662.

[11] [1897] A.C. 596.

Ashton Roskill Q.C. in reply. In a civil case the issues are decided on a basis of probability. On the findings in this case it was established as a reasonable probability that the coal which would have been carried in the *Lord Citrine* was carried in chartered ships. The question here is whether the facts proved support the inferences suggested. The *Lord Citrine* is not in the same category as a dredger. It is wrong to divide ships into categories for this purpose. The principles applicable should be considered in the light of the decided cases without dividing ships into categories of profit-earning and non-profit-earning. In any event, this ship was profitably engaged as a trading entity, though not for the purpose of making profits. It is wrong to limit the damages for loss of the use of this ship to interest on capital because it cannot be shown that she would be hired out at a profit. The onus is not on the appellants to show that every single one of their considerable fleet was fully engaged at the material time. It is enough to give sufficient evidence from which that fact appears.

Their Lordships took time for consideration.

1960. Dec. 21. LORD REID. My Lords, nearly nine years ago, on December 23, 1951, there was a minor collision off Cromer between the *Lord Citrine* and the *Hebridean Coast*. The owners of the *Hebridean Coast* admitted liability on March 21, 1952, and since then the only question at issue between the parties has been the amount of damages due to the appellants. But the appellants' statement of damages, amounting in all to £5,241, was not filed until June 14, 1956, and the case only now comes before your Lordships for final decision.

The *Lord Citrine* was owned by the Central Electricity Authority and was one of a number of vessels used by them to bring coal to London from various ports on the north-east coast. When the collision occurred she was on a voyage in ballast from London to Immingham. After the collision she was able to proceed to Immingham and, after some temporary repairs, to take on her cargo of coal and carry it to London. Thereafter, she was out of service for a time undergoing permanent repairs. The largest item in the appellants' claim was: "14. Loss by detention: "10 a.m. 31/12/51 to 7 a.m. 14/1/52, 13 days 21 hours, loss of "use of *Lord Citrine* for carriage of coal and charter of equivalent "shipping space £2,451 13s. 0d." All the other items were agreed or decided by the Admiralty Registrar and this item has now been modified, the claim now being for £1,525 for detention for 11½ days.

The point at issue between the parties is largely a question of fact. The Admiralty Registrar made careful and elaborate findings of fact but on some crucial points these lack precision. I do not blame him because it would appear that the issues were not presented to him with precision.

I shall first set out as briefly as I can the facts which are not in dispute. The Central Electricity Authority and the National Coal Board agreed tonnage programmes for each summer and winter period. About a quarter of the tonnage due to be brought to London was brought by sea. During the winter period November–April, 1951–52, the Coal Board only supplied about 87 per cent. of the agreed tonnage. About 1,250,000 tons should have been brought by sea during this period and it would seem that about 87 per cent. of that amount was in fact brought by sea. It is not disputed that all the coal available for shipment was in fact shipped during the period.

The authority's own ships did not and could not carry more than about half of that coal, the rest was carried in chartered vessels. Certain vessels were chartered on ten-year charter. Others were employed on short charter or spot charter as required. The *Lord Citrine's* voyages lasted on the average 8½ days and her average cargo was 4,171 tons. If she had not been under repair she would not have been idle but would have been carrying coal, but we do not know to what port she would have been sent or what particular consignment of coal she would have carried during the repair period.

There is no evidence or finding that the loss of the *Lord Citrine's* services during the repair period in any way dislocated the authority's programme or that any particular steps were taken at the time to make good that loss of her services. The registrar found that all the authority's own ships were "regularly "employed" and that none was "idle during the detention "period." He further found that "no specific vessel can be "pointed to as having taken the place of the *Lord Citrine* during "the 11½ days' detention of that vessel." By that he clearly means no specific vessel either of the authority's fleet or of the chartered ships. The appellants' argument before him was that "the general circumstances were such as to indicate that the "loss of one of their ships resulted in their having to use chartered tonnage more than they would otherwise have done." Their claim was based on the cost to them of the "charter of "equivalent shipping space," and the finding of the registrar is: "I do not think that if the plaintiffs have to show they chartered "other tonnage to replace the *Lord Citrine* they have succeeded "in doing so." But he added: "It seems to me quite likely "that they did in fact do so," though he does not explain why he thought this quite likely.

The argument which I have quoted from the registrar's reasons was repeated before your Lordships. If I substitute the word "prove" for "indicate," the argument might be valid if supported by the facts. The appellants attached great importance to *Strathfillan* (*Owners*) v. *Ikala* (*Owners*).[1] I shall quote two passages. Lord Sumner said[2]: "It has to be proved that, "in doing the shipowner the wrong of laying his ship idle at the "time in question, work, which she would otherwise have done "during the time, went undone to his measurable loss or was "only done by resorting to other expedients at a measurable "outlay." And Lord Warrington of Clyffe said[3]: "Though "there was no sufficient positive evidence of any chartering "effected for the purpose of supplying the tonnage lost by the "detention of the *Strathfillan* the circumstances proved might "have been such that the tribunal would have been justified in "drawing the inference that a proportion of the chartered tonnage "did in fact supply the tonnage lost by the detention."

Proof may be by direct evidence or by inference, and the standard of proof in civil cases is that the fact to be proved must be made to appear more probable than not. The essential steps in the appellants' argument are these. All the coal available during the winter period was in fact brought to London. This must have included the coal which the *Lord Citrine* would have carried if there had been no detention for repairs. That coal must have been carried either in the authority's vessels or in chartered vessels. It could not have been carried in the authority's vessels because they were already being used to their full capacity. Therefore it must have been carried in chartered vessels. It is more expensive to carry coal in chartered vessels, and the claim is for the difference in cost between carrying the coal in chartered vessels and carrying it in the authority's vessels.

If any one of the links in this chain is faulty, the argument breaks down, and I need only consider the statement that all the authority's vessels were already being used to their full capacity. The amount which the *Lord Citrine* would have carried during the detention period is a very small proportion of the total carried during the remainder of the winter period by the authority's vessels—almost certainly less than 1 per cent. Do the findings then show that so small an extra burden could not be or probably was not carried by them? The registrar's findings are that all the authority's own ships and those on ten-year charter were "regularly employed over the years" and that "none of the "authority's vessels except the *Lord Citrine* was idle during the "detention period." I do not regard a finding that vessels were regularly employed over the years as excluding the possibility or even the likelihood that they could have carried 1 per cent. more than they did, and finding that none was idle during the detention period is of little weight. All we know is—if we do know it—that all the available coal was brought during the winter period. There is nothing to show that the coal which the *Lord Citrine* would have carried was brought at any particular time, and that is not surprising, because no one knows what coal she would have carried or from what port. I would also refer to and adopt what Willmer and Devlin L.JJ. said on this matter in the Court of Appeal.

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[1] [1929] A.C. 196, H.L.

[2] Ibid. 205.

[3] Ibid. 211.

Counsel also referred your Lordships to the evidence. They were quite entitled to do so because the registrar's findings are not binding on this House even when they have been accepted in the courts below. But the evidence appears to me to be even less definite than the registrar's findings and to afford even less basis for the appellants' contentions.

The appellants then argued that, in any event, they are entitled to general damages, that the method of assessing such damages is a jury question, and that, taking the whole matter into consideration as a jury would, a fair method is to take into account what, as a matter of regular practice, the authority was paying for chartered tonnage. I must confess that I do not understand that. I do not proceed on any supposed distinction in principle between a profit-earning ship and a non-profit-earning ship. The task of assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit-earning ship there is no direct financial loss and one must ask what harm was done to the owner by his being deprived of the use of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that the owner is deprived of the services of his ship during the period of repairs, the opinion of Lord Herschell in *Steam Sand Pump Dredger No. 7 (Owners)* v. *Greta Holme (Owners)*[4] appears to have given rise to the practice of awarding damages based on interest on the value of the ship.

In this case if the coal in question was carried in the authority's own vessels there is nothing to show that that involved them in any substantial additional expense. The case would be like *Admiralty Commissioners* v. *Susquehanna (Owners)*.[5] It is only if the coal was carried in chartered ships that there would be any reason for taking into account the cost of so carrying it. But that is just what the appellants have failed to prove. I do not see how general damages can be awarded on the basis of compensating an owner for some kind of harm which he cannot prove that he ever sustained.

The award of general damages approved by the Court of Appeal was based on interest on the value of the vessel. The appellants argue that that is a very unsatisfactory basis. So it may be, though it has been in use for a long time. But if the only alternative proposed by the appellants cannot be supported, then I see no other possible course but to use this method with all its disadvantages.

In my judgment, the appeal should be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, throughout the argument on this appeal the words "the appellants" were used to cover both the present owners, the Central Electricity Generating Board, and their immediate predecessors, the Central Electricity Authority. I shall follow this practice.

The respondents admitted liability, and all questions of damages have been agreed, except for one item, namely, a claim for damages in respect of the detention of the *Lord Citrine*, for a period which has been agreed at 11½ days, while the collision damage was being repaired.

The learned President awarded, by way of general damages, interest at 7 per cent. on the capital value of the *Lord Citrine*, and the Court of Appeal affirmed his decision. Mr. Ashton Roskill, for the appellants, submitted that the method of awarding interest on capital was a "last resort" in assessing damages and should not have been adopted in the present case. He put his argument as follows: (1) It is to be inferred that the appellants chartered tonnage to replace the *Lord Citrine*. If so, the damage sustained is special damage, and the amount is the net cost to the appellants of chartering equivalent space; alternatively, (2) the appellants lost the use of the *Lord Citrine* for 11½ days, and are entitled to be compensated in general damages therefor. Such damages fall to be ascertained by reference to the sums which the appellants were paying for chartered tonnage, as a matter of regular practice, less expenses saved by not using the *Lord Citrine*.

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[4] [1897] A.C. 596; 13 T.L.R. 552, H.L.

[5] [1926] A.C. 655; 42 T.L.R. 639, H.L.

My Lords, in my opinion, the claim to special damage must fail, as the evidence does not establish that the appellants chartered any tonnage to replace the *Lord Citrine*, and a claim for special damage must be clearly proved.

In support of his second argument Mr. Roskill referred to the following findings by the registrar:

(i) "The authority's own ships could not have carried the "whole of the seaborne coal actually received; there were ten "large chartered vessels on ten-year charter from June, 1949; "all these vessels were regularly employed over the years subject, "of course, to periods of survey, etc.; certain other vessels were "employed on short charter and others on spot charter as "required, e.g. owing to weather conditions."

(ii) "None of the authority's vessels except the *Lord Citrine* "was idle during the detention period and if any had been idle it "would have been known to the authority."

(iii) "If the *Lord Citrine* had not been under repair she would "not have been idle but would have been carrying coal or on the "way in ballast for more coal or loading or unloading; the average "duration of a round voyage was agreed at 8½ days including "loading and unloading."

(iv) "At no time during the 26 winter weeks of 1951–52 was "the authority not chartering vessels additional to the long-term "chartered vessels."

Counsel then referred to the following passage in the registrar's "reasons for decision": "There is, in my view, no difficulty "in finding the proper amount of damages in the present case; "I accept the figure arrived at by the plaintiffs in their amended "claim. The main point which seems doubtful is whether the "plaintiffs are entitled to base that figure, which I feel to be the "right one, on charter rates less savings as they have done or "whether the figure must be reached in another way." Counsel submits that at this stage the registrar went wrong in principle. Thinking that he was precluded from awarding general damages

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on the former basis, because the appellants were not a profit-earning body, he had resort to the method of awarding damages by way of interest on the capital value of the *Lord Citrine*.

My Lords, I think that the registrar was wrong in drawing any distinction, for this purpose, between a profit-earning body and a non-profit-earning body. I see no reason, in principle, why such a distinction should be drawn, and no one of the authorities cited in argument lends any support to the view taken by the registrar. So far, I would accept Mr. Roskill's argument. In *The Susquehanna*[6] Viscount Dunedin observes: ". . . the "functions of the registrar and merchants are those of a jury," and I think it was open to the registrar to adopt the method of assessing damages which he rejected, if he thought that this method was justified by the evidence.

In my view, however, the appellants have not proved that they were put to any extra expense in carrying coal by the detention of the *Lord Citrine*. In agreement with the learned President and the Court of Appeal, I think that the present case is simply one wherein the appellants have been wrongfully deprived for a time of the services which could have been rendered by that vessel. They are, therefore, entitled to general damages on the principle laid down in *The Greta Holme*.[7]

I would dismiss the appeal.

LORD TUCKER. My Lords, this case does not, in my view, raise any question of principle or general importance in shipping circles save in so far as it seeks to disturb a practice which has prevailed ever since the decision in *The Greta Holme*.[7] in 1897.

It is clear that the appellants failed to prove any specific damage which could be assessed in pounds, shillings and pence. This seems to be generally referred to as special damage in contradistinction to general damages which cannot be accurately quantified but fall to be computed on what is often referred to as "a jury basis" or a "judicial guess." The distinction may be convenient but I doubt whether it is strictly accurate when applied to loss alleged to have been suffered as a result of damage to a chattel by negligence. Specific damage of the kind referred to must be strictly proved and must, in the case of collision at sea, be causally connected with the collision. See *per* Lord Sumner in *The Ikala*.[8]

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[6] [1926] A.C. 655, 662; 42 T.L.R. 639, H.L.

[7] [1897] A.C. 596; 13 T.L.R. 552, H.L.

[8] [1929] A.C. 196, 205, H.L.

Having failed to prove such damage, the appellants sought to invite your Lordships to infer that extra coal must at some time have been carried in chartered vessels instead of the authority's own ships as a result of the detention of the *Lord Citrine* for repairs necessitated by the collision with the *Hebridean Coast*. If such was the case I do not understand why it could not have been proved at the inquiry before the Admiralty Registrar, or, at any rate, that some firmer basis for such an inference could not have been laid than the mere statement by the registrar that "none of the authority's vessels except the *Lord Citrine* was idle "during the detention period." There is no finding that they were all loaded to capacity nor is there any finding that any chartered vessel which otherwise would have been idle was available. Furthermore, the evidence of the witness Stafford showed that he really was not possessed of sufficient material to enable him to answer questions as to the whereabouts of any particular vessel, or its employment at any particular time, so that too much reliance cannot be placed on the denial that any of the authority's vessels were "idle" during the period in question.

Having, therefore, failed to prove or lay the foundation for an inference that additional coal was carried at charter rates as a result of the collision, and having left the evidence in such a state that it would appear not improbable that the authority in fact suffered no pecuniary loss at all, it was argued that nonetheless the registrar should not have adopted the practice which derives from *The Greta Holme* case [9] of assessing damages in such cases on the basis of interest on the value of the damaged vessel. I can find no reason in the present case for holding that the registrar was not entitled to take the course which he did subject to the deduction for depreciation allowed in the Court of Appeal. In *Admiralty Commissioners* v. *Chekiang* (*Owners*),[10] Lord Sumner was somewhat critical of the principle of assessing damages on this basis, but, after examining the facts of that case, he stated that he could not say as a matter of law that the registrar was wrong in adopting this method. It appears to me that this observation is equally applicable to the present case, and that there are no special facts or circumstances which render it inappropriate.

I would, accordingly, dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, though the damage caused to the *Lord Citrine* had the result that her owners were deprived of her use for a period of 11½ days, they have not been able to point to any specific charter by which the use of some substituted vessel was obtained. They contend, however, that the facts which have been found justify an inference that they did charter tonnage to replace the *Lord Citrine*. The learned registrar, while holding that they had failed to show that they had chartered replacement tonnage, considered that it was quite likely that they had in fact done so. On the evidence I do not consider that any inference that replacement tonnage was chartered could legitimately be drawn: nor do I think that the likelihood that there had been such chartering was shown. The appellants had a number of ships available to them for the carriage during the winter period of the coal that they intended to carry to London by sea: some of these ships were owned by them and some were chartered. In submitting that an inference should be drawn that the loss of the use of the *Lord Citrine* resulted in some chartering of replacement tonnage, the appellants do not fix the period or the dates of the suggested chartering, though their claim is based upon the average on the charter rates ruling in the period between the end of November, 1951, and the first part of February, 1952. It is always possible that in the later part of the winter period there was some chartering that continued for a slightly longer time than would have been the case had the *Lord Citrine* not been damaged, but this is neither established by direct proof nor, in my view, by inference. When it is remembered that the tonnage of coal that would be carried by the *Lord Citrine* on one voyage was a minimal fraction of the total tonnage which would be carried by sea during the winter period and for which purpose a fleet of ships was available, it seems probable that the lost carrying capacity was, as Willmer L.J. said,[11] "easily absorbed "by the work of the other vessels which the plaintiffs had at their "disposal." It is sufficient, however, to say that proof is lacking from which it can be deduced that some additional or prolonged chartering was caused. It is possible that as a result of the temporary unavailability of the *Lord Citrine* the accumulated stocks of coal of the appellants at their generating stations were at some time or times slightly less than they would otherwise have been: this, however, is speculative, and, in any event, the appellants have not suggested that their output of electric power was at all affected.

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[9] [1897] A.C. 596.

[10] [1926] A.C. 637; 42 T.L.R. 634, H.L.

On the findings of the learned registrar the respondents have not sought to argue that the damages to be awarded in respect of the loss of the use of the *Lord Citrine* for 11½ days should be only nominal. It is therefore proper that such sum should be awarded as will fairly compensate the appellants. This sum is to be assessed having regard to the particular facts of this case. No help in the process of assessment is to be derived from seeking to describe the *Lord Citrine* by some form of words or by seeking to place her in some category or classification. Everything depends upon the circumstances which are special to this case. The appellants would not have hired out the *Lord Citrine* on a commercial basis and so have earned money from some charterer. Nor was their use of the *Lord Citrine* in any way comparable to the use which the owners of the *Ikala* were able to make of her as a profit-earning ship earning specially high profits in exceptional times. Nevertheless, the wrongdoing of the respondents did have the result that for a period of 11½ days the *Lord Citrine* was under repair whereas, had she not so been, she would have been carrying coal and playing her part in the appellants' comprehensive winter coal-carrying operations. The then capital value of the *Lord Citrine* was for her owners "infructuous" during the 11½ days. In these circumstances, I respectfully agree with the assessment of damages made by the learned President, which, on the evidence in this case (subject to the addition of the agreed sum for depreciation), seems to me to have been fair and reasonable.

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[11] Ante, p. 556; [1960] 3 W.L.R. 29; [1960] 2 All E.R. 85.

Appeal dismissed.

Solicitors: *Sinclair, Roche & Temperley for Botterell, Roche & Temperley, Newcastle-upon-Tyne; Middleton, Lewis & Co. for Middleton & Co., Sunderland.*

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J. C.*

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MOHAMED FALIL ABDUL CAFFOOR AND
OTHERS, THE TRUSTEES OF THE
ABDUL GAFFOOR TRUST . . . APPELLANTS;

AND

COMMISSIONER OF INCOME TAX,
COLOMBO . . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Charity—Class, gift for limited—Education—Limited primarily to members of donor's family—Whether of public character solely for charitable purposes—Family trust—Ceylon Income Tax Ordinance (*No.* 2 *of* 1932, *as amended*), *s.* 7 (1) (*c*).

Estoppel—Per rem judicatam—Revenue—Income tax—Decision granting exemption—Revenue not estopped from challenging exemption in subsequent years—Not "eadem quaestio."

Ceylon—Revenue—Income tax—Exemption—Trust—Whether public charitable or family trust—Decision granting exemption—Revenue not estopped from challenging exemption in subsequent years—Ceylon Income Tax Ordinance (*No.* 2 *of* 1932, *as amended*), *s.* 7 (1) (*c*).

By the terms of a trust deed executed in Ceylon in 1942 the trust income after the death of the grantor was to be applied by the board of trustees, the appellants, in their absolute discretion for all or any of a number of purposes which included "(2) . . . "(*b*) the education instruction or training in England or else-"where abroad of deserving youths of the Islamic Faith" in any department of human activity. "The recipients of the benefits ". . . shall be selected by the board from the following classes of "persons and in the following order:—(i) male descendants along "either the male or female line of the grantor or of any of his "brothers or sisters failing whom" youths of the Islamic Faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Colombo or elsewhere in Ceylon.

Assessments to income tax having been made by the respondent, the Commissioner of Income Tax, on the income of the trust for the five years 1950–51 to 1954–55 the appellants, alleging that the trust was an "institution of a public character established solely for "charitable purposes" within the meaning of section 7 (1) (*c*) of the Ceylon Income Tax Ordinance, 1932, as amended, claimed exemption thereunder from liability to tax. The Board of Review, constituted under the Ordinance, had in fact on an appeal by the appellants in respect of the assessment for the previous year 1949–50 decided that the trust income was exempt on the ground that the trust was of a public character established solely for charitable purposes:—

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* *Present*: LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

Held, (1) that the respondent was not estopped by the decision of the Board of Review for the year 1949–50 from challenging the appellants' claim to exemption for the subsequent years. A question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another year—as not eadem quaestio—even though there might appear to be similarity or identity in the questions of law on which they respectively depended, and the principle of res judicata did not apply. It was not the status of the tribunal itself, judicial or administrative, that formed the determining element for estoppel in cases of this kind but the limited nature of the question that was within the tribunal's jurisdiction (post, pp. 598, 599).

Broken Hill Proprietary Co. Ltd. v. *Broken Hill Municipal Council* [1926] A.C. 94, P.C., applied.

Inland Revenue Commissioners v. *Sneath* [1932] 2 K.B. 362; 48 T.L.R. 241, C.A. and *Society of Medical Officers of Health* v. *Hope* [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L. considered.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155; 42 T.L.R. 207, P.C., not followed; that case could not be treated as an authority on the question of estoppels in respect of successive years of tax assessment.

Held, (2) that in view of what was in effect the absolute priority to the benefit of the trust income which was conferred on the grantor's own family by clause (2) (*b*) (i) of the trust deed this was a family trust and not a trust of a public character solely for charitable purposes, and the income thereof was accordingly not entitled to the exemption claimed (post, p. 603).

In re Compton, Powell v. *Compton* [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198, C.A., *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L., and *In re Koettgen's Will Trusts* [1954] Ch. 252; [1954] 2 W.L.R. 166; [1954] 1 All E.R. 581 considered.

Judgment of the Supreme Court of Ceylon (1959) 60 N.L.R. 361 affirmed.

APPEAL (No. 53 of 1959) from a judgment and decree of the Supreme Court of Ceylon (H. N. G. Fernando and Sinnetamby JJ.) (November 26, 1958) allowing an appeal by the present respondent, the Commissioner of Income Tax, Colombo, by way of case stated, from a decision (February 19, 1957) of the Board of Review constituted under the Income Tax Ordinance of Ceylon which had allowed an appeal by the present appellants, the trustees of the Abdul Gaffoor Trust, against a determination of the respondent confirming assessments to income tax made on the appellants in respect of the trust income for the years 1950–51 to 1954–55 inclusive.

The trust purposes, as set out in a trust deed of December 24, 1942, executed by the grantor, were as follows:

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"(2) . . . (*a*) A sum not exceeding one thousand rupees "(Rs. 1,000/-) a month for the remuneration of the trustees and "the expenses incurred by them in connection with the administration of the trust and for the payment of the costs of professional accountants solicitors counsel or agents or managers or "other persons whomsoever for or relating to any services rendered or other things done in connection with matters relating "to the trusts hereby created or the trust property.

"(*b*) A sum not exceeding in all one thousand rupees (Rs. "1,000/-) a month for the education instruction or training in "England or elsewhere abroad of deserving youths of the Islamic "Faith in such professions vocations occupations industries arts "or crafts trades employments subjects lines or any other departments of learning or human activity whatsoever as the board "may in its aforesaid discretion decide in the case of each such "deserving youth with a like discretion in the board from time "to time [to] change modify or alter or completely discontinue in "the case of each such youth either the object or objects of instruction education or training selected for him by the board (from "among the objects enumerated above) or the place or places or "countries whereat such education training or instruction is being "given from time to time. The board may under a like discretion "partially or wholly discontinue any assistance it may have given "or may be giving in the case of any such youths. It shall be lawful for the board out of the said sum to pay for or provide the "whole or any part of the cost of any such youth going abroad from "or in returning to Ceylon once or oftener as the board may under "such discretion aforesaid from time to time decide. The recipients of the benefits provided for in this clause shall be selected "by the board from the following classes of persons and in the "following order:

"(i) male descendants along either the male or female line of "the grantor or of any of his brothers or sisters failing whom

"(ii) youths of the Islamic Faith not being male descendants "as aforesaid of the grantor or of his brothers or sisters born "of Muslim parents of the Ceylon Moorish Community permanently resident in the City of Colombo (wherever such youths "may have been or be resident from time to time) failing whom

"(iii) youths of the Islamic Faith not being male descendants "as aforesaid of the grantor or of his brothers or sisters born of "Muslim parents of the Ceylon Moorish Community permanently "resident anywhere else in the said Island of Ceylon other than

" in Colombo (wherever such youths may have been or be resident " from time to time).

" (*c*) A sum not exceeding two hundred and fifty rupees (Rs. " 250/-) a month for the education of deserving youths of the " Islamic Faith born of Muslim parents of the Ceylon Moorish " Community permanently resident in Ceylon at either the University of Ceylon or any institution associated with or affiliated " to it or the Ceylon Law College or any other scholastic or vocational or professional or agricultural or industrial or other " technical institution public or private in Ceylon.

" (*d*) A sum not exceeding two hundred and fifty rupees (Rs. " 250/-) a month for providing dowries for poor girls of the Islamic " Faith wherever resident born of Muslim parents of the Ceylon " Moorish Community permanently resident in the City of " Colombo.

" (*e*) A sum not exceeding two hundred and fifty rupees (Rs. " 250/-) a month for supplementing the income of the Ghaffooriyah Arabic School at Maharagama in the said Island " founded [by] the grantor in the event of the funds already " provided for the said school under the relative trusts proving " insufficient.

" (*f*) A sum not exceeding one thousand rupees (Rs. 1,000/-) " a month to be accumulated from month to month and distributed for charity once a year during the month of Ramadan.

" (*g*) any surplus or any sums not expended on any of the " above objects shall be credited to a reserve fund to be used in " such proportions to such extents at such time or times and from " time to time in such manner as the board may in its absolute " and uncontrolled discretion decide (1) for the purpose of meeting any unforeseen expenditure or contingency in connection " with the trust property (2) in furtherance of all or any one or " more of the various objects of the trust (3) for educating in a " secondary school or secondary schools in Ceylon poor deserving " boys of the Islamic Faith born of Muslim parents permanently " resident in Ceylon (wherever such boys may have been or be " resident from time to time) and (4) for the relief of poverty " distress or sickness amongst members of the Islamic Faith in " Ceylon."

The main questions raised in this appeal were: (1) Whether the decision of the Board of Review on appeal against an assessment made on the trustees for the year 1949–50 operated as res judicata in respect of subsequent years now in question. (2) Whether, during the years covered by the present assessments, the trust was a trust "of a public character established solely for "charitable purposes" and exempt from tax by virtue of section 7 (1) (*c*) of the Income Tax Ordinance.

The Supreme Court of Ceylon held (1) that the decision of the Board of Review on an appeal from a previous assessment did not operate as res judicata; and (2) that the income of the trust was not exempt from tax.

1961. March 1, 2, 7, 8. *E. F. N. Gratiaen Q.C.*, Ceylon, *Michael Nolan*, *M. Sanmuganathan* and *Basnayake* for the appellants. The main question is whether as from the date of the grantor's death on November 1, 1948, this trust was an "institution of a public character established solely for charitable "purposes" within the meaning of section 7 (1) (*c*) of the Income Tax Ordinance, 1932, as amended, and the income thereof exempt from income tax under that section. The question as to tax liability arose first in the year 1949–50, when the trustees obtained a ruling from the Board of Revenue that the trust income was exempt by virtue of the provisions of section 7 (1) (*c*). The present appeal raises the question whether the commissioner is entitled to claim that the trust income is liable to tax for the five subsequent years 1950–51 to 1954–55 inclusive.

Two questions therefore arise: (1) Whether the decision of the Board of Review, right or wrong, operates as res judicata in respect of the appellants' present claim for exemption. The appellants say that it does. While it is appreciated that res judicata will only apply to a judicial decision and not to the decision of an estimating authority, and that the contest must be in respect of the same subject-matter, the submission is that both those tests are satisfied in this case having regard to the functions of the Board of Review under the Ordinance, which equates them, it is submitted, to a court exercising strictly judicial functions; and they are judicial functions because the decision is whether the trustees are entitled to claim permanent exemption from tax. If it is not the same subject-matter, then the plea fails. (2) Whether, even if the plea of res judicata fails, the Supreme Court were wrong in holding that in this case the exemption was not available to the trustees.

The Commissioner of Income Tax, it is conceded, is clearly an estimating authority and not a court, and the doctrine of res judicata cannot possibly apply in Ceylon to a determination made by him: Income Tax Ordinance, ss. 2, 3 (2), 5, 6, 20, 54, 55, 61, 64, 65, 66, 67, 69. The jurisdiction of the Board of Review, however, is in sharp distinction when contrasted with the administrative functions of the commissioner: sections 70, 71, 73. The board gives its " decision " as opposed to a " determination ": section 74. The board has no general estimating functions; and re finality, see section 75, and see also sections 77–83. Res judicata applies because the status and functions of the Board of Review are not merely not those of an estimating authority or of a revising body or of an administrative tribunal which substitutes its own assessment for that of another official, but, on the contrary, are of a judicial nature, and it makes final decisions subject only to the dissatisfied party's right to appeal to the Supreme Court and also to the Judicial Committee on a question of law. The decision of the Board of Review may properly be equated to a lis inter partes, as between the taxpayer on the one hand and the commissioner representing the Crown on the other affecting legal rights and liabilities.

The decision of the Board of Review was made on a fundamental question which directly arose for decision in respect of the year 1949–50 and which is equally a fundamental issue in relation to the claim for exemption for the later years of assessment. The order of the board annulling the determination of the commission in regard to the first year of assessment was on the basis of a decision that the appellants were entitled to permanent exemption under section 7 (1) (*c*).

Reference may be made first to a group of cases where the persons performing the functions of commissioners and Special Commissioners were held to be estimating authorities and not exercising judicial functions. Those cases are perfectly applicable to the commissioner here, but not to the Board of Review. In *Inland Revenue Commissioners* v. *Sneath* [1] the Special Commissioners were administrative officers charged with the duty of making an assessment for a particular year as soon as the matter came before them. They were clearly not a court; they had no seisin of any lis between the parties. In *Sneath's* case [1] there was only a decision as to what was the proper formula in arriving at an assessment. See also *Inland Revenue Commissioners* v. *Brooks*.[2] In *Patuck* v. *Lloyd* [3] there is an independent assessment to be made each year, and they are not bound to follow their own previous decision; which is conceded. The functions of the board in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation*[4] were held to be purely judicial and not administrative; thereafter an amending Act was passed expressly equating the board's decisions with the assessments of the commissioner—their decisions are really made by law decisions of an administrative board. In *Federal Commissioner of Taxation* v. *Munro*[5] Knox C.J. (dissenting) held that the amendment did not alter the position, but that view was rejected by the High Court and when that case came on appeal to the Privy Council: *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation*[6]; it was held that the board are merely in the same position as the commissioner, namely, another administrative tribunal. On a true analysis, however, the functions of the Board of Review in the Ceylon Ordinance are far more comparable to the board under the original Australian Act, and in Ceylon the commissioner is the final administrative officer; after him there is only the judicial authority of the Board of Review, subject to appeal on law. *Hoystead* v. *Commissioner of Taxation*[7] is relied on for the purposes of the present case; that case and *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*[8] are correct and can be readily differentiated. [Reference was made to Spencer Bower on Res Judicata (1924), p. 9, r. 5.]

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[1] [1932] 2 K.B. 362, 378, 379, 386, 388; 48 T.L.R. 241, C.A.

[2] [1915] A.C. 478, 482, 485; 31 T.L.R. 89, H.L.

[3] (1944) 171 L.T. 340, 341, C.A.

The present case is uncomplicated, for the appellants say that they have been assessed by the commissioner to tax for the year 1949–50 upon a computation which section 7 (1) (*c*) prohibits, and they have a decision in their favour. In the following years they make again the same complaint and ask for a quashing on the ground that the commissioner was for the identical fundamental reason not entitled to assess them at all. The question on the second occasion involves the determination of the same fundamental identical question. On eadem quaestio, see *Badar Bee* v. *Habib Merican*[9]; the same principle applies even in the context of a taxing statute. A similar case is *Sankaralinga* v. *Commissioner of Income Tax.*[10] See also *Society of Medical Officers of Health* v. *Hope*[11]; none of the grounds of the decision in that case affects the submissions made for the appellants here. [Reference was also made to *Hoystead's* case below[12] and to Halsbury's Laws of England, 3rd ed., vol. 15, p. 181, para. 355.]

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[4] (1925) 35 C.L.R. 422, 432, 435.

[5] (1926) 38 C.L.R. 153.

[6] [1931] A.C. 275, 293, 295; 47 T.L.R. 115, P.C.

[7] [1926] A.C. 155, 171, 172; 42 T.L.R. 207, P.C.

[8] [1926] A.C. 94, 100, P.C.

[9] [1909] A.C. 615, 619, 623, P.C.

[10] A.I.R. (1930) Mad. 209, 214.

[11] [1960] A.C. 551, 556, 560, 561, 569; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.

[12] (1921) 29 C.L.R. 537, 552.

Turning now to the question of charity, it is conceded that if in Ceylon there is no valid charitable trust with the necessary public element, then the trust would fail and be completely invalid. [Reference was made to the Trusts Ordinance of Ceylon (Legislative Enactments, 1938 Rev., c. 72), ss. 99, 110 (1) (5).] The narrow point here is whether one particular purpose could be adopted or resorted to in a certain situation—whether that lacked the public element. There was admittedly a direction that not more than Rs. 1,000 a month should be spent on the education abroad of deserving youths of the Islamic Faith. That, admittedly, was a public charity; but there was a direction that preference should be given to people of that class in particular order, and the first category was descendants of the grantor himself or of his brothers and sisters. It is not sought to bring this case within the "Founder's Kin" cases. Whether the special preference to members of the family circle divests the trust of its public character is the simple issue. There was no suggestion at any stage that this was a colourable provision so far as the author of the trust is concerned. It is clear that there is no express intention to confine the benefits of clause 2 (*b*) to the family circle.

The following authorities show that membership of a family as a qualification has only been held to divest the trust of its public character if the membership of the particular family of the author of the trust—or employees of a named company—was an essential part of the qualification: *In re Compton, Powell* v. *Compton*[13]—the present case is distinguishable because no member of the family circle can qualify for the benefit under clause 2 (*b*) unless he is a deserving youth of the Islamic faith; *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[14]—if the appellants are to succeed, it must be on the basis that the instrument confers a benefit on a section of the community with express preference for members of the family qualified themselves within the larger class; *In re Cox, decd., Baker* v. *National Trust Co. Ltd.*[15]—which is another case where the only beneficiaries within the bequest were employees and ex-employees; it does not carry the matter further. Whether the present case comes entirely within *In re Koettgen's Will Trusts* [16] or not, that case was correctly decided and the question is whether there are valid grounds for differentiating it from this case. If it was quite obvious that nobody but the preferred beneficiaries could come in, then it would be confined and that would make the difference.

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[13] [1945] Ch. 123, 129; 61 T.L.R. 167; [1945] 1 All E.R. 198, C.A.

[14] [1951] A.C. 297, 303, 305; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L.

[15] [1955] A.C. 627, 638; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550, P.C.

In summary, there was res judicata because (1) the Board of Review was a judicial tribunal (see the *British Imperial Oil Co.* case [17]) charged with the duty of determining issues between commissioners representing the Crown and the taxpayer which arose from the Income Tax Ordinance. (2) There was a lis inter partes—between the Crown and the trustees. (3) The annulment of the 1949–50 assessment necessarily involved a decision that the trustees were exempt from liability under the Income Tax Ordinance. The claims particularised in the assessments for 1950–51 to 1954–55 seek to re-open that decision and thus to reagitate the same question.

On the question of charity: (1) The only persons who can benefit are deserving youths of the Islamic Faith—plainly a section of the public. (2) Relationship to the grantor gives no right to benefit: his relations can only benefit if—and because—they come within (1) above. (3) Therefore the mere fact that they are preferred does not affect the character in which they benefit, i.e., as members of a section of the public. Lastly, the discretion of the trustees (or the board) must be exercised properly, and the court will interfere if it is not so exercised: see Tudor on Charities, 5th ed., p. 250.

Sir John Senter Q.C. and *Walter Jayawardena* for the respondent. The basic reasons given by Mr. Gratiaen for seeking to establish that the decision of the Board of Review in respect of the 1949–50 assessment was res judicata are wrong. No question of res judicata arises as regards the Board of Review in Ceylon; until the matter reaches the Supreme Court it is not judicial at all. Once an appeal has been set in motion by notice, the function of the Special Commissioners in this country is purely a function of valuation, and the position of the Board of Review in Ceylon is analogous to that of the Special Commissioners here. [*Edwards* (*Inspector of Taxes*) v. *Bairstow* [18] was referred to.] The commissioner and the Board of Review are part of the administration of assessment. The fact that an annual Finance

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[16] [1954] Ch. 252; [1954] 2 W.L.R. 166; [1954] 1 All E.R. 581.

[17] 35 C.L.R. 422.

[18] [1956] A.C. 14, 33; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.

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Act is necessary in England makes no essential difference. The Ceylon Ordinance has been changed from time to time, so that Mr. Gratiaen's point about the nature of the legislation, and that there is here a permanent exemption which cannot be changed, is a most unrealistic view. It is not right to differentiate the Income Tax Ordinance of Ceylon from the structure of the income tax legislation of this country. The Board of Review is really in the same position as the Special Commissioners here and they have no judicial functions; that is my main point. None of the refinements indicated for the appellants make it a judicial body. *Rex* v. *Income Tax Special Commissioners*[19] is a striking example of the Special Commissioners being a valuing body, and of their resemblance to the functions of the Board of Review in Ceylon. Under the law as it stands the duty of the board is to act as valuers and to state what is the amount of the tax due, and nothing else. See also *Inland Revenue Commissioners* v. *Sneath.*[20] There was no lis at all—the function of the High Court is to determine whether the Special Commissioners were right. The earlier decision of the Board of Review does not operate as res judicata in respect of the assessments under appeal.

On the charity point, the reasoning of the Supreme Court is clearly right—that it would be possible for the trustees, without imputing bad faith to them, to accumulate under clause 2 (*g*) of the trust deed and to apply the whole of that for the benefit of the founder's children without any breach of trust. Reliance is placed on *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[21] The Board should not give any extension to this trust which clearly has not the requisite element of public benefit. The trustees could use their discretion in a way which would wholly destroy the public character of the trust. The instrument was not, and is not, established solely for charitable purposes within the meaning of section 7 (1) (*c*) of the Ordinance, and the assessments appealed against were rightly made.

Jayawardena following. Under the relevant sections of the Income Tax Ordinance the question is: What are the tribunals deciding?—that is the true test in *Sneath's* case,[22] *Hope's* case[23] and the *Broken Hill* case.[24] The appeal is on the amount of the assessed income for the relevant years—that is the subject-matter of the appeal, and what happened to the assessment for the earlier year is irrelevant. The commissioner and the Board of Review are by the Ordinance given the same powers—to confirm, reduce, etc. The board does not act in a judicial capacity; one of the marks of a court in Ceylon is absent—they do not act on legal evidence. The earlier decision on the 1949–50 assessment was not res judicata.

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[19] [1936] 1 K.B. 487; 52 T.L.R. 143, C.A.

[20] [1932] 2 K.B. 362, 385.

[21] [1951] A.C. 297.

[22] [1932] 2 K.B. 362.

[23] [1960] A.C. 551.

[24] [1926] A.C. 94.

On the charity point, the question always is: What can the trustees legally do? Can the provisions of the instrument here be separated into different trusts? There is not one class from whom a selection is to be made; the grantor's descendants are in a separate class by themselves. The trustees here are not bound to apply the funds for charitable purposes. [Reference was made to *Income Tax Commissioner* v. *Aga Abbas Ali Shiraji*[25] and *Morice* v. *Bishop of Durham.*[26]] This is not a charitable trust even under English law, and if there are certain objects which do not pass the test of public character in the normal sense, the trust fails to qualify for the exemption. The onus is on the assessees to show that the assessment was wrong, and they have not discharged it in this case.

Gratiaen Q.C. in reply. The decision of the Board of Review is a judicial decision which binds both parties because it is fundamental to the claim for exemption in a subsequent year. The decision in *Hoystead's* case[27] was perfectly right and is in no way inconsistent with the judgment in the *Broken Hill* case,[28] and is an excellent illustration of the way in which estoppel by judgment as opposed to estoppel by res judicata could arise in a tax case. [Reference was also made to *Munro's* case,[29] *Brook's* case[30] and *Sneath's* case.[31]]

As to charity, there is in Ceylon a statutory adoption of the English principles in deciding what is " the public " or " a section of the public." The only issue here on charity is whether what would otherwise have been a trust of a public character has been divested of that character because of the direction that preference should be given to members of the family. The founder did intend to establish a trust of a public character, and if it is in substance for the public benefit, then there is a public trust, but if in substance clause 2 (*b*) is in effect a private family trust, it is conceded that the appeal must fail. Upjohn J. in *Koettgen's* case [32] was perfectly right.

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[25] (1944) I.L.R.(Mad.) 837.
[26] (1804) 9 Ves. 399.
[27] [1926] A.C. 155.
[28] [1926] A.C. 94.
[29] 38 C.L.R. 153.
[30] [1915] A.C. 478.
[31] [1932] 2 K.B. 362.

April 17. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from a judgment of the Supreme Court of Ceylon concerns five assessments to income tax for the revenue years 1950–51 to 1954–55 which have been made upon the income of a trust, styled the Abdul Gaffoor Trust, of which the appellants are the trustees. The appellants' case is that these assessments ought to be discharged because the trust is an "institution or trust of a public character established solely for "charitable purposes" within the meaning of section 7 (1) (*c*) of the Ceylon Income Tax Ordinance, 1932 (No. 2 of 1932, as subsequently amended), and its income is accordingly exempt from liability to the tax. For the moment it is sufficient to note that by virtue of the interpretation section of the Ordinance, section 2, "charitable purpose" is to be held to include "relief of the poor, "education and medical relief."

The trust in question was set up by a deed dated December 24, 1942, executed by one Noor Deen Hadjiar Abdul Caffoor, the grantor, of the one part and certain persons of the other part who were to act as the intended trustees. The trust property was stated to be of the value of Rs. 2,050,000, lawful money of Ceylon, at the date of the deed. The overriding trust in the deed was that during the life of the grantor the trustees were to apply the whole of the income for such purposes and in such manner as the grantor himself should in his absolute direction direct, whether or not such purposes should fall within those directed by the deed to be operative after the grantor's death. It is plain, therefore, that until his death, which took place on November 1, 1948, the current trust income was not in any sense devoted to charitable purposes. Accordingly, it can be argued that for this reason alone the Abdul Gaffoor Trust is not capable of being described as "established solely for charitable purposes." This argument was placed before the Supreme Court by the respondent and was there rejected on the ground that the word "established" had no essential connection with the date of the founding trust deed, and that the critical test for the purposes of the exemption of income from tax was the nature of the trusts that were operative in the year to which the claimed exemption related. The respondent's submission was repeated to their Lordships on the ground that it was desired to keep the point open.

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[32] [1954] Ch. 252.

The point was not fully developed in argument and, for reasons which will shortly appear, their Lordships find it unnecessary to express any opinion upon it.

Once the grantor was dead his overriding trust came to an end. The trust income thereafter was to be held by the trustees upon trust, after reserving a sum of Rs. 1,000 a month for upkeep and maintenance of the trust property, for all or any of a number of enumerated purposes which were set out in subheads (*a*) to (*g*) inclusive of paragraph 2 of the trust deed. The application of the income for or among these purposes was left to the absolute and uncontrolled discretion of a board, to be set up under the trust, consisting of the trustees and certain other named persons.

It is more convenient to set out these trust purposes in full as expressed in the deed than to try to reduce the expression of them by abridgement. [His Lordship stated the relevant terms of the trust deed as set out above and continued:]

If one accepts, as their Lordships do, the Supreme Court's reading of the words "for charity" in subhead (*f*) as meaning no more than "for the relief of the poor," it appears that in any year after the grantor's death the whole of the trust income, after allowing for administrative expenses, was destined to be applied for purposes that can broadly be described as serving education or the relief of poverty or of sickness or distress. Prima facie, these would qualify as charitable purposes.

The first main point taken on behalf of the appellants is that as between themselves and the respondent the question of exemption has been conclusively decided in their favour by a decision of the Board of Review, constituted under the Income Tax Ordinance, which decision was given on December 22, 1954, upon an appeal made by them to that board against assessment for the revenue year 1949–50. It is not in dispute that this decision was given or that the ground upon which exemption was allowed was that the income was that of a trust of a public character established solely for charitable purposes.

The appellants, therefore, are seeking to treat the decision of the Board of Review as setting up an estoppel per rem judicatam on the question of the trust income's right to be exempted from tax. This plea has not hitherto prevailed in the various hearings in Ceylon, it has been rejected in turn by the Commissioner of Income Tax, acting under section 69 of the Ordinance, by the Board of Review, acting under section 73, and by the Supreme Court, under section 74. For the reasons which will appear their Lordships are also of opinion that it cannot succeed.

The grounds for rejecting the estoppel in the courts of Ceylon have been stated either as " the previous decision of the Board of " Review which relates to an assessment for a year previous to " the years of assessment which are now before us is not binding " on us " (Decision of the Board of Review, paragraph 2) or as depending upon the question whether the Board of Review performs judicial and not merely administrative functions or, to put it in yet another way, upon the question whether the board was intended to function as a court of competent jurisdiction to decide litigation between the subject and the Crown (judgment of the Supreme Court). These different ways of approaching the issue reflect differences of formulation which are to be found in judgments in this country on similar or analogous issues. It is to be observed, however, that such differences could well lead to different conclusions in certain circumstances; for, if the fundamental reason why there is no estoppel is based upon the idea that the Board of Review does not possess adequate status as a judicial court of competent jurisdiction, it might seem to follow that a decision of the Supreme Court on the other hand when given on a case stated to it would set up an estoppel per rem judicatam in respect of tax for other years; whereas if the essence of the matter is that a question of liability to tax for one year is always to be treated as inherently a different issue from that of liability for another year, even though there may appear to be similarity or identity in the questions of law on which they respectively depend, it would seem to be the consequence on the contrary that a Supreme Court decision would be no more capable of setting up an estoppel than would one made by the Board of Review, whatever its precise status as a judicial tribunal.

In their Lordships' opinion the question of estoppel cannot be decided merely by inquiring to what extent the Board of Review exercises judicial functions. The critical test is not the bare issue whether or not such a board exercises judicial power, an issue which can indeed arise in other contexts, such as the constitutional question decided in *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation.*[1] What is important here is that the Board of Review is a tribunal set up under the Income Tax Ordinance for the purpose of deciding income tax appeals at a certain stage of their prosecution, and that decisions given with regard to such appeals are effective only within the limited jurisdiction that the Ordinance creates for all tribunals that deal with the matter of an appeal. All such appeals remain in one sense a part of the process of assessment since all the tribunals, including the Supreme Court, have independent power to increase or reduce the assessment under appeal. While, therefore, it is unexceptionable to say that the Board of Review when exercising its powers under section 73 is acting in a sense judicially, that the dispute which it has to determine is at any rate somewhat analogous to a lis inter partes and that the assessor who made the assessment or some other representative of the Commissioner (section 73 (3)) resembles a party hostile to the appellant, these considerations are not those that are critical to the issue of estoppel. The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see section 75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning upon the construction of the Ordinance or of other statutes or upon the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination (cf. *Reg.* v. *Hutchings* [2]).

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[1] [1931] A.C. 275; 47 T.L.R. 115, P.C.

It is in this sense that in matters of a recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with " eadem quaestio " as that which arises in respect of an assessment for another year and, consequently, not to set up an estoppel. It is precisely that point that was raised and accepted by this Board in 1926 in *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*,[3] where it is said: " The " decision of the High Court related to a valuation and a liabi- " lity to a tax in a previous year, and no doubt as regards that " year the decision could not be disputed. The present case " relates to a new question—namely, the valuation for a different " year and the liability for that year. It is not eadem quaestio, " and therefore the principle of res judicata cannot apply."

The *Broken Hill* decision [4] is in itself a striking application of the principle involved, since the earlier judgment which it was sought to set up as an estoppel was one given by the High Court of Australia on a rating assessment referred to it by way of appeal under the tax procedure. It underlines the point that it is not the status of the tribunal itself, judicial or administrative, that forms the determining element for estoppel in cases of this kind but the limited nature of the question that is within the tribunal's jurisdiction. The judgment of the High Court that had been given in the earlier year was explicitly directed to the construction of a particular section of the rating Act and to the correct measurement of the liability in the light of that construction. Precisely the same point arose in the later year and was ultimately decided by this Board in a sense contrary to that which had previously been adopted.

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[2] (1881) 6 Q.B.D. 300, C.A.

[3] [1926] A.C. 94, 100, P.C.

[4] Ibid.

So, on the present appeal, the earlier decision of the Board of Review governing the 1949–50 assessment was based upon a construction of section 7 (1) (*c*) of the Income Tax Ordinance as applied to the income of the Abdul Gaffoor Trust; and the same point of construction now arises again but in respect of assessments of that income for other and later years. In their Lordships' opinion it is not possible to distinguish the principle of the *Broken Hill* decision[4] from that which should prevail in the present case on any such ground as that here the earlier decision related to the taxpayer's " status " as an exempt person while in the *Broken Hill* case[4] the decision " merely " related to the correct amount of the assessment; for in truth, as has been explained, in all these cases which arise under income tax or rating appeal procedure the decision is essentially as to the correct amount (if any) of the assessment, and in the one case as much as in the other the decision was based upon a question of law, the proper interpretation of one of the provisions of the taxing Act.

To apply the principle of the *Broken Hill* decision[4] to the case now before their Lordships is to bring it into line with what seems to be by now the regular course of authority with regard to appeals in successive years against income tax or rating assessments: see *Inland Revenue Commissioners* v. *Sneath*[5]; *Patuck* v. *Lloyd*[6]; *Reg.* v. *Hutchings*[7]; *Society of Medical Officers of Health* v. *Hope*.[8] It may be that the principles applied in these cases form a somewhat anomalous branch of the general law of estoppel per rem judicatam and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered; but in their Lordships' opinion they are well established in their own field, and it is not by any means to be assumed that the result is one that should be regretted in the public interest.

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[4] [1926] A.C. 94, 100, P.C.

[5] [1932] 2 K.B. 362; 48 T.L.R. 241, C.A.

[6] (1944) 171 L.T. 340, C.A.

[7] 6 Q.B.D. 300.

[8] [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.

The decision of this Board in *Hoystead* v. *Commissioner of Taxation*[9] is not consistent with this line of authority, and the appellants naturally relied upon it in their argument. What happened in that case was that an assessment to federal land tax in Australia for the year 1918–19 had been the subject of appeal, and a case was stated for the opinion of the High Court on a point of law that determined the assessment, the correct interpretation of the taxing statute with regard to joint interests in land taken by the assessees under their father's will.

There was a later appeal in respect of the assessment for the year 1920–21; and the question that was brought to this Board was whether the Commissioner of Taxation was estopped in the matter of that assessment by the judgment that had been delivered by the High Court in the earlier proceedings. The Board decided that he was. Unfortunately, however, the argument that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year, an argument that was accepted by the Board at almost the same time in the *Broken Hill* case,[10] does not appear either to have been presented to the Board or to have been noticed or adjudicated upon in the opinion which was delivered by Lord Shaw. It is not possible to explain why the matter was dealt with in this way; and it is fair to note that in the majority judgment of the High Court, which was reversed on the appeal, there is a reference, though a passing one, to the point of "eadem "quaestio." In the result, however, the attention of the Board in delivering its opinion was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be estoppel per rem judicatam in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Their Lordships are of opinion that it is impossible for them to treat *Hoystead's* case[11] as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the *Broken Hill* case [12]; and to follow it would involve preferring a decision in which the particular point was either assumed without argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined.

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[9] [1926] A.C. 155; 42 T.L.R. 207, P.C.

[10] [1926] A.C. 94.

[11] [1926] A.C. 155.

For these reasons their Lordships are satisfied that the respondent is not estopped by the 1954 decision of the Board of Review from challenging the appellants' claim that the income of the Abdul Gaffoor Trust is exempt from tax under section 7 of the Income Tax Ordinance.

It is necessary now to turn to the question of exemption. To qualify at all there must be income of an " established " trust. Having regard to the nature of the Abdul Gaffoor Trust it cannot be validly established unless it falls within the definition of " charitable trust " which is contained in section 99 (1) of the Trusts Ordinance, 1918. This definition includes any trust " for " the benefit of the public or any section of the public " falling within any one of a number of categories which extend to such purposes as the relief of poverty and the advancement of education or knowledge. To satisfy the definition contained in the Income Tax Ordinance, therefore, the Abdul Gaffoor Trust must be a charitable trust " of a public character "; to be a subsisting charitable trust at all it must be a trust for the benefit of the public or some section of it.

In order to determine this question their Lordships think that the following principles may safely be applied in the interpretation of the Ceylon Ordinance. First, the general principles that govern the English law as to the validity of charitable trusts can be invoked. It seems plain that both the conception of a trust itself and the conception of what constitutes a charitable trust have been much influenced by English law. Secondly, there is no necessity to include in those general principles rules of the English law that appear to be specially associated with English local conditions or English history, or which appear to be now accepted as anomalous incidents of the general law. Thirdly, there is no significant difference between the meaning of " of a public " character " and the meaning of " for the benefit of the public " or any section of it." The two phrases are often used interchangeably in English decisions and textbooks—see, e.g., the quotation from Tudor on Charities, 5th ed., p. 11, employed by Lord Greene M.R. in *In re Compton* [13]—" a universal rule that

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[12] [1926] A.C. 94.

[13] [1945] Ch. 123, 128; 61 T.L.R. 167; [1945] 1 All E.R. 198, C.A.

"the law recognises no purpose as charitable unless it is of a "public character. That is to say, a purpose must . . . be "directed to the benefit of the community or a section of the "community." Charitable trusts must be "trusts of a public "nature" (see Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel* [14]). Fourthly, although educational purposes are themselves charitable purposes, no trust under which the beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. If, therefore, persons for whose benefit an educational trust is created, derive their title to their benefits by proving their qualifications in this way, whether as descendants of a named person or as employees of a named company, the trust must be regarded merely as a family trust and not as one for the benefit of a section of the community (see *In re Compton* [15]; *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [16]).

Their Lordships do not think that it would be consistent with these principles to apply to the law of Ceylon any doctrine that had as its foundation the ancient English institution of educational provision for "Founders Kin" in certain schools and colleges, or old English decisions about charitable relief for poor relations of a testator. The former provisions were commonly accepted as validly instituted, though there seems to be virtually no direct authority as to the principle upon which they rested, and they should probably be regarded as belonging more to history than to doctrine: the latter are today treated as no more than an anomaly in the general law.

Is, then, the Abdul Gaffoor Trust a charitable trust? It was not disputed that to determine this it is necessary to treat the whole trust income as if it were appropriated for the purposes specified in clause 2 (*b*). This is so because the form in which the various trust sub-heads are expressed is such that no definite sum of money is dedicated to any one, and the power given by sub-head (*g*) makes it possible for the whole of the income to be carried to a reserve fund which could then be expended as from time to time the Board thought proper in the exclusive implementation of the purposes of sub-head (*b*). To test whether any particular trust is a charitable one what must be asked is whether the income is bound with certainty to be applied to charitable purposes, not whether it may be so applied. Unless, therefore, sub-head (*b*) itself declares a valid charitable purpose, no part of the trust comes within the exempting provision of the Ordinance.

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[14] [1891] A.C. 531, 580; 7 T.L.R. 657, H.L.

[15] [1945] Ch. 123.

[16] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L.

There are several material constituents in this particular purpose. The money is to be used for "education, instruction or "training" in any department of human activity. Their Lordships will assume, without deciding, that this could be called an educational purpose. The recipients of the benefit are "deserving "youths of the Islamic Faith." So long, however, as there are male descendants in either the male or female line of the grantor, or any of his brothers or sister for whose education the board are prepared to provide or reserve money on the ground that they qualify as deserving youths of the Islamic Faith, no other youth of that Faith can obtain any benefit under the trust purpose. They can only come in "failing" the line of the descendants.

It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of deserving young people of the Islamic Faith, and that its required public character was not destroyed by the circumstance that a preference in the selection of deserving recipients was directed to be given to members of the grantor's own family. Their Lordships go with the argument so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is in effect the absolute priority to the benefit of the trust income which is conferred on the grantor's own family by clause (i) of sub-head (*b*), the only fair way to describe this trust is as a family trust under which the income is made available to provide for the education or training of relatives of the propositus, in this case the grantor himself, provided only that they are young, deserving and of the required Faith. These conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes.

In the Supreme Court judgment much consideration was given to the English decision *In re Koettgen's Will Trusts*,[17] the facts of which have much in common with those of the present case. The trust there created was expressed to be for the promotion and furtherance of commercial education; the persons eligible were British-born subjects without sufficient means to obtain at their own expense an education for a higher commercial career; and in selecting beneficiaries the trustees were directed to give preference to employees or members of the families of employees of a named company. It is evident that the court's decision, which upheld the trust as a valid trust for charitable purposes, turned on the exact construction which was given to the words of the will. It was argued that the trust was one "primarily for "the benefit of the employees . . . and their families, and that "it was only if there were insufficient employees or members of "their families that the public could come in as beneficiaries "under the trust." The judge says in his judgment that he did not accept that as the true construction of the clause in question; if he had accepted it, it is evident that he would have rejected the trust as a charitable bequest. The construction that he adopted as correct was that the primary class of beneficiaries consisted of persons without sufficient means to obtain commercial education at their own expense, and that the preference given merely amounted to a duty in the trustees to select employees or members of their families, if available, out of this primary class.

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[17] [1954] Ch. 252; [1954] 2 W.L.R. 166; [1954] 1 All E.R. 581.

It is not necessary for their Lordships to say whether they would have put the same construction on the will there in question as the judge did, or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with *Oppenheim's* case,[18] but it is sufficient to say that the construction of the gift which was there adopted does not tally with the construction which their Lordships are bound to place upon the trust which is now before them. Here the effect of the wording of clause 2 (*b*) (i) is to create a primary disposition of the trust income in favour of the family of the grantor.

For the reasons which have been set out above their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

Solicitors: *Smiles & Co.; T. L. Wilson & Co.*

C. C.

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[18] [1951] A.C. 297.

MANGALESWARI . . . . APPELLANT; J. C.*

AND

VELUPILLAI SELVADURAI AND OTHERS . RESPONDENTS.

1961
April 26.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Tesawalamai — Land — Pre-emption — Two equal co-owners of land—Sale by one of his half-share to stranger—No prior notice to co-owner—Action to enforce right of pre-emption—Time of accrual—Date of knowledge of sale—Pre-emptor not required to prove financial ability and intention to purchase at date of sale—Whether knowledge of natural guardian imputed to minor.
Roman-Dutch Law—Retraction or naesting—Extent of right—Ceylon.
Mohammedan Law—Pre-emption, right of—Extent of right—Ceylon.

Under the law of Tesawalamai—a body of customary law, subsequently given statutory force, obtaining among the inhabitants of the Northern Province of Ceylon—where the requisite notice has not been given by one of two co-owners of land in equal shares to the other before a sale of his own undivided half-share to a stranger a cause of action accrues to the other co-owner to enforce his right of pre-emption on his gaining knowledge of the sale and to have it set aside and the half-share transferred to him on the same terms as those on which the sale had taken place. He has not to "establish by positive proof that, had he in fact "received the requisite notice, he would and could have purchased "the property himself . . . rather than permit it to be sold to a "stranger."

Velupillai v. *Pulendra* (1951) 53 N.L.R. 472 overruled.

There is nothing in the statutory provisions of the Tesawalamai or in previous decisions of the Supreme Court of Ceylon to support the principle in *Velupillai* v. *Pulendra* (supra) that the pre-emptor must show that had he received notice he could and would have purchased the property. Further, there is nothing in Roman-Dutch law, which "where the Tesawalamai is silent is applicable" (*Sabapathypillai* v. *Sinnatamby* (1948) 50 N.L.R. 367), which supports that principle; nor is there anything in the Muslim law relating to pre-emption directly or indirectly to support it. The principle does not form part of the law of Ceylon.

Kathiresu v. *Kasinather* (1923) 25 N.L.R. 331, at 332; *Mailvaganam* v. *Kandiah* (1930) 32 N.L.R. 211, at 213 and *Karthigesu* v. *Parupathy* (1945) 46 N.L.R. 162 considered.

The appellant and her father, the first respondent, inherited in 1935 certain land as co-owners in equal shares. In 1937 the first respondent sold his half-share to the second respondent. The appellant, who did not become aware of the sale until January, 1950, shortly thereafter, and while still a minor, brought an action to enforce a right of pre-emption under the law of Tesawalamai, which was applicable to the rights of the parties, in respect of the undivided half-share sold by her father, and asked that the conveyance to the second respondent should be set aside and her father ordered to execute a deed of transfer in her favour on her bringing into court a sum equal to the consideration paid by the second respondent:—

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* *Present*: LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD DENNING, LORD MORRIS OF BORTH-Y-GEST, the RT. HON. L. M. D. DE SILVA.

Held, that notice to, or knowledge of, a natural guardian as interested as her father could not be imputed to the minor appellant; that her cause of action arose at the time when she came to know of the sale; that she had not to show that had she received the requisite notice she would and could have purchased the property; and that she was entitled to the relief claimed on depositing the amount of the consideration in court.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 10 of 1958) from a judgment and decree of the Supreme Court of Ceylon (June 25 and 26, 1952, respectively) allowing an appeal from a judgment and decree of the District Court of Chavakachcheri (November 28, 1950) whereby it had been held, inter alia, that the appellant was entitled to preempt an undivided half-share in certain land sold by the first respondent.

The following facts are taken from the judgment of the Judicial Committee: The appellant, a minor at the time but now a major, instituted this action through her duly appointed next friend in the District Court of Chavakachcheri on August 30, 1950, to enforce a right of pre-emption under the law of Tesawalamai in respect of an undivided half-share of a certain land. It was agreed that the law of Tesawalamai was applicable to the rights of parties in this case. She prayed that a deed of conveyance executed by the first respondent in favour of the second respondent be set aside and that the first respondent be ordered to execute a deed of transfer in her favour on her bringing into court a sum of Rs. 1,500, which was the consideration paid by the second respondent to the first on the deed, or other sum as the court might fix.

The district judge entered judgment in her favour on November 28, 1950, giving her time till December 18, 1950, to deposit a sum of Rs. 1,500 in court. She had deposited in court the said sum of Rs. 1,500 and a further sum of Rs. 1,500 determined by the district judge to be payable as compensation for improvements.

The Supreme Court (Gunasekera J., with whom Gratiaen J. agreed) set aside the said judgment and dismissed the action. The present appeal was from that order.

The appellant (born in 1930) and her father, the first respondent, inherited as co-owners in equal shares the property in question under the last will of her mother, who died in 1935. In September, 1937, the first respondent sold his half-share of it to the second respondent who, in turn, had sold the property to the third and fourth respondents. The appellant as a co-owner fell into the category of persons entitled to pre-empt under the Tesawalamai. The second and third and fourth respondents did not fall into that category. It had been stated by the appellant in evidence, and found by the district judge, that she did not become aware of the sale till after the institution of a certain partition action (the details of which were not material to this case) on January 10, 1950. That finding was not challenged on this appeal or elsewhere.

1961. Feb. 27, 28. *Stephen Chapman Q.C.* and *John Stephenson Q.C.* for the appellant. The appeal deals with the customary law among the inhabitants of Jaffna—the Tesawalamai; so far as that law does not apply Roman-Dutch law is their basic law. The particular section of this customary law now in question is the right of pre-emption, a right vested in certain categories to oust the purchaser of immovable property on paying to that purchaser the consideration he paid together with, if necessary, compensation for any improvements effected by the purchaser. That right is based on the idea that the community should be entitled to prevent invasion of the communal lands by a stranger, and also to protect members of a family who are co-owners of property. The basic point in this case is this: there may be a considerable lapse of time between a sale by a vendor and a person with a right of pre-emption acquiring knowledge of that sale, and in such a case the question is: Must a pre-emptor prove that he had, at the date of the impugned sale without his knowledge, the means to pay the purchase price of the land he claims? or is the true view that the material time is when the right of pre-emption is sought to be exercised, so that at that time the pre-emptor must either tender the sale price or pay it into court or comply with conditions by the court as to payment.

The first occasion on which it was held that means had to be shown as at the date of the original sale was by a decision of the Supreme Court in *Velupillai* v. *Pulendra*,[1] which was followed in the following year in the present case. This doctrine—that there must be means at the date of the original sale—emerged in 1951 for the first time in the hundreds of years during which the Tesawalamai has been in existence. The submission is that it is contrary to principle and has no authority for it—the whole trend of the cases is entirely against it. This point, which had never been made an issue in the present case—there was no proper investigation as to the means of the appellant—was the sole basis of the Supreme Court's judgment reversing the District Judge. The Supreme Court held that it was not established by the infant appellant that she had the means to purchase at the time of the original sale.

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[1] (1951) 53 N.L.R. 472.

Even, however, if her means had to be ascertained at the time of the original sale, she had absolutely her own half-share of the property, and she had the right to pre-empt the other half, and anyone then considering her financial position would without any doubt have said that she was good security for Rs. 1,500, which was the cost of buying the half-share. The respondents state in their formal reasons that the half-share was sold to the second respondent by the father and natural guardian of the appellant, and that in the negotiations for the sale he sufficiently represented her in waiving her right to pre-empt and, in the absence of any evidence of mala fides on his part, the sale was binding on the appellant ab initio and could not thereafter be set aside by the appellant. That cannot be right.

With regard to the authorities, there is no case, apart from *Velupillai* v. *Pulendra*[1] and the present case, in which it has ever been suggested that the pre-emptor must show that he had the means to purchase at the date of the original sale. If that doctrine is right, there would have to be an investigation of means of the pre-emptor as at the date of the sale. The Tesawalamai was given the force of law by Regulation 18 of 1806. A whole chapter is devoted to this system of law and its history in Balasingham's The Laws of Ceylon (1929), vol. 1, pp. 136 et seq. It was said in *Sabapathypillai* v. *Sinnatamby*[2] that "where the "Tesawalamai is silent the Roman-Dutch law is applicable," and *Puthatampy* v. *Mailvakanam*[3] and *Seelachchy* v. *Visuvanathan Chetty*[4] also show that Roman-Dutch law can be looked to. If, however, Roman-Dutch law is not relevant, some of the authoritative works under Muslim law will be cited, but it is submitted that in neither system of law can one find any trace of this principle adopted here by the Supreme Court.

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[1] 53 N.L.R. 472.
[2] (1948) 50 N.L.R. 367.
[3] (1897) 3 N.L.R. 42.
[4] (1922) 23 N.L.R. 97.

As to the position under Roman-Dutch law, see Lee's Introduction to Roman-Dutch Law, 5th ed., p. 298, citing Grotius' Jurisprudence of Holland, vol. 1, bk. 3, ch. 16 (Lee's ed. (1926), vol. 1, p. 377); Van Leeuwen's Commentaries on Roman-Dutch Law, 2nd ed. (1923), vol. 2, bk. 4, ch. 19, p. 146; Voet's Commentaries on the Pandects (Wilson's translation, 1897), bk. 18, ss. 9, 10, 11, 12, 15, 16, 17, 21–27: there is a direct statement by Voet contrary to the view that the father can bind his children; and there may be quite an interval between the date of the original sale and the date of the exercise of the right of retraction; the pre-emptor is stepping into the shoes of the purchaser and has only himself to blame if he does not get the fruits because of the long delay in exercising his right of pre-emption. [Reference was also made to Tiraquellus' Commentarii de Utroque retractu & municipali & conventionali, para. 143 (published in Paris in 1543).] Zoesius insists that the whole price shall be offered and that it must be done within a certain time, and he discusses when the time should begin to run: Zoesius, Commentary on the Pandects, XVIII, iii, 97, 110; he also says that it runs against minors, with certain exceptions, and quotes edicts which deprive minors of the right of pre-emption altogether: ibid. 120. The views of the jurists in all the above-cited works do not establish the proposition relied on by the Supreme Court in the present case.

With regard to the other source on this topic of pre-emption—Muslim law—Mulla's Principles of Mahomedan Law, 13th ed. (1950), pp. 229, 231, 233, 234, 236–238, 242, does not show that a pre-emptor has to establish that at the date of the sale he had the means to purchase; there is there an authoritative statement of the principles. Wilson's Anglo-Muhammadan Law, 6th ed. (1930), p. 387, is substantially on the same lines as Mulla. (Wilson was the translator of Voet (supra).) See also Tyabji's Mohammedan Law, 2nd ed. (1919), p. 677, s. 528 (c) (g).

That being the background, how the matter existed in Ceylon may be shown by referring to some Ordinances and cases: Civil Procedure Code, c. 86, s. 200; Prescription Ordinance, c. 55, ss. 10, 13. The right of pre-emption only arises as a cause of action when knowledge has been brought home to the person entitled to pre-empt. *Tillainathan* v. *Ramasamy Chetty* [5] gives the history of this curious system of law, and the judge there constantly refers to Roman-Dutch authorities in support of his views. See also *Suppiah* v. *Thambiah.*[6] *Silva* v. *Mohamadu*[7] is cited for the general principle in relation to a minor and the sale of property which, by analogy, may be applied to the present case. *Mailvaganam* v. *Kandiah*[8] does not carry the matter any further, but it indicates that the pre-emptor does stand in the shoes of the purchaser, and is authority for the proposition that knowledge of the sale is a necessary ingredient in the cause of action. *Karthigesu* v. *Parupathy*[9] is direct authority that the amount in the sale is the relevant figure unless it can be shown to be fictitious. It has been suggested that something more modern and clear should be laid down in relation to notice; that has now been done: Thesawalamai Pre-emption Ordinance, No. 59 of 1947, ss. 2 et seq.

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[5] (1900) 4 N.L.R. 328, 433.

Finally, as to whether awareness of the father was knowledge of the child, see *In re David Payne & Co. Ltd.*[10] In the circumstances of this case the father acted in his own capacity and his knowledge cannot be imputed to the child.

Gilbert Dold and *J. A. Baker* for the second respondent (now deceased and represented by his widow) and for the fifth, sixth, seventh and eighth respondents (substituted together with the third and fourth respondents in place of the deceased second respondent). First, the claim is statute-barred by reason of Ordinance No. 59 of 1947.

Stephen Chapman intervening. This is an entirely new point not raised in any of the courts below.

Dold. This is a matter of substantive law which would have a very direct effect on the judgment of this Board. The respondents pleaded limitation, but not specifically the Ordinance now sought to be relied on. In support of taking the point, see *Stool of Abinabina* v. *Chief Kojo Enyimadu*,[11] *Connecticut Fire Insurance Co.* v. *Kavanagh*[12] and *Basant Singh* v. *Mahabir Pershad.*[13]

[The Board ruled that the point should not be taken.]

There is no reference in the Koran to pre-emption, but in so far as Mohammedan law might apply, it is agreed that it has been correctly stated by Mr. Chapman. Of the Dutch commentators, Van Leeuwen in his work makes a grand tour of Europe reviewing the law of pre-emption. In Ceylon it is the Roman-Dutch law that the courts must apply where there has been a casus omissus. [Reference was made to the Censura Forensis of Van Leeuwen, 4th ed. (1741), pp. 433, 436.] Perezius supports the proposition that the pre-emptor must purchase with his own money. [The Ceylon Evidence Ordinance, ss. 100 and 111, were referred to.] As to the position of a father and his powers in relation to the property of his child, see Lee's Introduction to Roman-Dutch Law, 5th ed., pp. 35–37 and 107.

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[6] (1904) 7 N.L.R. 151.

[7] (1916) 19 N.L.R. 426.

[8] (1930) 32 N.L.R. 211.

[9] (1945) 46 N.L.R. 162.

[10] [1904] 2 Ch. 608, 611; 20 T.L.R. 590, C.A.

[11] [1953] A.C. 207; [1953] 2 W.L.R. 261, P.C.

[12] [1892] A.C. 473; 8 T.L.R. 752, P.C.

[13] (1913) L.R. 40 I.A. 86.

[LORD RADCLIFFE. Normally the father must get the sanction of the courts when exercising rights on behalf of an infant.]

It is conceded that the renunciation of a minor's right to pre-emption would normally require the sanction of the court. The half-share of the land was sold by the father and natural guardian of the appellant, and in the negotiations for the sale he sufficiently represented her in waiving her right to pre-empt and the sale was binding on her ab initio and could not thereafter be set aside by her. The judgment of the Supreme Court was right.

Baker following. In Ceylon the Tesawalamai has been interpreted in the light of other developments in the law, particularly, in this case, to the power of testamentary succession and to the registration of title to land; the object of the latter being the protection of purchasers and the facilitating of conveyancing. Looking at these developments one also has to see what is the appropriate remedy for the infant appellant, that is, whether she should have a remedy against purchasers of the property or be confined to an action for damages against her father.

In interpreting customs where the Tesawalamai and Roman-Dutch law are silent, one must consider whether the custom as alleged is inveterate and also reasonable: *Chinnappa* v. *Kanakar.*[14] The code is not the equivalent of an unchanging statute.

While Roman-Dutch law has been referred to, one must take account also of the common law: *Seelachchy* v. *Visuvanathan Chetty.*[15] [Reference was also made to *Iya Mattayer* v. *Kanapathipillai.*[16]] The custom of making a will is contrary to the policy of keeping property within the family, but if one concedes that pre-emption still exists, it is open to the Board to find that restitution is not the appropriate remedy. Co-ownership and the right of pre-emption arising from it is based on an implied contract: *Thangammah* v. *Kanagasabai.*[17]

[LORD RADCLIFFE. How does a right to take over property depend on co-ownership?]

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[14] (1910) 13 N.L.R. 157.
[15] 23 N.L.R. 97.
[16] (1928) 29 N.L.R. 301.
[17] (1949) 51 N.L.R. 500.

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See *Annapillai* v. *Eswaralingam*.[18] The Prescription Ordinance makes no special provision for a case of pre-emption. While the general policy is that a minor should not suffer by lapse of time, there is also a general policy of protecting purchasers, and the question is whether that should be paramount or subordinate to the minor's interests.

[A reply was not required.]

The first respondent did not appear and was not represented.

The tenth and eleventh respondents were substituted for the ninth respondent, a defendant in the action, since deceased. They were not represented on this appeal.

April 26. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA, who stated the facts set out above and continued: The Tesawalamai is a body of customary law obtaining among the inhabitants of the Northern Province of Ceylon. Its origin has been the subject of some controversy. It was collected and put into writing at the instance of the Dutch Governor Simons in 1706 and, after the British occupation, given the force of law by Regulation 18 of 1806 which, as amended by Ordinance No. 5 of 1869, is now Chapter 51 of the Legislative Enactments of Ceylon (Vol. II, p. 49). Part VII relates to pre-emption. There have been subsequent amendments but these were subsequent to the date of the sale mentioned above, and have not been invoked by the parties in the courts in Ceylon.

Under the Tesawalamai any of several persons (among them co-owners as stated above) falling into a defined category had on any proposed sale of a land to a person outside the category the right to demand that the property be sold to him on the same terms and conditions as on the proposed sale. Notice had to be given to all persons in the category or else the sale was liable to be defeated by any one of them. The position was correctly stated in the judgment of the Supreme Court in *Kathiresu* v. *Kasinather* thus[1]: "The Tesawalamai itself declared the form of "notice to be given where a co-owner has the right of pre-"emption. But by Ordinance No. 4 of 1895, so much of the "Tesawalamai as requires publication and schedules [these were "prescribed formalities] of intended sales of immovable property "was repealed. But this court held in *Suppiah* v. *Thambiah*,[2]

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[18] (1960) 62 N.L.R. 224.

[1] (1923) 25 N.L.R. 331, 332.

[2] (1904) 7 N.L.R. 157.

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" that notwithstanding the abolition of publication and schedules " of intended sales, the liability of a co-owner desiring to sell his " share of a land to give reasonable notice to his other co-owners " of the intended sale still survived."

It was further held in *Kathiresu* v. *Kasinather*[3] and approved in *Mailvaganam* v. *Kandiah*[4] " that a person who has knowledge " of an intended sale by a co-owner of his share and does not offer " to exercise his right of pre-emption cannot thereafter bring an " action for pre-emption and that the burden of proof is on the " defendant to prove that he either gave formal notice or that " the plaintiff had knowledge of the intended sale."

Their Lordships are of opinion, consistently with views expressed by the Supreme Court of Ceylon in various decisions, that where no notice has been given before the sale a cause of action accrues to a pre-emptor on his gaining knowledge of the sale to have it set aside and the property transferred to him on the same terms as those on which the sale had taken place. This principle, while it stood, created no doubt a serious difficulty in making sure that a proposed transfer of land would be sound. Amending legislation has been passed in 1947 to meet this and other difficulties arising from the Tesawalamai in dealing with land.

The Supreme Court allowed the appeal of the respondents and dismissed the action on the basis of the case of *Velupillai* v. *Pulendra*,[5] decided two years earlier by the same judges, in which it was held " it is fundamental to the cause of action such as is " alleged to have arisen in this case that the pre-emptor should " establish by positive proof that, had he in fact received the " requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to " be sold to a stranger." On an examination of the evidence in the present case they came to the conclusion that the appellant's estate was insufficient for the purpose (of a purchase) at the time of the sale by the first respondent to the second in 1937. For these reasons they dismissed the action.

It is necessary now to examine whether the view expressed in *Velupillai* v. *Pulendra*[6] is sound. It has been urged by counsel for the appellant, and not challenged by counsel for the respondent, that there is nothing in the statutory provisions of the Tesawalamai or in previous decisions of the Supreme Court which supports the view mentioned. In such circumstances the courts in Ceylon have derived assistance sometimes from the Roman-Dutch law and sometimes from the Muslim law relating to pre-emption. There has been a difference of opinion as to which system should be resorted to. It was held by the Supreme Court in *Karthigesu* v. *Parupathy*[7]: "pre-emption as it "prevails in British India owes its origin entirely to Mahome-"dan Law and the provisions in the Tesawalamai (Legis-"lative Enactments, Volume 2, Chapter 51, Part 7) may be due "to the early occupation of North Ceylon for a time by Mahome-"dans or the later occupation by the Malabars who had them-"selves come under Mahomedan influence in India. The "decisions of the Indian courts on questions of pre-emption may, "therefore, be taken as guides so far as such decisions are not "affected by statutes or the personal law governing persons of "Islamic faith."

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[3] 25 N.L.R. 331.
[4] (1930) 32 N.L.R. 211, 213.
[5] (1951) 53 N.L.R. 472, 474.
[6] Ibid.

But it was held in *Sabapathypillai* v. *Sinnatamby*[8] that "where the Tesawalamai is silent the Roman-Dutch law is "applicable." This view has also been expressed in other cases.

Counsel for the appellant argues, correctly in their Lordships' opinion, that there is nothing in either system which supports the view expressed in *Velupillai* v. *Pulendra*[9] and that, on the contrary, there is a certain amount which appears to be inconsistent with it.

It appears to their Lordships that neither the Roman-Dutch law nor the Muslim can be regarded as part of the law of Tesawalamai, but that it is permissible to look at the law obtaining in those systems, to ascertain the reasoning which underlies the principle of pre-emption as it is to be found in them in dealing with various problems; and, when not in conflict with the principles of Tesawalamai as established in Ceylon and otherwise appropriate, to borrow such rules and concepts as seem best suited to the situation in Ceylon.

Grotius, Book III, Chapter XVI, section 10 (Lee's Translation of the Jurisprudence of Holland by Hugo Grotius, p. 379) says: "10. The right of recall must be instituted within a year of the "sale or, at all events, within a year of its coming to the know-"ledge of the person asserting the right, as to which he may be "put to this oath." He does not say that the pre-emptor must show he was able to produce the money necessary for pre-emption at the time of the sale, or at the time it comes to his knowledge.

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[7] (1945) 46 N.L.R. 162, 163.

[8] (1948) 50 N.L.R. 367.

[9] 53 N.L.R. 472.

Voet in his commentary on the Pandects (Berwick's Translation, p. 61), founding himself upon Tiraquellus, says: "A renunciation of the right of retractus is indeed not to be inferred "merely from one having refused to purchase the thing when "offered to him by a cognate; for many circumstances might "dissuade him from an immediate purchase, for example, less "astuteness on the part of the cognate [vendor] than on that of "the extraneous purchaser, which might make it more to the "advantage of the latter to avail himself of the right of retractus "after it has been already purchased than to be himself the first "purchaser; want of ready money which however he might be "able to procure within the year allowed for the exercise of the "right; and many others. Tiraquellus *De retractu gentilit*, § 1, "*gloss.* 9, *n.* 145. Nor is renunciation to be inferred from the "circumstance of his having been present at the sale and "remaining silent; for such silence is rather to be attributed to "his knowledge that his right would last for the term of a whole "year or other period defined by statute."

Retraction (or naesting) was the name given in Roman-Dutch law to pre-emption. It will be seen that under the Roman-Dutch law a pre-emptor was in a position much more privileged than under the law of Ceylon. There is nothing in the Roman-Dutch law which directly or indirectly supports the view on which the judgment of the Supreme Court rests.

Their Lordships have been referred to various passages in the works of Mulla, Wilson and Tyabji which satisfy them of the negative proposition that there is nothing in the Muslim law which supports directly or indirectly the view of the Supreme Court. They will make reference to a passage which appears in Wilson's Anglo-Muhammadan Law (6th ed., p. 415, art. 387): "It is not "necessary according to Muhammadan Law, but it is sometimes "required by the local wajib-ul-arz, [local board of rights, p. 66 "ib] that the owner of property should give notice to the persons "having the right of pre-emption before selling to a stranger. "Under the Muhammadan Law the right cannot be lost by delay "in making the demand until the existence of a binding contract "has actually come to the knowledge of the pre-emptor; where "notice is required by the wajib-ul-arz the right is lost unless the "pre-emptor replies to the notice within a reasonable time after "receiving it, offering to purchase at the price asked, or at a price "to be settled in accordance with the provisions of the wajib-ul-"arz."

There is no indication in this passage or elsewhere that if the property is sold without notice the pre-emptor asserting his right to pre-emption in an action must " establish by positive proof " that had he in fact received the requisite notice, he would and " could have purchased the property himself rather than permit " it to be sold to a stranger," and no indication of anything which resembles what has just been said in any way.

It appears from what has been said that there is nothing in the Roman-Dutch law or the Muslim law which can be said to support the principle upon which the judgment of the Supreme Court rests. The passages quoted tend on the whole to be opposed to such a principle. As already stated, there is nothing in the statute law or in the decisions of the Ceylon courts which has a bearing on it. Their Lordships are of opinion that it must be held that the principle does not form part of the law in Ceylon. The Supreme Court in laying down the principle observed[10]: " A " would-be pre-emptor cannot claim to be in a better position " by not receiving notice of the intended sale than he would have " been if he had received such notice." On the other hand, it has to be noted that the point of time at which the cause of action arises in the case of a sale without notice is, as already stated, the time at which the person deprived of his rights as a pre-emptor comes to know of the sale. This may be a considerable time after the sale and still further from the time at which he should have received notice. Had he received notice and did not possess the necessary money at the time he might have raised it. It would not be just to insist that he should establish facts which might well have existed some considerable time before the action, but of which it might at the time of action be difficult to obtain evidence in a convincing form; for instance, a person who might at the relevant time have assisted the pre-emptor with money might be dead or, if alive, his evidence could be criticised on the ground that he is saying he would have done something which he was never called upon to do in the past and would not be called upon to do in the future.

It was argued that the vendor, being the father of the minor, was her natural guardian, and that his knowledge of the sale should be imputed to her. The Supreme Court did not decide this question as the view discussed above taken by it was sufficient to dispose of the case. Their Lordships do not find it necessary to consider the general question as to the circumstances, if any, under which notice to a natural guardian can under the law of Ceylon be said to be notice to a minor sufficient to bind him

[10] 53 N.L.R. 472, 474.

(or her). They are of opinion that notice to, or the knowledge of, a natural guardian as interested as the first respondent could not be imputed to the appellant.

The Muslim law, while recognising the doctrine of pre-emption, does not look upon it with favour. Thus Tyabji (Muhammadan Law, 3rd ed.) says at p. 725: "Pre-emption is not favoured by "the law," and further: "The right of shufa [pre-emption] is but "a feeble right, as it is a disseising another of his property, merely "in order to prevent apprehended inconveniences." In Ceylon it was said rightly by the Supreme Court in 1923 in the case of *Kathiresu* v. *Kasinather*[11]: "The right of pre-emption imposes "a serious fetter on an owner's right of free disposition of pro-"perty, and the facts have to be carefully scrutinised before a "co-owner is allowed to set aside a sale on such a ground." In the case of *Velupillai* v. *Pulendra*[12] the Supreme Court was no doubt quite rightly scrutinising the circumstances closely, but with all respect their Lordships cannot find sufficient material upon which the view expressed by it can be sustained.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be allowed, the decree of the Supreme Court set aside and the decree of the District Court restored. The costs in the Supreme Court and on this appeal must be paid by the second to eleventh respondents. The first respondent filed no answer and raised no opposition at any stage of the case.

Solicitors: *Lee & Pembertons; A. L. Bryden & Williams.*

C. C.

[11] 25 N.L.R. 331, 332–333.

[12] 53 N.L.R. 472.

ATTORNEY-GENERAL OF THE GAMBIA . APPELLANT;

AND

PIERRE SARR N'JIE . . . . . . RESPONDENT.

J. C.*
1961
May 3.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Barrister — Professional misconduct — Disciplinary power of judge— Exercise by deputy—Whether a judicial power—Gambia.

West Africa—Gambia—Legal practitioner—Professional misconduct— Disciplinary power of deputy judge to suspend or strike off—

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* *Present*: LORD RADCLIFFE, LORD DENNING, LORD GUEST.

J. C.

1961

ATTORNEY-GENERAL OF THE GAMBIA v. N'JIE.

Judicial power—Supreme Court Ordinance (Laws of the Gambia, 1955, *c.* 5), *s.* 7*—Rules of the Supreme Court of the Gambia,* 1928, *Ord. IX, r.* 7.

West Africa—Gambia—Appeal to Privy Council—Competency—Locus standi of Attorney-General—"Person aggrieved"—West African (Appeal to Privy Council) Order in Council, 1949, *s.* 31.

By section 7 of the Supreme Court Ordinance of the Gambia: ". . . it shall be lawful for the Governor to appoint a deputy judge "to represent the judge of the Supreme Court of the Colony of the "Gambia [the Chief Justice] in the exercise of his judicial "powers . . ."; and by Order IX, r. 7, of the Rules of the Supreme Court of the Gambia: "The judge shall have power, for reasonable "cause, to suspend any barrister or solicitor from practising within "the jurisdiction of the court . . . or order his name to be struck "off the Roll of Court."

The name of the respondent, a member of the English Bar who had been admitted to practice as a barrister and solicitor of the Supreme Court of the Gambia, was, after due inquiry into allegations of professional misconduct by a deputy judge appointed under section 7 of the Supreme Court Ordinance, ordered by him to be struck off the roll of the Supreme Court of the Gambia. On his appeal, the West African Court of Appeal set aside the deputy judge's order on the ground that he had only jurisdiction to represent the Chief Justice "in the exercise of his judicial powers," and that the power to strike a legal practitioner off the roll was not a judicial power. On appeal by the Attorney-General of the Gambia by special leave:—

Held, that the power of a judge, sitting as a disciplinary authority, to suspend or strike off a legal practitioner was a judicial power of the judge which it was competent for a deputy judge to exercise.

Order IX, r. 7, was simply a restatement of the inherent power of the judge at common law and was intra vires.

In re Justices of Court of Common Pleas of Antigua (1830) 1 Knapp 267, at 268, P.C.; *Har Prasad Singh* v. *Judges of Allahabad High Court* (1931) L.R. 58 I.A. 152 and *Macauley* v. *Judges of the Supreme Court of Sierra Leone* [1928] A.C. 344, P.C. considered.

Held, further, that the Attorney-General, representing the Crown as guardian of the public interest, was a "person "aggrieved"—words of wide import—by the decision of the West African Court of Appeal within the meaning of section 31 of the West African (Appeal to Privy Council) Order in Council, 1949, and accordingly had a locus standi to petition for special leave to appeal.

Ex parte Sidebotham (1880) 14 Ch.D. 458, at 465, C.A. and *Ex parte Official Receiver, In re Reed, Bowen & Co.* (1887) 19 Q.B.D. 174; 3 T.L.R. 640, C.A. considered.

By section 5 of the West African (Appeal to Privy Council) Order in Council, 1949: "Applications to the court for leave to "appeal shall be made by motion or petition within 21 days from "the date of the judgment to be appealed from, and the applicant "shall give the opposite party notice of his intended application."

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Held, that while a literal construction of section 5 would appear to require that the application itself must be heard within 21 days, all that was intended was that notice should be lodged in the court within 21 days from the date of the judgment appealed from, and a copy served on the opposite party as soon as possible, and in any case within a reasonable time before the date of the hearing.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 54 of 1959), by special leave.

The following facts are taken from the judgment of the Judicial Committee: Pierre Sarr N'Jie was a member of the English Bar who was admitted a few years ago to practice as a barrister and solicitor of the Supreme Court of the Gambia. On September 22, 1958, the deputy judge (Abbott J.) made an order striking his name off the roll of that court and directing that it be reported to the Masters of the Bench of his Inn. On June 5, 1959, the West African Court of Appeal (Bairamian Actg.P., Hurley Actg.J.A. and Ames Actg.J.A.) set aside the order on the ground that the deputy judge had no jurisdiction in the matter. The Attorney-General of the Gambia sought leave to appeal to Her Majesty in Council but on July 6, 1959, the West African Court of Appeal (Bairamian Actg.P., Benka-Coker J. and Marke J.) refused him leave to appeal on the ground that notice had not been given in due time to Pierre Sarr N'Jie. Thereupon the Attorney-General made a petition to Her Majesty for special leave to appeal from the judgments of the West African Court of Appeal, both of June 5, 1959, and July 6, 1959. This petition was granted but liberty was expressly reserved to Pierre Sarr N'Jie to raise the preliminary point that no appeal lay at the instance of the Attorney-General. Their Lordships rejected this preliminary point and their reasons appear in their judgment.

The history started with a civil suit tried in 1958 in the Supreme Court of the Gambia before the Chief Justice of the Gambia (Wiseham C.J.). On June 27, 1958, in the course of giving judgment, Wiseham C.J. criticised severely certain conduct of Pierre Sarr N'Jie which had come to his notice during the trial, and he sent a copy of his judgment to the Attorney-General of the Gambia. On July 16, 1958, the Attorney-General served a notice of motion on Pierre Sarr N'Jie asking for an inquiry to be made by the Chief Justice into allegations of professional misconduct against Pierre Sarr N'Jie and for his name to be struck off the roll of court. The allegations were set out in an affidavit and were to the effect that he had received several sums of money on behalf of others, to wit, £350, £150, £50, £203 9s., £1,360, and

£200, and had utilised them for his own purposes, and further, that he had, with intent to deceive, been guilty of false representation and concealment.

On July 19, 1958, the motion came on for hearing before Wiseham C.J. Pierre Sarr N'Jie was then represented by his brother, Mr. S. A. N'Jie. He consented to an inquiry being held but asked that it should be held by someone other than Wiseham C.J. The Chief Justice said that, in view of his findings in the civil suit, this was reasonable. He said that he would recommend that someone other than himself should be appointed as a deputy judge to hold the inquiry and to exercise all the powers vested in the Chief Justice. Mr. S. A. N'Jie asked for time until November, but this the Chief Justice refused to grant. A day or two later Pierre Sarr N'Jie left the Gambia for England and on July 25, 1958, he wrote from London to the Attorney-General of the Gambia asking the date of the inquiry. He said: "I should "like it held as early as possible, say, first week of September "next."

Steps were duly taken to appoint a deputy judge to hold the inquiry instead of the Chief Justice. The Governor appointed Abbott J. (at that time a Justice of the Federal Supreme Court of Nigeria) to be a deputy judge of the Gambia. The hearing was fixed for September 15, 1958, at Bathurst in the Gambia. Notice was given to Pierre Sarr N'Jie, who wrote on August 17, 1958: "I have noted that the hearing of the matter before the court will "take place (at Bathurst) on September 15, 1958, and I shall be "present, God being willing."

Notwithstanding the apparent concurrence in the date of September 15, 1958, Pierre Sarr N'Jie afterwards sought by various means to get the hearing adjourned. At one time he objected to a hearing during the vacation. At another time he said it was impossible for him to attend. Eventually he said he was ill and that a medical certificate was available, but none ever came. All his objections were overruled: and Abbott J. held the inquiry on September 15, 16, 17 and 18, 1958. The Attorney-General appeared but Pierre Sarr N'Jie did not appear nor was he represented, save for a fleeting moment when his brother, Mr. E. D. N'Jie, asked for an adjournment and, on its being refused, withdrew.

On September 22, 1958, Abbott J. gave his decision. He found that eight out of the nine allegations against Pierre Sarr N'Jie had been established. He summarised his conclusions in these words: "Of the respondent's behaviour as disclosed by the "documentary and oral evidence before me, I find it difficult to "speak with anything approaching moderation. He is undoubtedly guilty of the most disgraceful professional misconduct that I have come across in 35 years' legal experience. He "is totally unfitted, in my view, to be entrusted with the interests "and affairs of any member of the public, still less with any "money belonging to anyone else, and he is a disgrace to the "profession to which he belongs."

Abbott J. ordered that his name be struck off the roll of barristers and solicitors of the Supreme Court of the Gambia and directed that the making of the order be reported by the Attorney-General to the Masters of the Bench of the Inn of Court by which he was called to the Bar.

On June 5, 1959, the West African Court of Appeal set aside this order on the ground that a deputy judge had only jurisdiction to represent the Chief Justice "in the exercise of his judicial "powers": and they held that the power to strike a legal practitioner off the roll was not a judicial power. Against that decision the Attorney-General of the Gambia now appealed.

1961. March 15, 16, 20. *J. G. Le Quesne* for the appellant.

E. F. N. Gratiaen Q.C. Ceylon and *Walter Jayawardena*, for the respondent, took a preliminary objection that the Attorney-General was not a "person aggrieved" within the meaning of section 31 of the West African (Appeal to Privy Council) Order in Council, 1949, and accordingly did not have the status which qualified him to appeal to the Board either from the judgment of the West African Court of Appeal of June 5, 1959, or from that of the same court of July 6, 1959.

The appellant initiated a disciplinary inquiry before the Chief Justice of the Gambia in regard to certain allegations of professional misconduct against the respondent, but it was made quite plain in the proceedings that the Attorney-General's status in the matter was that of amicus curiae. He made it clear that he was not in any sense claiming the status of a plaintiff. Pursuant to a right of appeal given by the West African Court of Appeal Ordinance (Laws of the Gambia, 1955, c. 6, s. 14), the respondent appealed to the West African Court of Appeal against the order of the deputy judge that he be struck off the roll. It is significant that whereas a right of appeal is given to a person against whom an order is made, no such right is conferred on the person who has initiated the proceedings before the tribunal. This is really a matter between the judge and the professional person concerned, and nobody else has in any such disciplinary proceedings the status of a party who could claim as of right that the man's name should be struck off. The Attorney-General, however, was admittedly a party to that appeal, and in due course the West African Court of Appeal made an order quashing the order of the deputy judge.

On June 23, 1959, the Attorney-General gave notice of motion in the West African Court of Appeal for leave to appeal to the Privy Council. On July 6 the Court of Appeal dismissed the application for leave to appeal on the ground that it was out of time. There was then an application to this Board by the Attorney-General for special leave to appeal against both those orders—that allowing the respondent's appeal and the other refusing leave to appeal to the Privy Council. Objection was taken in regard to both matters that the Attorney-General had no status to make an application for special leave to appeal as he was not a "person aggrieved" within the meaning of section 31 of the Order in Council of 1949, which is in standard form. Section 3 is the only section which confers leave to appeal as of right, and it is submitted that the intention was to confer that right only in civil matters; that section relates to where there are two parties in the proper sense of the term and there is a matter in dispute. The West African Court of Appeal had no power in this kind of proceeding to give the Attorney-General leave to appeal under section 3 (*b*).

The short submission is that section 31 recognises that a person who petitions the Crown for leave to appeal must be a "person aggrieved" by the judgment in the legal sense. In other words, there must be a person who is a party to a proceeding who is aggrieved by the judgment which affects him, not a mere general dissatisfaction of a person who has claimed no rights and against whom no order has been made.

In every case where professional misconduct alone was the matter for consideration by the Privy Council the respondents were the judges. It is conceded that the judges were not parties in the strict sense—the lis sense. Reliance is placed on certain pertinent observations in *Boulter* v. *Kent Justices.*[1] See also *Reg.* v. *Keepers of the Peace and Justices of the County of London*[2]; *Ex parte Sidebotham*,[3] which is consistently quoted in this context; *Sevenoaks Urban District Council*

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[1] [1897] A.C. 556, 569; 13 T.L.R. 538, H.L.

[2] (1890) 25 Q.B.D. 357, 360; 6 T.L.R. 389.

[3] (1879) 14 Ch.D. 458, 465, C.A.

v. *Twynam* [4] and *Rex* v. *London Quarter Sessions*.[5] Cases where the judges were heard in support of their decision—although the Attorney-General was not a party or a necessary party against whom the order was made—are *In re Monckton*,[6] *Smith* v. *Justices of Sierra Leone* [7] and *In re Justices of Court of Common Pleas of Antigua*.[8] The proceeding does not become one between the Attorney-General and the professional man. It is not disputed that the Attorney-General is a proper person to be there, but that does not confer on him the status of a person who is aggrieved if an order is not made striking the person off. *Har Prasad Singh* v. *Judges of Allahabad High Court* [9] is relied on as a correct description of the nature of these proceedings, which do not include the idea of any other party—it is a disciplinary decision. [Reference was also made to *In re Downie and Arrindell*,[10] *Macauley* v. *Judges of the Supreme Court of Sierra Leone*,[11] *In re Taylor* [12] and *Morgan* v. *Leech*.[13]] The Attorney-General has no status to appeal against either of the orders of which he complains.

J. G. Le Quesne. It is clear that the Attorney-General was made a respondent to the proceedings in the West African Court of Appeal, and all the cases cited do not go at all to the question whether he is a person aggrieved; all they show is that the judges in those cases were made respondents. The Attorney-General before the West African Court of Appeal was attempting to support the order which had been made by Abbott J. When the Court of Appeal discharged that order the Attorney-General was a person aggrieved. It is clear from the authorities that in any kind of case, including a criminal case, there is always someone in a position to get special leave, subject to the Board's discretion: *Attorney-General for Ceylon* v. *Perera*.[14] In *Reg.* v. *Bertrand* [15] it might be difficult to distinguish between the Attorney-General and the Queen—he might be said to be appearing on behalf of the Queen. In *Macauley's* case [16] the respondents were described as the Justices of Sierra Leone and another; the other was in fact the Attorney-General.

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[4] [1929] 2 K.B. 440, 445; 45 T.L.R. 508, D.C.

[5] [1951] 2 K.B. 508, 510; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032, D.C.

[6] (1837) 1 Moo.P.C. 455.

[7] (1848) 7 Moo.P.C. 174.

[8] (1830) 1 Knapp 267, P.C.

[9] (1931) L.R. 58 I.A. 152, 158.

[10] (1841) 3 Moo.P.C. 414, 418.

[11] [1928] A.C. 344, 345, P.C.

[12] (1912) 28 T.L.R. 206; 105 L.T. 973, P.C.

[13] (1841) 3 Moo.P.C. 368, 374.

[14] [1953] A.C. 200, 203, P.C.

[15] (1867) L.R. 1 P.C. 520, 522, 529.

[16] [1928] A.C. 344.

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Even if the Attorney-General could not properly be described as a party in the court below, he was a party to the appeal, appearing as a respondent there for the purpose of saying that the court should dismiss the appeal. When they made an order setting aside the judge's order the Attorney-General was a person aggrieved by the order within the meaning of those words in the English cases, which is that a person who has sought from a court a decision which he has a right to seek, and has wrongly been refused, is a person aggrieved. The Attorney-General cannot be described as having no more grievance than any member of the public. Applying *Ex parte Official Receiver, In re Reed, Bowen & Co.*[17] to this case, the Attorney-General is a person aggrieved.

Further, the Attorney-General is an officer of the Crown and head of the Bar. He is therefore under a duty to see that any person against whom charges of this sort are established should not remain on the roll of the court. The position of the Attorney-General in this case is to be compared with that of the Official Receiver in *Ex parte Official Receiver.*[18] *In re Lamb, Ex parte Board of Trade*[19] is on its facts an even stronger case than *Ex parte Official Receiver.*[18] The case of *Sevenoaks Urban District Council* v. *Twynam*[20] was approved by the House of Lords in *Jennings* v. *Kelly.*[21] The local authority cases are to be distinguished from the present case because in them the local authority have not sought any order of the court, but were simply acting themselves as a tribunal for some purposes—to decide, e.g., whether a man should have a street trading licence; or as an executive authority to see that the town planning scheme has been properly enforced. *Reg.* v. *Keepers of the Peace and Justices of the County of London*[22] is not a decision of any general import upon the words "person aggrieved" when they are not used in the context of an acquittal on a criminal charge. An example of the cases under the Public Health Act is *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow.*[23]

The correct definition of a "person aggrieved" is that of Lord Esher M.R. in *Ex parte Official Receiver,*[24] and applying what was there said to this case, the Attorney-General is seen to be a person aggrieved. None of the "judges" cases is strictly comparable with this case. The Attorney-General was entitled to petition the Board and there was jurisdiction to grant him leave to appeal—there is nothing in the Order in Council of 1949 to interfere with that jurisdiction, which was within the prerogative power.

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[17] (1887) 19 Q.B.D. 174, 176; 33 T.L.R. 640, C.A.

[18] Ibid.

[19] [1894] 2 Q.B. 805, 812–814; 10 T.L.R. 575, C.A.

[20] [1929] 2 K.B. 440.

[21] [1940] A.C. 206, 225; 56 T.L.R. 154; [1939] 4 All E.R. 464, H.L.

[22] 25 Q.B.D. 357.

[23] [1952] 2 Q.B. 601, 607; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78, D.C.

[24] 19 Q.B.D. 174, 177–178.

Gratiaen Q.C. in reply on the preliminary point. Article 31 of the Order in Council lays down in perfectly clear and correct legal language what is the right of any litigant to invoke the final appellate jurisdiction of the Crown which has not been taken away by express language. The Attorney-General has no legal grievance as a party in respect of an order which operated against him in any way at all so that he would be entitled to come to the Crown and ask for the order to be set aside. A person aggrieved is one who can show that there is an order against him which can be set aside on the appeal: *Reg.* v. *Bertrand.*[25] The position here is very different from a criminal matter, where there is a prosecutor and an accused who are both parties. The Attorney-General in Ceylon is a party to a criminal proceeding in the correct sense of the term: *Attorney-General for Ceylon* v. *Perera.*[26] When the Crown appeals against an acquittal it can only do so, and only ask for special leave, because it has the status of a party to the proceedings and had a legal right to a proper verdict.

The position of the Attorney-General when he appeared on the appeal was very different indeed from that of the Official Receiver in *Ex parte Official Receiver*[27] or of the Board of Trade in *In re Lamb*[28] or of the objectors in *Jennings* v. *Kelly.*[29] In considering the statutory status of a person it is necessary to examine the particular statute for the purpose of deciding what are the statutory rights and what is the statutory status: *Jennings* v. *Kelly.*[29] Applying a very simple test here, what is the order in the Attorney-General's favour which he asks to have restored, and what order is adverse to him which he says should be set aside? [Reference was also made to *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow.*[30]] In the context of an appeal for the purpose of invoking the appellate jurisdiction of the Crown as the fountain of justice the grievance must be a strict legal one. The Attorney-General is not, for a number of reasons, a " person aggrieved " by the judgment in the sense in which those words ought to be interpreted in section 31 of the Order in Council of 1949.

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[25] L.R. 1 P.C. 520.
[26] [1953] A.C. 200.
[27] 19 Q.B.D. 174, 177, 181.
[28] [1894] 2 Q.B. 805, 811.
[29] [1940] A.C. 206.
[30] [1952] 2 Q.B. 601.

Lord Radcliffe (after a brief adjournment). Their Lordships have decided that the appellant is entitled to maintain his appeal before the Board and that the preliminary objection cannot be upheld. They will give their reasons for coming to that view when they give their decision at the end of the case.

J. G. Le Quesne. The jurisdiction of the deputy judge depends on section 7 of the Supreme Court Ordinance; it is quite clear that "judicial powers of the judge" in that section include everything which the judge does when he is sitting in court. A power may, however, it is submitted, be a judicial power even though it is not to be exercised in court. The criterion of the judicial power is not to be found in the nature of the thing which is to be done but in the manner in which it is to be done; the vital question is whether it is judicial or administrative. The power under Order 9 of the Gambia Rules of the Supreme Court, made under section 72 of the Supreme Court Ordinance, to enroll legal practitioners is an administrative power. It is submitted, therefore, that under the general legislation the Chief Justice has himself powers which are administrative, and those are the powers which it was intended should not be conferred on the deputy judge. "Judicial" in subsection (2) of section 7 is used to exclude the administrative powers of the judge, and authorises the deputy judge to exercise the judicial power of the judge whether to be exercised in court or anywhere else.

Order 9, r. 7, of the Supreme Court Rules, which provides that the judge shall have power to disbar or suspend for reasonable cause is a judicial rather than an administrative power, and therefore a deputy judge is by section 7 (2) empowered to exercise it. Subsection (3) of section 7 does not on its proper interpretation limit the meaning of "the judicial powers" in subsection (2). The purpose of subsection (3) is to empower the Chief Justice to decide what matters in the Supreme Court should come before the deputy judge. It is submitted that the judicial power of the Chief Justice included power under Order 9, r. 7, so that the order of the deputy judge was made with jurisdiction.

Turning to the question of the validity of Order 9, r. 7, the making of that rule was a valid exercise of the power conferred by section 72 of the Supreme Court Ordinance. If a distinction is to be drawn between judges and the court, in England there was no power in the court as opposed to the judges to exercise disciplinary control over members of the Bar. [*Rex* v. *Benchers* *of Gray's Inn*[31] and *Rex* v. *Benchers of Lincoln's Inn*[32] were referred to.] The powers under section 72 of the Supreme Court Ordinance to make rules of court included the power of regulating the qualification and admission of barristers and solicitors, and that included there exclusion. Order 9, r. 7, has the same force and effect for all purposes as if it had been made by Ordinance.

Abbott J. was exercising what is admitted to be part of the general jurisdiction. It would not affect the validity of the order if he mistakenly thought that he derived the jurisdiction from some other source. His order should be restored.

With regard to the second judgment of the West African Court of Appeal against which the Attorney-General was given leave to appeal—the judgment of July 6 refusing him leave to appeal to this Board—the submission is that an "intended application" in section 5 of the West African (Appeal to Privy Council) Order in Council, 1949, remains an intended application until it is heard in court; on July 3, 1959, the appellant's application for leave to appeal to the Board was still an "intended application," and it was not then too late to give to the respondent notice of that intended application.

Gratiaen Q.C. There was an inherent power in the colonial courts not only to enroll but also to disbar: *In re Justices of Court of Common Pleas of Antigua.*[33] That is also the position in the Gambia. One of the powers which is essential to the proper administration of justice is that the court should be empowered to control the right of audience on behalf of litigants and the right to give licences to practise in the courts, and that necessarily involves as incidental to that that the court can recall the licences. Certain powers vested in the court for the purpose of facilitating the exercise of the judicial powers must not be confused with the judicial powers. There are many powers vested in the court and in the judges which are non-judicial powers in the strict sense, and there is also legislative power in the sense of rule-making power. The matter comes down to the narrow question whether the power of the court here, which is exercised by its only judge, of regulating the admission and removal of practitioners for the purpose of assisting the administration of justice involves the exercise of judicial power.

It is submitted that the sole purpose of appointing a deputy judge to perform the limited functions conferred on him by section 7 (1) is to empower him to hear civil and criminal causes in the strict sense of the term, thereby exercising the restricted judicial functions of the court; and section 7 (3) is a recognition of what is in fact a true judicial function. The term "judicial "power" has a well-recognised legal meaning: *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation*[34] indicates the proper test to be applied in considering what are the powers of a deputy judge appointed under section 7 of the Supreme Court Ordinance. The power to strike off is not a judicial function; the very fact of delegation to a voluntary association—to the Inns of Court—shows that that is so; it would be quite unthinkable that the High Court should delegate a judicial power to a voluntary body. Further, the power to strike off is not incidental to the exercise of judicial power in any particular case. [*Har Prasad Singh* v. *Judges of Allahabad High Court*[35] was referred to.]

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[31] 1780 1 Doug. 353.

[32] (1825) 4 B. & Cr. 855.

[33] 1 Knapp 267, P.C.

With regard to the intra vires point, it is now established that the background of Order 9, r. 7, is the inherent power of the court to admit, enroll and strike off. It is conceded that the rule is intra vires; it is a recognition of existing jurisdiction. On the assumption, however, that rule 7 confers on the court as such the power to strike off, the order of the deputy judge is bad because he expressly directed himself that he was not sitting as a court. Even assuming that it is a judicial function, the judge himself disassociated himself from that power. An order made in the purported exercise of a wrong power cannot now be allowed to stand. In fact this was not a judicial power but an administrative function which was being exercised. The legislature in empowering the deputy judge to exercise only the judicial powers of a judge must have intended some clear-cut distinction between one kind of function and another, and there could not have been any idea of leaving this question of what is judicial and what is not judicial vague. The duty to act judicially in the course of exercising an administrative power does not convert that power into a judicial power. [*In re Justices of Court of Common Pleas of Antigua*[36] was referred to.] Under section 7 of the Supreme Court Ordinance the main function of the deputy judge is to hear litigation. He did not in this case purport to exercise a judicial power but a private jurisdiction. [Reference was made to *Institute of Patent Agents* v. *Lockwood*.[37]]

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[34] [1931] A.C. 275, 295; 47 T.L.R. 115, P.C.

[35] L.R. 58 I.A. 152.

[36] 1 Knapp 267.

[37] [1894] A.C. 347; 10 T.L.R. 527, H.L.

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Le Quesne in reply. If, as Mr. Gratiaen said, section 7 (2) of the Ordinance gives strict judicial power to the judge to hear civil and criminal cases in court, it is difficult to see why it should not have been said. The exercise of the jurisdiction in this case is the exercise of a judicial power. The *Shell Company of Australia* case [38] cannot be cited as authority for the general distinction which Mr. Gratiaen suggested between judicial and administrative functions. Disciplinary proceedings against a solicitor were not merely not a criminal proceeding, but were a civil proceeding: *Godfrey* v. *George*.[39]

As to the judgment refusing the Attorney-General leave to appeal, all that has to be done under section 5 of the Order in Council of 1949 within 21 days is to apply to the court and give notice to the other side.

May 3. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships see no reason to suppose that Abbott J. was wrong in refusing to grant an adjournment. It was a matter for his discretion, and there is no ground for saying that he exercised his discretion improperly. If Pierre Sarr N'Jie had any defence on the merits, he ought to have returned to the Gambia to put it forward: and no good reason was shown for his not doing so.

In order to consider the validity of the decision of the West African Court of Appeal their Lordships must draw attention to the fact that there is only one judge of the Supreme Court of the Gambia: for by section 4 of the Supreme Court Ordinance it is provided that: "The Supreme Court shall consist of and shall be "held by and before a judge to be appointed by the Governor." The single judge is the Chief Justice. There is provision for an acting judge to be appointed to act if the Chief Justice is ill or absent from duty, but that was not the case here. There is also provision for a deputy judge to be appointed, and that is what was done. Abbott J. was appointed a deputy judge under section 7 of the Supreme Court Ordinance, which provides that:

"1 (1). Notwithstanding anything in this Ordinance contained, "it shall be lawful for the Governor to appoint a Deputy Judge "to represent the Judge of the Supreme Court of the Colony of "the Gambia *in the exercise of his judicial powers*, although he "be present in the Colony or the Protectorate.

"(2) Such Deputy Judge *shall exercise all the judicial powers*

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[38] [1931] A.C. 275.

[39] [1896] 1 Q.B. 48, 50–51, C.A.

"of the Judge of the Supreme Court, and all acts done by such "Deputy Judge, in the execution of his powers, shall be as valid "and effectual, to all intents and purposes, as if they had been "done by the Judge of the Supreme Court, and all judgments "orders or decrees made by such Deputy Judge shall be subject "to the same right of appeal in all respects as if they had been "made by the Judge of the Supreme Court.

"(3) The Judge of the Supreme Court may direct at what time "and place such Deputy Judge shall sit, and what causes shall "be heard before him, and generally make such arrangements as "to him shall seem proper for the division and despatch of the "business of the Supreme Court."

It is quite apparent from that section that the deputy judge can only represent the Chief Justice in the exercise of his judicial powers. He cannot represent the Chief Justice in the exercise of his administrative powers. Some of the powers of the Chief Justice are clearly judicial powers, as when he sits in court to decide civil or criminal cases. Others are equally clearly administrative powers, as when he directs the times at which the offices of the court shall be open, or appoints notaries public, or makes rules of court. Into which of these categories are we to place the power of the Chief Justice to suspend legal practitioners or to strike them off the roll of court? Is this a judicial power or an administrative power? This necessitates an analysis of the nature of the power.

By the common law of England the judges have the right to determine who shall be admitted to practise as barristers and solicitors: and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court: and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies the judges have retained the power in their own hands, at any rate in those colonies where the profession is "fused." The principle upon which this rests was well stated by Lord Wynford in 1830 in *In re Justices of Court of Common Pleas of Antigua*[1]: "In the colonies there are no Inns of Court, but it is "essential for the due administration of justice that some persons "should have authority to determine who are fit persons to prac-"tise as advocates and attorneys there. Now advocates and "attorneys have always been admitted in the Colonial Courts by

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[1] (1830) 1 Knapp 267, 268.

"the judges, and the judges only. The power of suspending from "practice must, we think, be incidental to that of admitting to "practise, as is the case in England with regard to attorneys. In "Antigua the characters of advocates and attorneys are given to "one person; the court therefore that confers both characters "may for just cause take both away." In the Gambia these powers of the judges have been embodied in Rules of the Supreme Court, 1928. Order IX, r. 2, says that the judge may, in his discretion, approve admit and enrol to practise as a barrister and solicitor of the court (inter alios) any person who is entitled to practise as a barrister in England and who produces testimonials of good character. Order IX, r. 7, says that "the Judge shall "have power, for reasonable cause, to suspend any barrister or "solicitor from practising within the jurisdiction of the Court for "any specified period, or order his name to be struck off the Roll "of Court." Their Lordships notice that a majority of the West African Court of Appeal (Bairamian Actg.P. and Ames Actg.J.A., with Hurley Actg.J.A. dissenting) thought that Order IX, r. 7, was ultra vires. But it seems to their Lordships that it is simply a restatement of the inherent power of the judge at common law and is intra vires. And this was conceded by Mr. Gratiaen before their Lordships.

When the judges exercise this power to suspend or expel, they do not decide a suit between parties. There is no prosecutor as in a criminal case, nor any plaintiff as in a civil suit. The judges usually act on their own initiative, ex mero motu, on information which has come to their notice, or to the notice of one or other of them in the course of their duties; as in *Rex* v. *Southerton*[2] and *Har Prasad Singh* v. *Judges of Allahabad High Court.*[3] But sometimes they have acted on the complaint of the Attorney-General of the colony, as in the *Petition from Antigua*[4] and *Macauley* v. *Judges of the Supreme Court of Sierra Leone*[5] (see the printed book). Or even on the complaint of a third person, as in *Anandalvan* v. *Judges of the High Court of Madras*[6] (see the printed record of the proceedings, pp. 1 and 284). Whoever makes the complaint, the judges, are, of course, under a duty to act judicially: see *Har Prasad Singh* v. *Judges of Allahabad High Court.*[7]

When a legal practitioner is suspended or struck off by the judges of a colony, he has always been at liberty to petition Her

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[2] (1805) 6 East 126, 143.

[3] (1931) L.R. 58 I.A. 152, 154.

[4] 1 Knapp 267.

[5] [1928] A.C. 344, P.C.

[6] (1930) L.R. 58 I.A. 156n.

[7] Ibid. 152.

Majesty in Council to restore him. But he should give notice of his application to the judges so as to enable them to justify their order: see *Smith* v. *Justices of Sierra Leone*,[8] by Lord Brougham; and in all the cases since 1848 the judges themselves have been made respondents to the appeal, see, for instance, *Har Prasad Singh* v. *Judges of the High Court of Allahabad*[9]: though in one of the cases the Attorney-General was also made a respondent: *Macauley's* case.[10]

This fact—that the judges are themselves always made respondents to the petition to Her Majesty—is an implicit recognition that, when exercising this jurisdiction, they do not sit as a court of law but as a disciplinary authority. And it has been expressly decided in West Africa that the judges in this regard do not sit as a court. In *Macauley's* case[10] the Chief Justice of Sierra Leone struck Macauley off the roll of court. Macauley sought to appeal to the Full Court under a provision which gave an appeal from a decision of the "Supreme Court" to the Full Court. It was held by Petrides and Sawrey-Cookson JJ., with Aitkin J. dissenting, that no appeal lay to the Full Court because the order of the Chief Justice striking him off was not a decision of the "Supreme "Court," and that Macauley's only remedy was to go to the Privy Council for special leave. (The judgment is contained in the printed record in *Macauley's* case, pp. 30 to 33 and 44 to 49.) The legislature seems to have had its attention drawn to this decision, for it soon afterwards made special provision for an appeal. When setting up the West African Court of Appeal, it made provision for appeals to it from the decisions of the "Supreme Court" in civil and criminal cases, and then went on by a special section 14 to provide that "An appeal shall lie to "the Court of Appeal from any order of the Judge suspending a "barrister or solicitor of the Supreme Court from practice or "striking his name off the Roll and for the purposes of any such "appeal any such order shall be deemed to be an order of the "Supreme Court." That section is still in force. It was the very section under which Pierre Sarr N'Jie appealed to the Court of Appeal. And it shows clearly enough that the legislature did not regard the decision of the judge in such a case as a decision of the Supreme Court but as a decision of the judge as a disciplinary authority.

It was on this account—that the judge, when exercising disciplinary powers, does not sit as a court—that the West African

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[8] (1848) 7 Moo.P.C. 174, 175.

[9] L.R. 58 I.A. 152.

[10] [1928] A.C. 344.

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Court of Appeal concluded that it was not part of his "judicial powers" within section 7 of the Supreme Court Ordinance, and it was therefore not within the competence of a deputy judge. Bairamian Actg.P. said: "A deputy judge cannot in my opinion deal with any matter which is not a proceeding in the court": and Ames Actg.J.A. said: "By 'judicial powers' is meant powers which he exercises when constituting the Supreme Court under section 4, to the exclusion of any other of his powers." Their Lordships recognise that in some contexts the words "judicial powers" do signify the powers of a court which sits to decide controversies between parties: as, for instance, in the phrase "The judicial powers of the Commonwealth," see *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation.*[11] But in this Ordinance the phrase is "The judicial powers of the judge." And it appears to their Lordships that in this context a judge exercises judicial powers, not only when he is deciding suits between parties, but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. Suppose, for instance, that a judge, finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see *Myers* v. *Elman,*[12] *per* Lord Wright). That would be an exercise of the judicial powers of the judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off. And suppose that the judges of a colony do suspend a practitioner or strike him off. It is undoubtedly open to the practitioner to appeal to Her Majesty in Council: and this necessarily imports that it is the exercise by the judges of a judicial power. For there is no right of appeal to their Lordships' Board from the exercise of an administrative power.

Their Lordships are therefore of opinion that the power of a judge to suspend or strike off a legal practitioner is a judicial power of the judge which it is competent for a deputy judge to exercise.

Their Lordships will now revert to the preliminary point: for the foregoing discussion is pertinent to it. The preliminary objection raised by Mr. Gratiaen was simply this: The Attorney-General has no locus standi to petition for special leave to appeal, because he is not a "person aggrieved." Section 31 of the West African (Appeal to Privy Council) Order in Council, 1949 (under which the Attorney-General made his petition) says that: "Nothing in this Order contained shall be deemed to interfere "with the right of His Majesty upon the humble petition of *any* "*person aggrieved* by any judgment of the Court to admit his "appeal therefrom upon such conditions as His Majesty in "Council shall think fit to impose."

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[11] [1931] A.C. 275, 295; 47 T.L.R. 115.

[12] [1940] A.C. 282, 318; 56 T.L.R. 177; [1939] 4 All E.R. 484, H.L.

In support of this preliminary point Mr. Gratiaen referred to the judgment of James L.J. in *Ex parte Sidebotham*,[13] where he said: "A 'person aggrieved' must be a man who has suffered a "legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or "wrongfully refused him something, or wrongfully affected his "title to something." If this definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a lis, a controversy inter partes, and had had a decision given against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the judge, ex mero motu or at the instance of the Attorney-General or someone else, against a delinquent practitioner.

But the definition of James L.J. is not to be regarded as exhaustive. Lord Esher M.R. pointed that out in *Ex parte Official Receiver, In re Reed, Bowen & Co.*[14] The words "person "aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge, or is otherwise a point in which the public interest is concerned, the Attorney-General is a "person "aggrieved" by the decision and can properly petition Her Majesty for special leave to appeal. It was for these reasons that their Lordships rejected the preliminary objection and held that the Attorney-General was a "person aggrieved" by the decision of the West African Court of Appeal.

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[13] (1880) 14 Ch.D. 458, 465, C.A.

[14] (1887) 19 Q.B.D. 174, 178; 3 T.L.R. 640, C.A.

There is one last point to consider. It relates to the order made on July 6, 1959, by the West African Court of Appeal when they refused the Attorney-General leave to appeal to Her Majesty in Council. The point arises on section 5 of the West African (Appeal to Privy Council) Order in Council, 1949, which says that: "Applications to the Court for leave to appeal shall be made by "motion or petition within 21 days from the date of the judgment "to be appealed from, and the applicant shall give the opposite "party notice of his intended application." In the present case the decision of the West African Court of Appeal (by which they set aside the order of the deputy judge) was given on June 5, 1959. The Attorney-General sought leave from that court to appeal to Her Majesty in Council. He lodged his notice of motion within 21 days, namely, on June 23, 1959, but he did not serve it on Pierre Sarr N'Jie within 21 days, because N'Jie was not in the Gambia but in England. On July 6, 1959, the West African Court of Appeal refused the Attorney-General's application. They said: "We cannot in face of section 5 of the Order in Council entertain "an application for leave to appeal unless the notice to the "opposite party of the intended application is given before the "21 days have expired." This ruling is of no practical significance in the present case because their Lordships afterwards gave special leave to appeal: but as the ruling is said to affect many colonies with similar Orders in Council, their Lordships gave special leave to appeal from it.

Their Lordships think that, if section 5 is construed literally, it does seem to lead to the result reached by the West African Court of Appeal: for an application remains an "intended "application" until it is heard in court. But this would mean that the application itself would have to be heard within 21 days. That cannot have been intended. No court could bind itself to give a date for the hearing within that time. All that was intended was that notice should be lodged with the court within 21 days: and a copy served on the opposite party as soon as possible and in any case a reasonable time before the date of the hearing. This result is reached by reading the section in this

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way: "Applications for leave to appeal shall be made by motion "or petition (notice of which shall be lodged with the court within "21 days from the date of the judgment to be appealed from), "and the applicant shall give the opposite party notice of his "intended application." Their Lordships think the section should be so read.

Their Lordships will humbly advise Her Majesty that the appeals should be allowed and the order of the deputy judge of the Gambia restored. They make no order as to costs.

Solicitors: *Charles Russell & Co.; A. L. Bryden & Williams.*

C. C.

[HOUSE OF LORDS.]

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July 12, 13, 14, 18, 19; *Oct.* 26.

FAWCETT PROPERTIES LTD. . . . APPELLANTS;

AND

BUCKINGHAM COUNTY COUNCIL . . RESPONDENTS.

Town and Country Planning — Development — Planning permission— Condition—Relation of condition to local planning considerations — Whether condition void for uncertainty — Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14 (1), 36.

Housing—" Agricultural population "—Meaning—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 115 (2)*—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 119 (1).

Statute—Construction—Uncertainty—Whether provision void—Provision incorporated in condition of planning permission—Whether condition valid.

By-law—Validity—Uncertainty—Condition of planning permission— Whether analogous to by-law—Town and Country Planning Act, 1947, *ss.* 14 (1), 36.

By section 115 (2) of the Housing Act, 1936, which reproduces section 34 (2) of the Housing Act, 1930, "agricultural population" is defined as "persons whose employment or latest employment "is or was employment in agriculture or in an industry mainly "dependent upon agriculture, and includes also the dependants of "such persons as aforesaid."

By section 14 of the Town and Country Planning Act, 1947: "(1) . . . where application is made to the local planning authority

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* *Present*: LORD COHEN, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD DENNING and LORD JENKINS.

"for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they "think fit, or may refuse permission; and in dealing with any "such application the local planning authority shall have regard "to the provisions of the development plan, so far as material "thereto, and to any other material considerations. (2) Without "prejudice to the generality of the foregoing subsection, conditions "may be imposed on the grant of permission to develop land there-"under—(a) for regulating the development or use of any land "under the control of the applicant . . ."

By section 36: "Where, under the foregoing provisions of this "Part of this Act, a local planning authority are required to have "regard to the provisions of the development plan in relation to the "exercise of any of their functions, then, in relation to the exercise "of those functions during any period before such a plan has "become operative with respect to the area of that authority, that "authority shall have regard to any directions which may be given "to them by the Minister as to the provisions to be included in "such a plan, and subject to any such directions shall have regard "to the provisions which in their opinion will be required to be "so included for securing the proper planning of the said area."

Section 119 (1) defined "agriculture" as including "horticul-"ture, fruit growing, seed growing, dairy farming, the breeding "and keeping of livestock (including any creature kept for the "production of food, wool, skins or fur, or for the purpose of its "use in the farming of land), the use of land as grazing land, "meadow land, osier land, market gardens and nursery grounds, "and the use of land for woodlands where that use is ancillary to "the farming of land for other agricultural purposes."

In 1952 the respondent council, acting under the above sections, granted the appellants' predecessor in title permission to develop an area by building thereon a pair of cottages subject to a condition that: "The occupation of the houses shall be limited to persons "whose employment or latest employment is or was employment in "agriculture as defined by section 119 (1) of the Town and Country "Planning Act, 1947, or in forestry or in an industry mainly "dependent upon agriculture and including also the dependants "of such persons as aforesaid." The permission stated that the reason for imposing the condition was "because the council would "not be prepared to permit the erection of dwelling-houses on this "site unconnected with the use of the adjoining land for agricul-"tural or similar purposes." The condition was registered as a local land charge. The property was within the metropolitan green belt, but there was no development plan yet in operation, although one was being prepared. At first the cottages were occupied by persons whose employment was within the terms of the condition, but the appellants, who acquired the freehold in 1956, sought a declaration that the condition was ultra vires the respondents, or was void for uncertainty, or was no longer effective, having been applicable only to the first occupants:—

Held, (1) that the imposition of a condition restricting the use of the premises according to the circumstances of the persons using them was not ultra vires the respondent council (post, pp. 659, 675, 679, 684).

(2) That the condition was not ultra vires in that it was not so wide that the result could not fairly and reasonably be said to relate to the permitted development or to any policy under the Act of 1947 (post, pp. 660 to 662, 674, 678 to 680, 684 to 687).

Dicta of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 233; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A., and of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A. applied.

(3) That the condition was not restricted to the first occupation of the cottages (post, pp. 659, 675, 681, 684).

(4) (Lord Morton of Henryton dissenting (post, pp. 667 to 670)) that the condition was not void for uncertainty (post, pp. 662, 663, 670 to 674, 676 to 678, 687 et seq.).

The language of the definition of "agricultural population" in section 34 (2) of the Housing Act, 1930, and section 115 (2) of the Act of 1936, from which the language of the condition was substantially taken, has an intelligible and ascertainable content both in the Act and in the condition.

Decision of the Court of Appeal [1959] Ch. 543; [1959] 2 W.L.R. 884; [1959] 2 All E.R. 321 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated April 27, 1959, discharging the judgment of Roxburgh J. dated October 29, 1958, and ordering that the action by the appellants, Fawcett Properties Ltd., against the respondents, the Buckingham County Council, should be dismissed and that the appellants should pay the respondents their costs of the action and occasioned by the appeal, to be taxed by the taxing master.

In 1952 Donald Decimus Clark, a farmer of Chalfont St. Giles in Buckinghamshire, wished to build two farm-workers' cottages, on the ground that, owing to the somewhat isolated position of his farm, it was necessary to offer living accommodation to his employees. At that time no development plan under section 5 of the Town and Country Planning Act, 1947, was operative in the county of Buckingham, and the Minister of Housing and Local Government had given no directions as to the provisions to be included in such a plan, but the respondents, the local planning authority for the county under the Act, had published in February, 1950, a provisional document described as an "Outline Development Plan for Buckinghamshire," which recognised that certain parts of the county, including the site in question in this appeal, should form part of the " Metropolitan Green Belt " and should be preserved so as to form a barrier against the further outward spread of London. Under section 12 of the Act it was incumbent on Clark to obtain permission for the erection of the cottages.

On July 22, 1952, the Amersham Rural District Council, acting as agents for the respondents, dealt with an application by Clark and granted him planning permission in writing to erect " a pair of agricultural cottages " off Dibden Hill Lane, Chalfont St. Giles, on condition that " the occupation of the houses shall " be limited to persons whose employment or latest employment " is or was employment in agriculture as defined by section 119 (1) " of the Town and Country Planning Act, 1947, or in forestry, or " in an industry mainly dependent upon agriculture and including " also the dependants of such persons as aforesaid." The reason given for imposing the condition was expressed as being " in the " interests of the amenities of the locality and to ensure compliance with the county development plan."

On making preparations to commence work on the cottages, Clark experienced some difficulty as to his right to build on that site and, in order to save time and trouble, decided to re-site the cottages altogether, and substituted as a site the land to which the permission in question in this appeal related. Accordingly, on November 22, 1952, he made a fresh application to the respondents for planning permission for " the erection of a pair of farm-" workers' cottages," and on December 5, 1952, the clerk to the rural district council for and on behalf of the respondents signed a planning permission which (omitting the formal parts) was as follows: " In pursuance of their powers under the above-" mentioned Act and Order the Bucks County Council as Local " Planning Authority hereby permit erection of pair of farm-" workers' cottages at Dibden Hill Lane, Chalfont St. Giles, in " accordance with your application dated November 22, 1952, " and the plans and particulars accompanying it subject to the " following conditions: (1) The occupation of the houses shall be " limited to persons whose employment or latest employment is " or was employment in agriculture as defined by section 119 (1) " of the Town and Country Planning Act, 1947, or in forestry, " or in an industry mainly dependant [sic] upon agriculture and " including also the dependants of such persons as aforesaid. " The reasons for imposing the above conditions are: (1) Because "the council would not be prepared to permit the erection of "dwelling-houses on this site unconnected with the use of the "adjoining land for agriculture or similar purposes."

By section 119 (1) of the Act of 1947 "'agriculture' includes "horticulture, fruit growing, seed growing, dairy farming, the "breeding and keeping of livestock (including any creature kept "for the production of food, wool, skins or fur, or for the purpose "of its use in the farming of land), the use of land as grazing land, "meadow land, osier land, market gardens and nursery grounds, "and the use of land for woodlands where that use is ancillary "to the farming of land for other agricultural purposes."

By section 34 (2) of the Housing Act, 1930 (now section 115 (2) of the Housing Act, 1936): "For the purposes of this sub-"section the expression 'agricultural population' means persons "whose employment or latest employment is or was employ-"ment in agriculture or in an industry mainly dependent upon "agriculture, and includes also the dependants of such persons "as aforesaid."

The condition was registered as a local land charge in the register of town planning prohibitions and restrictions.

Clark built the cottages shortly after the grant of the permission and used them for the housing of farm labourers for a substantial period of time.

On December 31, 1956, Clark's mortgagees conveyed the fee simple in the cottages to the appellants with vacant possession thereof, the appellants having knowledge of the condition. They wished to let the cottages to persons not qualified as occupants under the terms of the condition. There was a considerable correspondence between the parties on the subject of the removal or modification of the restriction but it led to no result, and on January 21, 1958, the appellants issued the specially indorsed writ in this action. By their statement of claim they claimed: "(1) A declaration that the condition is and was ultra vires, "alternatively is and was void for uncertainty and of no effect "and that the cottages may be lawfully occupied without regard "to the nature of the employment of the occupants. (2) Alter-"natively, a declaration that the said condition has been fulfilled "and that its force is now spent and that the cottages may now "be lawfully occupied without regard to the nature of the "employment of the occupants. (3) An order that the Register "of Local Charges be rectified to accord with any declaration "made by this honourable court."

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R. E. Megarry Q.C., *C. Fletcher-Cooke Q.C.* and *T. S. Legg* for the appellant company. The relevant sections of the Town and Country Planning Act, 1947, are sections 4 (1), 12, 13 (1) (*b*), 14 (1) (2) (3), 18 (3), 23, 24, 36 and 119 (1). See also paragraph 5 (9) of the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728).

The first submission is that the imposition of a condition restricting the occupation of premises according to the personal circumstances of the occupant is ultra vires the respondents. When a house is used as a dwelling-house it matters not what is the occupation of the dweller (unless, say, he is a doctor using the premises also for his practice). Here the use of the premises as a dwelling-house would be the same if an agricultural worker lived there or if it were occupied by a former agricultural worker, now employed in a factory. It is possible to impose conditions confining the use of the house to use as a dwelling-house, but not to restrict occupation to persons having particular characteristics, including the characteristics of their employment. The planning authority may specify in what way the property is to be used, but it has no power to specify by what persons it is to be used.

In any event, it is ultra vires the respondents to impose the condition sought to be imposed because that condition as a whole, or, anyhow, as regards a substantial part of it, cannot be said to come within the words of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[1] because it does not " fairly and reasonably relate to the permitted development " or to any possible policy under the Act of 1947. Thus a retired agricultural worker would satisfy the condition, on the ground that agriculture was his latest employment, but if he took temporary Christmas employment at the Post Office for three weeks, his latest employment would no longer be agriculture and he would be outside the condition. Again, a factory worker in a works manufacturing agricultural machinery, the demand for which depends on the continuation of agriculture, would be employed in an industry mainly dependent on agriculture and within the condition, but if he went to work in a typewriter factory he would be outside it. Again, suppose a worker in a factory, 80 per cent. of the production of which is agricultural machinery while 20 per cent. is motor-cars. Suppose the former item of production declines, while the latter increases until the

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[1] [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.; [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.

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proportions are reversed. Then at the start the worker would be within the condition, but at the end he would be outside it. Or again, taking a factory making agricultural machinery, suppose a worker, after handling the machinery, is put in the accounts department, he might thereby be put outside the condition. Or again, in the case of a large departmentalised concern with different factories for agricultural machinery and motor-cars, a man transferred from the former to the latter might be put outside the condition. Or take a retired sheep farmer from New Zealand; he would be within the condition, but, if he started writing articles for the Press, he would be engaged in the newspaper industry and so would be in breach of the condition. Or take the case of a man and his wife occupying one of these houses, the man being employed in local agriculture. Suppose he emigrates to New Zealand and gets farming work there while his wife and children (his dependants) continue to occupy the house. As long as they are his dependants the condition is satisfied, but if he stops sending them money they cease to be his dependants and the condition is broken. Or if he himself goes into mining in New Zealand, the condition will also be broken.

A condition which produces such results cannot be related to any conceivable policy under the Act and so cannot be enforced. Such examples also indicate that it is void for uncertainty. Thus even if a condition limiting occupation to persons employed in agriculture as defined in section 119 (1) of the Act is valid, the list of permitted occupants cannot be extended to persons whose latest employment has been in agriculture, to persons employed in " an industry mainly dependent upon agriculture " and to the dependants of such persons. Such a condition would be unrelated to any sensible planning policy and to the policy set out in the Outline Development Plan. See in particular p. 12 relating to the " Metropolitan Green Belt."

Absurdities would constantly arise. A retired fur breeder from overseas would be within the condition, although his children who lived with him were engaged in non-agricultural office work. But a retired local government official would be outside the condition although his children living with him might all be engaged in agricultural work in the district.

The condition is riddled with uncertainty from its very start, the words " The occupation shall be limited to persons . . ." The question arises whether it is the rateable occupier who must fulfil the condition or every person who lives in the house.

Suppose two brothers lived together, one a clerk and the other a farm-worker. If the latter were the tenant, then, treating "occupation" as equivalent to "tenancy," all would be well, but on the other view the condition would be broken. If it is the rateable occupier who is aimed at, he can take in lodgers or paying guests who are not within the condition. Otherwise a farmer occupying one of the houses could not have a son living with him who earned his own living, say, in the county council offices, because he would not be a "dependant." On the other view, a retired Devon farmer could take in as paying guests people who went to work in London every day. The word "dependant" is also imprecise.

The words "farm-workers' cottages" in the licence is an architectural description and is not one relating to the calling of the occupiers.

The chief difficulties in this condition arise from the words "an industry mainly dependent upon agriculture." If they are capable of any ascertainable meaning, it is one which is wholly unrelated to any planning considerations. The words "dependent "on agriculture" have no certain meaning; still less have the words "mainly dependent . . ." The wide definition of agriculture could cover cotton growing in Egypt, sheep raising in Australia or chinchilla breeding in South America. The industries mainly dependent on agriculture include the fur, the leather and the textile industries, among several others. This would make many workers in London eligible to occupy these cottages, though at a certain stage of the manufacture, say, of boots or woollen clothes, the dependence may be so remote that a worker is not within the condition.

As to the expression "latest employment," it would enable a retired furrier from London or a retired sheep farmer from Australia to occupy the cottages, although a telephone operator in Chalfont St. Giles would be ineligible.

The words of the condition would create great difficulties if an occupier of a cottage who was undoubtedly within them changed his employment to one that was doubtful. Or there might be the case of a person who divided his time precisely between an agricultural employment and some other employment.

In the light of these considerations, the condition not only has, as a whole, no reasonable relation to any conceivable planning policy, but is not in accordance with the reason given by the respondents for imposing it, particularly the reference to "the use of the adjoining land for agriculture."

This condition stems from section 34 (2) of the Housing Act, 1930, now section 115 (2) of the Housing Act, 1936. The whole context of section 34 is financial, relating to money grants. Thus when it uses the expression "industry mainly dependent upon "agriculture," the concept of financial dependence is easy enough, but dependence from a planning point of view is far more obscure and far harder to interpret precisely, when an agricultural context affords no aid in construing the word "dependent." Further, section 34 (2) refers to the "agricultural population of "the district," that is the district of the rural district council, and that provides a definite meaning which the context of this planning condition does not afford. Thus a retired New Zealand sheep farmer would not be within section 34 (2). See also section 27 (1) of the Act of 1930.

But under the condition there is no geographical limit as to the place of latest employment or of actual employment, so that these cottages could be let to agricultural workers employed several miles away in another county, where their activities would be irrelevant to the preservation of the green belt. An assistant in a boot shop in a town would be within the condition, since agriculture includes the production of skins from which leather is made and so boot-making depends on agriculture. Yet such an employment would be irrelevant to the use of green belt land for agriculture.

The considerations already urged indicate both that the condition is irrelevant to planning policy and that it is void for uncertainty. So to hold would not mean that the words as used in the context of section 34 (2) of the Act of 1930 were void for uncertainty. The condition is expressed imperfectly, defining imprecisely the persons to whom occupation of the cottages is limited, so that often the owners would not know whether or not they were committing a breach of it in allowing a given person to be a tenant or occupier. A general proposition that a form of words cannot be void for uncertainty in any context at all simply because it has been used in a statute in a different context cannot be right.

The courts distinguish between powers of appointment and trusts. In the case of a trust the trustees must know all the persons within the relevant class, but that is not so in the case of powers, although there must be an outside boundary to the class in question: see Halsbury's Laws of England, 3rd ed., vol. XXX, p. 213, para. 375. Where one has a purely discretionary power uncertainty is less important than where there is a duty coupled with a criminal sanction.

Here a breach of the condition might entail penal consequences under sections 23 and 24 of the Act of 1947. A local authority cannot contract not to serve an enforcement notice under section 23. One should not be put in peril for an ambiguity: see *London & North Eastern Railway Co.* v. *Berriman.*[2] The principle there expressed is applicable to planning law: see *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[3] and *Crisp from the Fens Ltd.* v. *Rutland County Council.*[4] In the latter case an originating summons might have been taken out to determine the simple ambiguity, but that could not be done here to resolve a general area of uncertainty involving more than two alternatives. The latter case stresses the importance of the reasons given for imposing the condition and indicates that conditions should be stated in plain language. In the present case the reasons do not resolve the ambiguity in the condition. *Sifton* v. *Sifton*[5] provides an example of a condition subsequent in a will being held void for uncertainty because one must know precisely in advance what event will cause a forfeiture. The present case is not one of forfeiture of the estate, but of penal consequences, and the same principle applies. If there is any substantial area of real doubt as to what will cause a breach of the condition, that condition will be held void for uncertainty.

This condition is analogous to a by-law, which must be certain: see Halsbury's Laws of England, 3rd ed., vol. XXIV, p. 517, para. 951. Otherwise it will be held invalid: see *Scott* v. *Pilliner.*[6]

The condition was registered as a local land charge, but if a purchaser is to be bound, not only by the condition as framed but also by the reason given so as to give it added stringency, that reason also should be registered before it can expose the landowner to further perils. When there is a statutory power to impose conditions, then, even against the original purchaser, the reason given does not affect or alter that which has been done in subjecting the property to the form of words set out in the condition. There is a material difference between the reasons given for imposing the condition on the first application and those given on the second. The two are inconsistent.

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[2] [1946] A.C. 278, 313–314; 62 T.L.R. 170; [1946] 1 All E.R. 255, H.L.

[3] [1957] A.C. 223, 230, 231, 232–233, 234, 240; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669, H.L.

[4] (1950) 1 P. & C.R. 48, 53–54, 58, 59, C.A.

[5] [1938] A.C. 656; 54 T.L.R. 969; [1938] 2 All E.R. 435, P.C.

[6] [1904] 2 K.B. 855; 20 T.L.R. 662, D.C.

But the form of this condition is full of uncertainty. When it says that " occupation of the house shall be limited . . ." to certain persons, it is not clear whether or not no person may live in the house unless he is in one of the categories set out. Thus children as they grow up and become self-supporting and independent might no longer be entitled to live in the house with their parent. Again, an occupier might cease to work in agriculture and become a part-time postman, thus putting himself outside the permitted class, even if his three grown-up sons, living with him, were full-time agricultural labourers. One runs into difficulties in every direction in trying to find what clear and certain concept it is intended to enforce. The expression " the " dependants " is equally uncertain. Suppose an agricultural worker, who has lived in the cottage, dies, leaving a widow who stays on. Is she a dependant of the deceased? The answer depends on the sense in which one regards a widow as being a dependant. Does one look at the will or intestacy of the deceased? Suppose he leaves his widow nothing and she has to work as a cleaner in the council offices. Does she remain a dependant? Or suppose her son, a farm-worker, supports his widowed mother, is she then a dependant of her son? The context gives one no guidance to the specific meaning of the word " dependants," since one cannot be dependent on a person in a town and country planning sense. Even in a property sense the word " dependants " has been held void for uncertainty: see *In re Ball*,[7] which illustrates the difficulty of saying what concept is embodied in the term. Suppose a man got 80 per cent. of his income from a rich uncle and 20 per cent. from his parents, on whom would he be dependent? The words " employment or " latest employment is or was " are also uncertain in meaning. Does that mean exclusive or part-time employment? A man might make half his income from writing articles and half from breeding rabbits for fur. Then there is seasonal employment—the case of a retired farm-worker doing Post Office work at Christmas.

Thus an occupant of these cottages would be exposed to expulsion on all sorts of happenings which cannot be related to preserving the Green Belt, and, further, there is so much uncertainty in the words that this should tip the scales against the condition.

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[7] [1947] Ch. 228; 63 T.L.R. 94.

In the phrase "industry mainly dependent upon agriculture," there is an initial difficulty in the word "industry." Does it mean the industry as a whole or the particular industrial concern? Does it refer to the employer or company operating the concern or the individual factory? Or must one look at the actual work a man is doing? What would be the position of an accountant in a factory making agricultural tractors? Then there is the phrase "dependent upon agriculture." The milling industry consumes the products of agriculture. Agricultural tractor makers produce the tools of agriculture. Does dependent mean "financially dependent"? In the case of a factory the output of which was 80 per cent. motor-cars and 20 per cent. agricultural tractors, a large profit might be made on the one and a small one on the other. "Dependent" might mean dependent for profit or dependent for continued existence. One cannot decide what hypothetically may have been in the mind of the draftsman of the condition. Is the amount of the turnover or of the profit material? As to the construction of "mainly dependent," compare *Bromley* v. *Tryon*.[8]

If some geographical limitation had to be read into the words, one would still have to ask, what limitation? Would it be a limitation to adjoining land? What does adjoining land mean? Would it include land half a mile away? It is hard to discover any sensible geographical limitation. At the present time a farm-worker may go as far as 12 miles to his work on a motor-cycle or even in a motor-car. It might be reasonable to limit occupation to workers on land adjoining in the sense of actually contiguous, if that was what was said in the condition.

Whether in the case of a by-law or of a planning condition, the citizen should know precisely what condition binds him. The court is under no duty to find a meaning for that which has no meaning. In W. C. Townsend's Lives of Twelve Eminent Judges (1846), vol. I, p. 149, it is related that when in one case counsel submitted that it was the duty of the court to find the meaning of the testator, Sir Richard Pepper Arden M.R. said: "My duty, sir, to find out his meaning! Suppose the will had "contained only these words 'Fustum funnidos tantaraboo,' am "I to find out the meaning of this gibberish?" When words make no sense the court cannot interpret them. If language, construed in its context, does not make sense, it cannot be saved from being void by the fact that the same words are used in

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[8] [1952] A.C. 265, 275; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058.

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another context and for quite different purposes in an Act of Parliament.

There is, further, another narrow point on the ultra vires aspect of the case, namely, that the condition is bad because it cannot be fairly related either (1) to any possible planning considerations or to planning policy in general, or (2) to the reasons given for imposing the condition in particular. The court cannot interfere with planning policy in any way. Planning policy may strike the court as being admirable or foolish, but that is not its concern. As a whole, this condition, though it is not entirely unrelated to any planning considerations, carries out no conceivable planning policy; no one has suggested what policy it carries out. It is irrelevant whether a cottage is large or small. The fact that these cottages are small rather aggravates the problem by reason of the employment problems of the persons who are likely to occupy them.

Section 14 (1) of the Act of 1947 creates no power to impose conditions on landowners, but only to grant a permission subject to conditions. See in particular section 14 (2) (*b*), which materially restricts the apparent width of the power to impose conditions.

The principle of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[9] was misapplied by the Court of Appeal. It was quite different from the present case where there is a great gulf between any conceivable planning policy and the actual condition imposed. If the condition imposed in that case had related to " any Wednesbury child," that would have introduced an element of uncertainty; so also would a condition that no children should be admitted unless they were " Wednesbury " girls." Even if the respondents here had had all the right considerations in mind, this condition would still be void for uncertainty because it does not carry out any planning policy, in particular the policy set out in the reasons.

This condition is also ultra vires in the wider sense that the Act of 1947 creates no power to control the persons who may use or enjoy the property, but only the way in which it is used. This is so, though sometimes the personal characteristics of the occupier may affect the use of the property, as in the case of a dentist. So, too, with a gamekeeper's cottage, a caretaker's cottage or a mine manager's house, where the use of the building is affected by their duties. One cannot, under the guise of town planning, establish control of colour, religion or work done. Section 12 (1) of the Act of 1947 is dealing with the use of land and not with the people who use it. In subsection (2) "the making "of any material change" is the expression used. Other matters than use would fall within housing policy, for example, reserving certain cottages for the workers in a particular factory. Under section 18 (3) provision may be made for a building being used for certain "purposes." Its last words do not relate to the personality of the occupiers. There is control of how a building is used and what is done on the premises, but not of the persons who do it, what are their personal characteristics, their origin or their religion. These are not subject to planning control. This also appears from the long title to the Act. Only conditions which fairly relate to development come within it. *Pilling* v. *Abergele Urban District Council*[10] is in the appellants' favour.

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[9] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

In any event, the condition has been fulfilled and its force is spent. As soon as the first occupant who complied with it was installed, it was satisfied. The sole alternative to this construction is to say that it applies for ever and, since there is provided in the Act no way of revoking or modifying it, that would be unreasonable. There is no half-way house between the appellants' submission on this point and the view that the condition applies for ever, however frequent the change of occupation.

Local authorities should not be free to draft conditions in a lax manner.

C. Fletcher-Cooke Q.C. following. It has been suggested that the scope of the permitted occupants under the condition was, in the interests of the landowners, made wider than it need have been and that such an extension is not ultra vires, because the landowners need not take advantage of it, since the condition is excessively liberal. But as to the powers of the respondents in this respect, see *Prescott* v. *Birmingham Corporation.*[11] In the present case the local authority, in view of the shortage of houses, has a duty to be fair to the various applicants for houses, and the operation of this condition would be unfair. The effect of its excessive liberality might be perhaps that a genuine Amersham man or a Post Office worker of Chalfont St. Giles might not come into consideration at all, while a manager of a textile factory in Harrow would.

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[10] [1950] 1 K.B. 636; 66 T.L.R. (Pt. 1) 166; [1950] 1 All E.R. 76, D.C.

[11] [1955] Ch. 210; [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698, C.A.

[LORD COHEN intimated that their Lordships would not require to hear argument from the respondents on the point that the condition had been fulfilled and its force was spent.]

Bernard MacKenna Q.C. and Alan Fletcher for the respondent council. A local authority is nonetheless planning the use of land within section 12 of the Act of 1947 because it prescribes a more, rather than a less, restricted use. If, when it lays down that a building shall be used as a residence, it is planning. It is also planning when it lays down that the building shall be used by persons connected with agriculture; that is planning more narrowly than in the former case. A condition imposed under section 14 may properly add to the statutory requirements of the section a further requirement that some act shall not be done, though that act falls short of being "development." It may be a nice question of construction whether or not, once a condition is fixed under the Act, there is any means of altering or revoking it, but that cannot have any bearing on the validity of the condition. The want of a means of escape cannot be the mark of an ultra vires condition; the presence or absence of a power to give relief is irrelevant. It is not accepted that section 14 (2) (*b*) materially restricts the width of the power to impose conditions. It is a fallacy to say that section 18 (3) relates only to the purpose for which a building is occupied and not to the personality of the occupier. Conditions cannot be confined to things which are development in themselves. See the reference to "any other "material considerations" in section 23 (1), which gives to the authority a discretion whether or not to enforce a condition. It might be a "material consideration" if there was a surfeit of accommodation for agricultural labourers. This is material in considering the picture which counsel for the appellants has drawn of the hardship which might be suffered by a former agricultural worker who took temporary work at the Post Office. Section 23 of the Act of 1947 provides means to determine doubtful cases. When the question arises what does a condition mean, there is no onus of proof, because on a question of construction as to the meaning of a legal instrument there is no such onus.

The reasons given in the two planning permissions granted are not inconsistent. They are both in accordance with the County Development Plan of the respondents, which indicates that their object is to maintain the normal life of an agricultural district. Sporadic residential development was to be checked and houses were not to be made available for city dwellers. Clark was given permission to build these cottages so that he could farm properly. The local authority considered that it would help the Outline Development Plan to tie these cottages to occupation by agricultural labourers. The condition does not become unworkable if the planning authority does not assign any geographical limit to the place of work of the labourers concerned. The planning authority may have thought that in these days of easy transport it was best to omit such a limit. As to the width of the class of permitted occupiers, the same reasons which led to a generous definition of "agriculture" in the Housing Acts operate also in a planning context, for example, the advantage of providing housing for men working in a sugar beet factory. As to the principles of construction applicable when general words are used, reliance is placed on *Gill* v. *City of Prahran.*[12] The condition can only be held void for uncertainty if it is impossible to give the words any workable meaning. Mere ambiguity is not enough and the appellants cannot show that this condition is so ambiguous that it is impossible to give it a workable meaning. This is not a notably unsatisfactory document and it does not give rise to more difficulties than other documents of this kind. There are always difficulties in applying general words to particular cases: see *Miller* v. *Ottilie* (*Owners*)[13] and *Bromley* v. *Tryon.*[14] Counsel for the appellants drew a picture of an industry on the borderline of dependence on agriculture. It is doubtful whether there could be such an industry and even more doubtful whether in the circumstances which he described an enforcement order would be issued. The words "mainly dependent upon agriculture" probably mean dependence for the volume of the raw material of an industry such as the sugar beet industry, but one must look at the particular manifestation of the industry in question and determine by reference to that particular example whether it is mainly dependent on agriculture, and also look at the work on which the man is actually employed.

In the case of the word "dependants" it is accepted that it implies financial dependence. Too much should not be made of *In re Ball*[15]; see also *In re Sayer.*[16] There is no authority for suggesting that an ambiguity may be solved where there are only two possible alternatives, but not where there are more.

[12] [1926] V.L.R. 400, 413.

[13] [1944] K.B. 188; 60 T.L.R. 169; [1944] 1 All E.R. 277, C.A.

[14] [1952] A.C. 265, 272.

[15] [1947] Ch. 228.

[16] [1957] Ch. 423; [1957] 2 W.L.R. 261; [1956] 3 All E.R. 600.

Here the planning authority has decided to promote agriculture in this area and not to allow speculative residential development. It wants to include a man working within five or 10 miles of this cottage, but not to exclude a man temporarily out of work, and the words used are general. "Agriculture," in the light of the reason given, means agriculture in the locality. As to the meaning of "agriculture" and "agricultural population" in the context of the Housing Acts, see also section 97 of the Housing Act, 1930 (which by section 33 makes provision for subsidies), section 11 of the Housing (Financial Provisions) Act, 1938, section 25 (1) of the Housing (Financial and Miscellaneous Provisions) Act, 1946, and section 114 of the Housing Act, 1957. The meaning is similar to that prescribed by this condition. In *Curtis* v. *Stovin*[17] Bowen L.J. said that "the rules of con-"struction of statutes are very like those which apply to the "construction of other documents, especially as regards one "crucial rule, viz., that, if it is possible, the words of a statute "must be construed so as to give a sensible meaning to them." In the Housing Acts one of the objects of the legislature was to encourage the construction of houses in rural districts for persons connected with agriculture. The Planning Acts pursue the same objects by different methods. If the arguments for the appellants were right and the condition was void for uncertainty, the same words would have the same effect in the context of the Housing Acts: see Lord Evershed M.R. in the Court of Appeal.[18] The words "of the district" in section 34 (2) of the Housing Act, 1930, cannot be relied upon as giving greater certainty to the statutory provision, since they occur in the operative part of the section outside the definition. Even if those words were included in the condition in the present case, they would only affect the geographical limitations and not other matters. For the appellants reliance was placed on *Berriman's* case,[19] but the passage cited must be looked at in its context. Nothing in the *East Riding* case[20] is applicable to the present case. See also the *Crisp from the Fens* case.[21] Applying the ordinary rules of construction, there is here a workable condition. *Sifton* v. *Sifton*[22] is not helpful here, but see *Clayton* v. *Ramsden*.[23] As to the

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[17] (1889) 22 Q.B.D. 513, 517; 5 T.L.R. 248, C.A.

[18] [1959] Ch. 543, 568; [1959] 2 W.L.R. 884; [1959] 2 All E.R. 321.

[19] [1959] A.C. 278, 313.

[20] [1957] A.C. 223.

[21] 1 P. & C.R. 48, 57.

[22] [1938] A.C. 656, 676.

[23] [1943] A.C. 320, 328; 59 T.L.R. 75; [1943] 1 All E.R. 16, H.L.

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construction of by-laws, see *Leyton Urban District Council* v. *Chew*.[24]

If any part of the condition was void for uncertainty there would be severance. If there were prescribed qualifications all of which must be possessed by any occupier of the cottages, the uncertainty of one might be fatal to the condition, as in *Clayton* v. *Ramsden*.[25] But the situation is different here in that this condition prescribes a number of alternative qualifications, so that, even if one fails, the others need not. If one class was described in unintelligible words, it would be struck out, leaving the rest. In any event, one is here dealing with a relaxation and that ought not to render the whole void.

It is true that some of the terms of the condition may give rise to anomalies, so that some persons whose connection with agriculture is remote or almost non-existent may satisfy it, while others, who might be expected to qualify, would be excluded. But broadly the distinction which it makes is between persons whose employment would require them to live in a rural area and persons whose employment is such that they need not do so. The effect of the condition is to exclude office or industrial workers who might otherwise come and live in the area. The condition thus makes a sensible contribution to the preservation of the rural character of this part of the country. Since it is right in principle, its imperfections in detail do not warrant its being held ultra vires or void for uncertainty.

As to the appellants' argument that the condition is ultra vires, even if the class of persons who may do a thing in connection with land cannot be made part of the description of its use, it does not follow that a valid condition cannot be made defining such a class. The subject-matter of such conditions as this can be very wide: see, for example, clause 41 (2), dealing with clause 18 of the Caravan Sites and Control of Development Bill, now before Parliament.

Agriculture will be promoted by this condition, even though its intention may be defeated in certain exceptional circumstances. In nine cases out of 10 its effect would be to limit occupation to local farm-workers. On the question of possible anomalies the Court of Appeal[26] took a more sensible view than Roxburgh J.[27]

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[24] [1907] 2 K.B. 283, 288, 289, D.C.

[25] [1943] A.C. 320.

[26] [1959] Ch. 543, 567, 571, 577; [1959] 2 W.L.R. 884; [1959] 2 All E.R. 321.

[27] [1958] 1 W.L.R. 1161, 1167–1168; [1958] 3 All E.R. 521.

There is far less real possibility of a retired New Zealand farmer becoming tenant of one of these cottages than of an agricultural worker doing so. The words "is or was employment in agricul-"ture" in the condition were probably put in to cover the case of, say, a farm-worker from Northumberland coming south before he has actually got employment there. The "occupation" contemplated is rateable occupation. The risk of including an unsuitable occupier was regarded as less important by those who drafted this condition than the possibility of excluding someone who should be included. A condition does not become ultra vires because it could have been better drafted.

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation*[28] was correctly applied by the Court of Appeal. See also *Short* v. *Poole Corporation*[29] and *Slattery* v. *Naylor*.[30] As to *Prescott's* case,[31] see what was said by Jenkins L.J.

Alan Fletcher following. Every part of this condition is at least connected with the planning policy of the local planning authority. The condition was meant to be permanent throughout the lives of these cottages. The Outline Development Plan and the Green Belt policy were meant (1) to restrain sporadic building and (2) to encourage agriculture and rural life. The housing policy in this area was to have only just enough houses to maintain its rural life and character. When the planning authority granted the application it must have been satisfied that Clark required the cottages for his farming purposes, but some condition had to be imposed. In drafting the condition the first thought would be to limit occupation to agricultural workers employed on the holding; but the houses might not always be needed for such persons, and in that case no one would be available who was within the condition. So it was reasonable to bring into the condition all agricultural workers or workers in industries serving the needs of agriculture, as workers in a milk bottling depôt or in a workshop repairing tractors. It was undesirable to specify individual industries, as the needs of agriculture change. There was nothing unreasonable in the draftsman of the condition taking over the phrase from the Housing Acts. If ten workers in the Green Belt are looking for houses, it is far easier for each man to find a house that suits him if the condition attached to every house available is such that any man can go into any house; each would be fitted into the house which was best for him, so there is an advantage in making the condition wide, despite the risk of letting in some people who are not the sort of people wanted. Only the local planning authority could estimate the extent of the risk of persons who were not wanted getting in. As for the objection that the condition ought to have been limited to workers in the particular area, in the Housing Acts the word "district" has a technical meaning, namely, the area of a district council and a district might not be a suitable unit for planning purposes. The border of a district might be very close to a farm and so it might not be practical to limit occupation of the cottages to persons working in the "district." If a vague word like "neighbourhood" were used, that would be uncertain. To limit the workers to workers in the "county" would be unsatisfactory because some cottages might be near the Hertfordshire border and other parts of Buckinghamshire might be remote. One might prescribe an exact distance within which the occupants must work, but that would be artificial and would create difficulties, say, in the case of foresters working in several woods. There would be difficulty in limiting occupation to workers in the Green Belt, because its limits have not been fixed.

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[28] [1948] 1 K.B. 223, 228.

[29] [1926] Ch. 66, 90; 42 T.L.R. 107, C.A.

[30] (1888) 13 App.Cas. 446, 452; 4 T.L.R. 426, P.C.

[31] [1955] Ch. 210, 235–236.

R. E. Megarry Q.C. in reply. The excessive latitude of this condition renders it void. Take a hypothetical case of a condition limiting occupation of the cottages (1) to persons employed in local agriculture, or (2) to persons having planning merits, or (3) to persons who work for the local authority. No. 2 would be void for uncertainty and No. 3 would be ultra vires because it would carry out no planning purpose. No. 1 would not preserve the validity of the condition by itself, because the whole of the condition must have sufficient certainty and be intra vires. According to the argument for the respondents, one could ignore Nos. 2 and 3 and limit oneself to No. 1, but that would mean that there was no extension of the latitude at all. Here there is an unalterable condition in three parts, exposing the landowner on breach to enforcement notices. If no agricultural workers want to occupy the cottages the owner must take this risk or leave them unoccupied.

Under section 14 of the Act of 1947 a condition is something subject to which permission to develop land may be granted, for example, a condition prescribing the number of rooms in a house.

Here the planning authority gave quite different reasons for this condition on the later occasion from those which it had given on the previous occasion. The amenity element was emphasised at one time but not at the other.

Allowing workers "in an industry mainly dependent upon "agriculture," for example, workers in a cotton factory, to live in these cottages does not carry out any planning policy. It has nothing to do with preventing sporadic building. If tractors have to be manufactured, there is no sense in manufacturing them in the Green Belt.

One must distinguish between (1) uncertainty of a concept, when one cannot say which of two or more possible interpretations the draftsman had in mind, and (2) difficulty in the application of a concept: see *In re Gape*,[32] where *Sifton* v. *Sifton*[33] was considered. What one is concerned with in any case of uncertainty is the question whether there is a sufficiently clear concept. See also *In re Leverhulme (No. 2)*[34] and *In re Moore*.[35] If the concept is certain and one knows what the draftsman is getting at from the surrounding subject-matter, the condition will not be avoided because there is some difficulty in its application: see *Gill* v. *City of Prahran*,[36] a case which does not touch on uncertainty of concept. If one has a general concept, difficulties in its application can be overcome. A condition saying "if the "majority of the Buckinghamshire ratepayers consider . . ." would express a clear concept, though there would be difficulty in its application. But the words "if a majority of Bucking-"hamshire men consider . . ." would be uncertain because it would raise such questions as: Does the condition include men born there or men who live there? Does "men" embrace "women"? Does it mean ratepayers? Does it mean men over 21 years of age? The context might show what was meant. A condition to be valid must have a workable meaning, but if on the wording there are two or more workable meanings possible, there must be something to show which is meant, for example, in the contract or in a statute. In section 34 (2) of the Housing Act, 1930, the addition of the words "of the district" makes it clear what is meant by "agricultural population." They would make it clear that a furrier from London spending week-ends in a country cottage is not part of the "agricultural population

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[32] [1952] Ch. 418, 421–422; [1952] 1 T.L.R. 971; [1952] 1 All E.R. 827; [1952] Ch. 743; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579, C.A.

[33] [1938] A.C. 656.

[34] [1943] 2 All E.R. 274.

[35] [1901] 1 Ch. 936, 938; 17 T.L.R. 356.

[36] [1926] V.L.R. 410, 413–414.

"of the district." A by-law may be void for uncertainty or unreasonableness: see Halsbury's Laws of England, 3rd ed., vol. XXIV, p. 515, para. 948, and *Russom* v. *Dutton* (*No. 2*),[37] *per* Lord Alverstone C.J. A planning condition does not go through the same fire of criticism in the course of drafting as a by-law and so is more likely to be uncertainly expressed.

[LORD DENNING. In *Rex* v. *King*[38] a statute was held to be so "inaccurately penned" that no conviction should be upheld under it.

Bernard MacKenna Q.C. In *Green* v. *Wood*[39] a phrase in an Act of Parliament was held to be meaningless, so that it must be disregarded.]

One effect of this condition, if it is upheld, would be that a man would be properly in occupation of one of these cottages if he was employed in a factory engaged in an industry mainly dependent upon agriculture, but that, if the factory turned over to non-agricultural production, he would either have to leave the cottage or change his job.

In re Vince[40] supports the view that the whole of this condition is void for uncertainty. (The report of this case is fuller in the Law Times than in the Law Reports.) See also *Murray* v. *Dunn*.[41]

As to the wording of the condition, "employment" means world-wide employment anywhere at all. The phrase "is or "was employment in agriculture" was probably meant to cover retired people. If the respondents are right and "occupation" means rateable occupation, an agricultural worker whose three sons, living with him, worked in the council offices would be within the condition, but a council employee whose three sons living with him worked in agriculture would not be within it. As to the word "dependants," *In re Ball*,[42] relied on by the appellants, was not a defeasance case. *In re Sayer*[43] is distinguishable and does not hurt the appellants' case.

As to restrictions on the user of land, see section 15 (1) and (7) of the Land Charges Act, 1925.

As to the ultra vires point, the local authority may prescribe the actual use to be made of premises, but not the personal qualities of those who may use them—their capacity in relation to the acts which they do off the premises. This is not like the case of a vicar in the vicarage, a gamekeeper occupying a cottage on a sporting estate, a pit manager occupying a house at the pit, a caretaker of a block of flats occupying a flat there. The provision of a flat for the porter in an Inn of Court is one thing; the provision of a flat for him as a residence five miles away from the Inn is another and falls within the sphere of proper subject-matter for a planning condition. The decision in the present case cannot be rested on the size of the houses in question and on the fact that they are small cottages. That is not a decisive element, as suggested by Romer L.J.[44]

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[37] (1911) 104 L.T. 601, 602; 27 T.L.R. 197, D.C.

[38] (1826) 2 C. & P. 412.

[39] (1845) 7 Q.B. 178.

[40] [1892] 2 Q.B. 478; 67 L.T. 70, 71–72; 8 T.L.R. 334, C.A.

[41] [1907] A.C. 283, H.L.

[42] [1947] Ch. 228.

[43] [1957] Ch. 423.

On the question of the unfairness of this condition, one must judge it by its own words. If the council prescribes a condition which does not apply to local planning considerations, it is bad, no matter how good the council's intentions. *Prescott's* case[45] shows that one must judge the acts of the local authority by what it has actually done. In the present case there is a breach between planning policy and what the respondents have done. They did not have a clear concept of what they were trying to achieve by this condition.

Their Lordships took time for consideration.

1960. Oct. 26. LORD COHEN. My Lords, the question for your decision is as to the validity of a condition, which the respondents in exercise of powers conferred on them by section 14 (1) of the Town and Country Planning Act, 1947, imposed on the appellants' predecessor in title when granting on December 5, 1952, planning permission for the development of two farm-workers' cottages. The condition is in the following terms: "The occupation "of the houses shall be limited to persons whose employment or "latest employment is or was employment in agriculture as "defined by section 119 (1) of the Town and Country Planning "Act, 1947, or in forestry or in an industry mainly dependent "upon agriculture and including also the dependants of such "persons as aforesaid."

The appellants impugn the validity of the condition on four grounds. They say: (A) That the imposition of a condition restricting the user of premises according to the personal circumstances of the persons using them is ultra vires the respondents. (B) That the condition now under consideration is ultra vires in

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[44] [1959] Ch. 543, 574.

[45] [1955] Ch. 210, 234–235.

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that it is so wide that in the result it cannot fairly and reasonably be said to relate to the permitted development or to any policy possible under the Act of 1947. (C) That the condition is void for uncertainty, and (D) That in any event the condition has been fulfilled and its force is now spent.

Roxburgh J. rejected the first of those arguments but accepted the second and did not find it necessary to reach a conclusion on the third or fourth. The Court of Appeal rejected all four arguments.

My Lords, I have been privileged to read the opinion about to be delivered by my noble and learned friend, Lord Morton of Henryton, and do not find it necessary to restate the facts or the relevant sections of the 1947 Act and of the various housing Acts. Finding myself, as I do, in complete agreement with the opinions expressed by all your Lordships on the first, second and fourth of the arguments summarised above, I shall state my conclusions thereon quite shortly.

Dealing with the first of them, I agree entirely with what was said on the subject by their Lordships in the Court of Appeal. The argument that a planning authority cannot specify which persons may live in a house, but only the purposes for which it is to be used, apparently concedes that the defendants in the present case could have made it a condition that the cottages should only be used for the purpose of housing agricultural workers, and it is not easy to appreciate any significant difference between that condition and a condition that the occupation of the cottages should be limited to persons employed in agriculture. The difficulties in Mr. Megarry's argument are further illustrated by Romer L.J.[1] and I cannot usefully add anything to what he said on the subject.

The fourth argument, namely, that the condition has been fulfilled and its force is now spent, was not, I think, seriously pressed before us. Like the Master of the Rolls, I cannot think that any planning authority could sensibly, in a case of this kind, have supposed that it was discharging its statutory duty by imposing a condition restricted to the first occupation of the cottages.

I return to the second argument. Here, too, I find myself in complete agreement with their Lordships in the Court of Appeal. I assume, in dealing with this argument, that the condition which has been imposed is not so uncertain as on that ground to be invalid. I shall deal with the question of uncertainty as a separate matter. On this basis, it seems to me quite plain that, though the wording of the condition may be unfortunate, it cannot be said to be unrelated to the planning purposes the fulfilment of which is the duty of the respondents.

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[1] [1959] Ch. 543, 572; [1959] 2 W.L.R. 884; [1959] 2 All E.R. 321.

The Master of the Rolls relied on the decision of the Court of Appeal in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*,[2] where the question at issue was as to the validity of a condition imposed by the Wednesbury Corporation in granting a licence to the plaintiff for Sunday cinema performances. The condition was to the effect that no child under 15 years of age should be admitted to Sunday performances at the cinema with or without an adult. It was sought to impeach the validity of this condition on the ground that it constituted an unreasonable exercise of the powers of the corporation. The court upheld the validity of the condition. The relevant passages of the judgment of Lord Greene, then Master of the Rolls, are fully set out in the judgment of the Master of the Rolls in the present case. I will content myself with citing one passage, which reads as follows[3]: "I do not read him [Atkin J.] as in "any way dissenting from the view which I have ventured to "express, that the task of the court is not to decide what it "thinks is reasonable, but to decide whether what is prima facie "within the power of the local authority is a condition which no "reasonable authority, acting within the four corners of their "jurisdiction, could have decided to impose." In that case their Lordships were concerned with the policy of the local authority. In the present case it would perhaps be more accurate to say that what the House is concerned with is not planning policy but means of effectuating a policy predetermined. Be that so. I agree with Romer L.J.[4] that the principle of the *Wednesbury*[5] umbrella covers decisions reached in effectuating planning policy.

In support of this second alleged ground of invalidity Mr. Megarry relied mainly on the following argument. He said that the scope of the condition was unrelated to the policy declared in the outline plan or to any other sensible planning policy. He conceded that, if his first argument was ill-founded, the condition that the occupation of the houses should be limited to persons whose employment is employment in agriculture as defined by section 119 (1) of the Act of 1947 was unobjectionable. But he said that extending the list of permitted occupants to (1) persons whose latest employment had been in agriculture, a category which would include persons who had been employed in agriculture overseas; (2) persons employed in "an industry mainly "dependent upon agriculture"; and (3) dependants of such persons as aforesaid had so wide an effect that the condition could not be said to be reasonably related to the planning policy indicated in the permission. Mr. Megarry gave a number of illustrations in argument showing that a large category of persons could qualify as tenants whose occupation of the cottages could bear no relation to any sensible planning policy and certainly not to the policy outlined in the Outline Development Plan.

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[2] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

[3] [1948] 1 K.B. 223, 233.

[4] [1959] Ch. 543, 569.

[5] [1948] 1 K.B. 223.

The respondents, by their counsel both in the Court of Appeal and before your Lordships, frankly admitted that curious and anomalous positions might arise under the terms of the condition and that certain persons whose connection with agriculture was non-existent or remote might qualify as tenants whilst other persons who might ordinarily be expected to qualify would find themselves excluded. But they submitted that the condition made a broad division between persons whose employment is such that they may have to live in a rural area and persons whose employment is such that they need not; and that the effect of the condition was to exclude such persons as industrial or office workers who might otherwise have come into the area; that it therefore made a sensible contribution to the retention of the rural character of the part of the county concerned. The condition, it was said, was right in principle and the imperfection of detail afforded insufficient grounds for holding it to be ultra vires. Romer L.J. agreed with this contention but thought the condition was unfortunately worded. He added that absurd results could follow but that having regard to its terms it did seem that broadly speaking it was in line with the Outline Development Plan. "It is," he said,[6] "not possible to say that the condition could "not implement the policy outlined in that document; on the "contrary, it seems to me that it almost certainly will implement "it, notwithstanding that it is dissociated from the policy in "certain of its aspects."

I agree with this view. It seems to me impossible to say that no reasonable planning authority, acting within the four corners of their authority, could have decided to impose it, and in my opinion your Lordships, applying the decision in the *Wednesbury* case,[7] should hold that it is not ultra vires the respondents.

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[6] [1959] Ch. 543, 571.

I turn now to the third argument, namely, that based on uncertainty. I confess that this point has caused me much difficulty but upon consideration I have come to the conclusion that for the reasons so clearly stated in the opinions which will soon be delivered by my noble and learned friends, Lords Denning and Jenkins, this argument also fails. It is based in the main on the principle relating to penal provisions of a statute which was concisely stated by my noble and learned friend, Viscount Simonds, in *London & North Eastern Railway Co.* v. *Berriman*,[8] in these words: " A man is not to be put in peril upon an ambiguity." This principle involves that if a statutory provision is ambiguous, the court should adopt any reasonable interpretation which would avoid the penalty, but the court should not, I think, strike a provision out of an Act on the ground of uncertainty unless it is impossible to resolve the ambiguity which it is said to contain. In the present case your Lordships are considering not a statutory provision but a condition imposed in a planning permission. But the language of the condition is taken from the definition of " agricultural population " in section 34 of the Housing Act, 1930. See also section 115 (2) of the Housing Act, 1936. It is true that the context in which the expression under consideration is used in those Acts is different from that in which it is used in the condition imposed under the Town and Country Planning Act, 1947. But I agree with the Master of the Rolls[9] that it is " inescapable that, if Mr. Megarry's arguments that the language " in the condition to which I have referred is void for uncertainty in " the context of the condition, it is no less void for uncertainty " in the context of the Housing Acts."

Mr. Megarry also relied on *Sifton* v. *Sifton*[10] and other cases on defeasance clauses. I agree with my noble and learned friend, Lord Denning, that these cases are sui generis. Such clauses may involve a forfeiture and the courts have insisted that they must be so worded that persons affected by them can know with certainty what events will give rise to the forfeiture.

In the present case the words which are alleged to create the uncertainty are not added to restrict the land-owner's enjoyment of his land but to mitigate the severity of the restriction which the respondents are imposing on that enjoyment. It would indeed be unfortunate if these words were now to be held to have the effect of nullifying entirely a restriction which was, in part, at any rate, plainly within the policy of the Act.

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[7] [1948] 1 K.B. 223.

[8] [1946] A.C. 278, 313–314; 62 T.L.R. 170; [1946] 1 All E.R. 255, H.L.

[9] [1959] Ch. 543, 568.

[10] [1938] A.C. 656; 54 T.L.R. 969; [1938] 2 All E.R. 435, P.C.

I do not find myself driven to this conclusion. In my opinion, in construing a statute or a contract a court should not hold a provision thereof to be void for uncertainty unless it cannot resolve the ambiguity which is said to be contained therein. I am not satisfied that the condition in the present case contains any such insoluble ambiguity. I do not desire to anticipate what the decision will be if at some future time any particular occupancy of these cottages is challenged as infringing the conditions. It is sufficient to say that as at present advised I see no reason to think that the court would be unable to resolve the ambiguity.

For these reasons I would dismiss the appeal.

Lord Morton of Henryton. My Lords, the appellants are the owners of two cottages situate off Dibden Hill Lane, Chalfont St. Giles, in the county of Buckingham. The respondents are the local planning authority for that county under the Town and Country Planning Act, 1947. The cottages were erected by the appellants' predecessor in title, pursuant to a permission granted by the respondents under powers contained in that Act. In this appeal the appellants challenge the validity of a condition attached by the respondents to the permission so granted.

It will be convenient to refer at once to certain provisions of the Act of 1947. The opening words of the title are: "An Act "to make fresh provision for planning the development and use "of land, for the grant of permission to develop land and for "other powers of control over the use of land." There follow other objects of the Act, and the title ends with the words: "and for purposes connected with the matters aforesaid."

Section 5 (1): "As soon as may be after the appointed day" (July 1, 1948), "every local planning authority shall carry out a "survey of their area, and shall, not later than three years after "the appointed day, or within such extended period as the "Minister may in any particular case allow, submit to the "Minister a report of the survey together with a plan (hereinafter "called a 'development plan') indicating the manner in which "they propose that land in that area should be used (whether "by the carrying out thereon of development or otherwise) and

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" the stages by which any such development should be carried " out."

Section 5 (4): " The Minister may approve any development " plan submitted to him under this section either without modi- " fication or subject to such modifications as he considers " expedient . . ."

Section 12: " (1) Subject to the provisions of this section " and to the following provisions of this Act, permission shall be " required under this Part of this Act in respect of any develop- " ment of land which is carried out after the appointed day. " (2) In this Act, except where the context otherwise requires, " the expression ' development ' means the carrying out of build- " ing, engineering, mining or other operations in, on, over or " under land, or the making of any material change in the use " of any buildings or other land . . ."

Section 14: " (1) Subject to the provisions of this and the " next following section, where application is made to the local " planning authority for permission to develop land, that authority " may grant permission either unconditionally or subject to such " conditions as they think fit, or may refuse permission; and in " dealing with any such application the local planning authority " shall have regard to the provisions of the development plan, so " far as material thereto, and to any other material considerations. " (2) Without prejudice to the generality of the foregoing sub- " section, conditions may be imposed on the grant of permission " to develop land thereunder—(*a*) for regulating the development " or use of any land under the control of the applicant (whether or " not it is land in respect of which the application was made) " or requiring the carrying out of works on any such land, so far " as appears to the local planning authority to be expedient for " the purposes of or in connection with the development autho- " rised by the permission . . ."

Section 36: " Where, under the foregoing provisions of this " Part of this Act, a local planning authority are required to have " regard to the provisions of the development plan in relation to " the exercise of any of their functions, then, in relation to the " exercise of those functions during any period before such a plan " has become operative with respect to the area of that authority, " that authority shall have regard to any directions which may " be given to them by the Minister as to the provisions to be " included in such a plan, and subject to any such directions shall " have regard to the provisions which in their opinion will be "required to be so included for securing the proper planning of "the said area."

By article 5 (9) of the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728), which was made under powers contained in the Act of 1947, "Every such notice" (of the local planning authority's decision) "shall be in writing "and (*a*) in the case of an application for planning permission "or approval, where the local planning authority decide to "grant such permission or approval subject to conditions or to "refuse it, they shall state their reasons in writing . . ."

My Lords, it is to be observed that under section 14 (1) of the Act of 1947 the planning authority may impose "such conditions "as they think fit" when they grant permission to develop land. These words are extremely wide, but the appellants rely upon the words of my noble and learned friend, Lord Denning, in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[11]: ". . . nevertheless the law says that those conditions, "to be valid, must fairly and reasonably relate to the permitted "development." They submit (inter alia) that the condition imposed in the present case fails to answer this test, and further, that the condition is void for uncertainty.

The events leading up to this appeal are as follows. On November 22, 1952, Mr. D. D. Clark, who was then the owner of the land upon which the two cottages were subsequently erected, applied in writing for permission to develop the said land by "the erection of a pair of farm-workers' cottages." At the date of this application no development plan under section 5 of the Act of 1947 had become operative in the county of Buckingham and the Minister had not given any directions as to the provisions to be included in such a plan, but the respondents had published in February 1950 a document described as an "Outline "Development Plan for Buckinghamshire" which recognised that certain parts of the said county, including the site in question, should form part of the "Metropolitan Green Belt" and should be preserved against building development so as to form a barrier against the further outward spread of London.

On December 5, 1952, the Amersham Rural District Council, acting as agents for the respondents, granted permission in writing for the erection of a pair of farm-workers' cottages in accordance with Mr. Clark's application subject to a condition that: "The

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[11] [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.; [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.

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"occupation of the houses shall be limited to persons whose "employment or latest employment is or was employment in agri-"culture as defined by section 119 (1) of the Town and Country "Planning Act, 1947, or in forestry or in an industry mainly "dependent upon agriculture and including also the dependants "of such persons as aforesaid." The definition of "agriculture" referred to in the condition is as follows: "'agriculture' includes "horticulture, fruit growing, seed growing, dairy farming, the "breeding and keeping of livestock (including any creature kept "for the production of food, wool, skins or fur, or for the purpose "of its use in the farming of land), the use of land as grazing "land, meadow land, osier land, market gardens and nursery "grounds, and the use of land for woodlands where that use is "ancillary to the farming of land for other agricultural purposes." The language of the condition, from the word "persons" onwards, is identical with the language employed in section 34 (2) of the Housing Act, 1930 (now section 115 (2) of the Housing Act, 1936), except that the words "or in forestry" do not appear in either of these statutes. The permission included a statement of the reason for imposing the condition as follows: "Because "the council would not be prepared to permit the erection of "dwelling-houses on this site unconnected with the use of the "adjoining land for agricultural or similar purposes."

It is common ground between the parties that the cottages now in question were occupied for some time by farm-workers after they had been erected by Mr. Clark.

On December 31, 1956, the appellants bought the cottages with knowledge of the condition, which had been registered as a local land charge. Letters were exchanged between the parties on the subject of the removal or modification of the condition but they led to no result and on January 21, 1958, the appellants issued the specially indorsed writ in this action. By their statement of claim the appellants asked for a declaration that the condition is and was ultra vires, alternatively is and was void for uncertainty and of no effect, and that the cottages might lawfully be occupied without regard to the nature of the employment of the occupant. Alternatively they asked for a declaration that the condition had been fulfilled and that its force was spent. They further asked for an order to rectify the register of local land charges. Before the learned trial judge, Roxburgh J., in the Court of Appeal and in your Lordships' House, counsel for the appellants contended that the condition was invalid on one or more of the following grounds: 1. The imposition of a condition restricting the occupation of premises according to the personal circumstances of the occupant is ultra vires the respondents. 2. It is ultra vires the respondents to impose the condition that they sought to impose in this case, since the condition as a whole, or alternatively a substantial part thereof, cannot fairly and reasonably be said to relate to the permitted development or to any policy possible under the Act of 1947. 3. The condition is void for uncertainty. 4. The condition has already been fulfilled and its force is spent.

Roxburgh J. rejected the first contention, but accepted the second contention, granted a declaration that the condition was ultra vires upon that ground, and ordered the vacation of the entry in the register of local land charges. He expressed no opinion on the third and fourth contentions. The Court of Appeal (Lord Evershed M.R., Romer and Holroyd Pearce L.JJ.) in a reserved judgment rejected all four contentions, allowed the appeal of the present respondents and dismissed the action.

My Lords, I agree with the reasoning and the conclusion of the Court of Appeal in regard to the first, second and fourth contentions, but in my opinion the condition ought to be held void on the ground of uncertainty.

On the question of uncertainty, the Master of the Rolls, after referring to the criticisms directed at the language of the condition by leading counsel for the present appellants (Mr. Megarry, Q.C.) observed [12]: "It is undeniable that these criticisms have much "force." Romer L.J. said [13]: "It remains to consider whether "the condition imposed by the defendants is void for uncertainty, "and this question has caused me considerable doubt." Later, he said [14]: "It is, in my judgment, quite wrong that a condition "couched in such vague and ambiguous terms should be imposed "by any planning authority, and I can only hope that it will "never be imposed again." Holroyd Pearce L.J. said [15]: "There "is no doubt that the condition is cumbrous and unsatisfactory, "and can in extreme instances produce ridiculous results."

My Lords, I agree with these last two observations. Before returning to the words of the condition, I desire to say this. It is, to my mind, particularly important that the language of a condition imposed under the provisions of the Act of 1947 should be clear and unambiguous, for sections 23 (as amended by section

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[12] [1959] Ch. 543, 565.

[13] Ibid. 573.

[14] Ibid. 573–574.

[15] Ibid. 576.

2 of the Town and Country Planning (Amendment) Act, 1951) and 24 of the Act impose penal sanctions upon any breach of such a condition. As my noble and learned friend, Viscount Simonds, said in *London & North Eastern Railway Co.* v. *Berriman*[16]: "A man is not to be put in peril upon an ambiguity." In my opinion, a condition which is accurately described in the words of Romer and Holroyd Pearce L.JJ. already quoted should not be allowed to remain as a permanent burden attached to the ownership of these two cottages.

Mr. Megarry, for the appellants, in this House submitted that the condition was "riddled with uncertainty." His criticisms were most forcibly directed to the words "an industry mainly "dependent upon agriculture," but he pointed out that the opening words: "The occupation of the houses shall be limited "to persons," etc., at once raise an ambiguity. Do these words mean that no one is ever to live in either house unless he comes within the condition, or is it enough that the rateable occupier is within the condition, so that he can take in lodgers or paying guests who are not within it? If the former is the true meaning, a farmer occupying one of the cottages could not have living with him an adult son who was earning his own living, e.g., in the county council offices, for he would not be a "dependant." If the latter is the true meaning, as there is no limitation upon the land whereon the "person" is or was employed, a retired farmer from, for example, Devonshire, could become tenant of the two cottages and take in as paying guests persons who daily travelled to work in London. It is difficult to see what planning purpose could possibly be served by such a condition and equally difficult to reconcile it with the reason which the respondents gave for the imposing of the condition, referring to "the use of the "*adjoining* land."

Mr. MacKenna, for the respondents, submitted that the word "agriculture," read in the light of the reason so given, ought to be construed as meaning "agriculture *in the locality*." My Lords, there are two fatal objections to this submission. First, to insert the words "in the locality" is not to construe the condition but to rewrite it. Secondly, the insertion of the words "in the locality" merely makes the condition even more uncertain. Mr. MacKenna was asked to define the limits of the territory designated by the words "the locality," and it is not surprising that he was unable to do so.

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[16] [1946] A.C. 278, 313–314.

Other criticisms were directed to other words in the condition, but I shall not detain your Lordships by travelling through them, for in my opinion the words "mainly dependent upon agri-"culture" are of themselves enough to lead your Lordships to declare the condition void. The word "mainly" at once gives rise to difficulties. Probably it means "more than half" and this was the meaning which this House gave to the phrase "the "bulk thereof" in *Bromley* v. *Tryon*.[17] Even so, one must ask "more than half of what?" There is no context in the condition which gives any assistance. Does the word refer (for instance) to turnover, to value or volume of goods produced *for* agriculture, to value or volume of raw material supplied *by* agriculture, or to profits? There is no reason, in a planning condition, for selecting one alternative rather than another. Indeed, two or more of these possible alternatives were suggested from time to time in the course of the argument, either by your Lordships or by counsel for the respondents, as being the correct solution of the problem. Moreover, all these factors may vary from time to time, and a business which is "mainly dependent" at one time may cease to be "mainly dependent" at another. In these circumstances a tenant who was within the condition when he entered upon his tenancy would become outside the condition, and the owner and occupier would both be in peril under sections 23 and 24 of the Act of 1947.

Again, in what sense is the word "dependent" used? Does it mean dependent for its supplies, as in the case of a beet sugar factory, or dependent for its customers, as in the case of a business which produces tractors and fertilisers to be used in agriculture? Or does it mean dependent in some other sense?

My Lords, ambiguity in any part of the condition may at any time put the owner of the cottages in grave peril under the provisions of sections 23 and 24 of the Act of 1947. The condition remains in effect as long as the cottages are in existence, and a time may come—it may have come already—when no one employed in agriculture or forestry desires to occupy them or one of them. The owner may then have great difficulty in determining whether a tenant or prospective tenant is or is not within the terms of the condition. It may be said that the court can interpret the condition and apply it to the particular facts of each case on an appeal under section 23 (3) of the Act of 1947, but to this there are two answers. First, that the owner of the

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[17] [1952] A.C. 265; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058, H.L.

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cottages ought not to be put to the trouble and expense of going to the court by reason of ambiguity in the condition. Indeed, he might have to go to the court on several occasions, in regard to several successive tenants. Secondly, in choosing between the various possible meanings of the words the court would be merely making a guess. There is no context which points to any one meaning of the words " mainly " and " dependent " and reveals the concept in the mind of the draftsman. The Master of the Rolls and Romer L.J. were strongly influenced by the fact that the wording of the greater part of the condition had been taken from section 34 (2) of the Housing Act, 1930, but I would adopt the words of Holroyd Pearce L.J.[18]: " . . . it is no answer, as Mr. " Megarry rightly says, to an accusation of uncertainty that the " condition contains words used in an Act of Parliament in another " context." If any court has to interpret the statutory words hereafter, it may well find in the context some clue to the meaning of the words. In the present case one gets no such guidance.

For these reasons, my Lords, I would allow the appeal and grant a declaration that the condition in question was and is void for uncertainty. I add that it was not, I think, suggested by counsel for the respondents that it is not open to your Lordships to take this course, if you are satisfied that the words of the condition are so uncertain as to justify it.

LORD KEITH OF AVONHOLM. My Lords, in his argument for the appellants, Mr. Megarry placed in the forefront the submission that the condition attached to the planning permission given by the respondents, the county council, was void for uncertainty. The other challenges of the validity of the condition put forward by the appellants do not need to be considered if this submission is sound. Logically, therefore, it should be considered first.

As stated the point is one of uncertainty of concept. If it is impossible, on construction of the condition, to reach a conclusion as to what was in the draftsman's mind, the condition is meaningless and must be read as pro non scripto. It is not a question of ambiguity. If a clause may convey several different meanings it is for the court to say, looking to the general background, surrounding circumstances, subject-matter of discourse and other aids derived from the context of the clause, supplemented not infrequently by certain legal presumptions, what meaning is to be attributed to the clause. Reference was made in the course of the argument to a dictum of Lord Simonds in *London & North Eastern Railway Co.* v. *Berriman*[19] that a man is not to be put in peril upon an ambiguity. That has much force in a penal statute, as was the Act there under consideration. Where two constructions are open one of which involves penal consequences, or even civil liability, and the other does not, it may be proper to adopt the construction which avoids these consequences, though I should not accept this as a universal rule in all circumstances. (See also *Elmdene Estates Ltd.* v. *White*,[20] *per* Lord Simonds.) But the question here is different. It is whether one or more intelligible concepts can be extracted from the condition here under challenge.

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[18] [1959] Ch. 543, 577.

The condition is a condition attached to a planning permission and the permission was for the erection of a pair of farm-workers' cottages. The argument for uncertainty consisted largely in dissecting various words or phrases in the condition and submitting that their width, or scope, was such as to make it impossible to say what was in the draftsman's mind. Reading the condition as a whole I do not find any insuperable difficulty in arriving at a reasonable and clear idea of the content of the condition. It refers in the first place to "the occupation of the "houses," which I read as being confined to occupation by persons having certain defined qualifications and to the dependants of these persons. There may be a certain ambiguity here, but your Lordships are not concerned here with resolving ambiguities or placing a considered and final meaning on the condition. Speaking for myself I would not read the occupation as covering an independent occupation by dependants of the persons mentioned, but as including occupation by such dependants while living in family with such persons and occupying the houses along with them. Death, or removal from the houses, of the persons defined would terminate the occupation of the dependants. Nor can I see any difficulty in construing "dependants," when brought within the confines of a house, as meaning persons living in family with the person defined and dependent on him in whole or part for their subsistence and support. Then I come to the words "whose employment or latest employment." Latest employment would, I think, cover the case both of a man who

[19] [1946] A.C. 278, 313–314.

[20] [1960] A.C. 528, 539; [1960] 2 W.L.R. 359; [1960] 1 All E.R. 306, H.L.

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was temporarily unemployed or of a man who from old age, or illness, was no longer able to work. Nor, as I see it, need the words necessarily exclude a man who was engaged in other part time, or temporary, employment, if he could still be regarded as a farm-worker, or retired farm-worker, or a worker in one of the other specified categories. The words "agriculture as defined "by section 119 (1) of the Town and Country Planning Act, "1947," were next prayed in aid as showing the width of the condition. A man retired from sheep farming in New Zealand or fur trapping in Canada would, it was said, come within the condition. So be it, if that was the proper construction of the condition. That does not establish uncertainty. But again, for myself, I should doubt if any such result followed. This is an Act applying to England. We were not referred to the use of the word "agriculture" in the body of the Act. But I see no reason to suppose that it was intended to refer to agriculture outside England and I should be disposed to construe "agriculture," as defined in the Act, with that limitation. In paragraphs 4 and 5 of Schedule III (in which on a cursory survey of the Act I have found the word used) it could have no other meaning. It may be that in a planning scheme for a particular area it should further be confined to agriculture within that area. That point may be left for future determination should it ever arise. Lastly there are the words employment "in an industry mainly depen-"dant (sic) upon agriculture." What, it is said, does this connote? In a very wide sense it may be said that all industry depends on agriculture, inasmuch as the workers in industry, to enable them to work, require the corn, meat and to some extent clothing produced by agriculture. If so the industry of agriculture itself depends on agriculture. So wide a meaning need hardly be considered. But an industry may be dependent on agriculture in a more limited sense, if it depends for its raw material on the products of agriculture. Such, for instance, would be a corn mill, a sugar-beet factory, or a harvester combine. The converse case of an industry which produces machinery, implements or material for agriculture may be more doubtful. There it might be said rather that agriculture is dependent on the manufacturing industry. I say nothing, however, to prejudice any particular case that may arise. On either or both of the views indicated the general concept seems to me to be clear enough and in relation to the occupier of one of these small cottages I would anticipate no difficulty in deciding on which side of the line he falls or in dubio giving him the benefit of the doubt.

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The argument for invalidity is largely countered by the fact that the condition is substantially borrowed from words found in the Housing Acts. It will be sufficient to refer to the definition of "agricultural population" in section 34 of the Housing Act, 1930 (20 & 21 Geo. 5, c. 36), which is, I think, more apt for a solution of the present question than Mr. Megarry would suggest. It was said that the agricultural population there referred to was the agricultural population of the district, that is, under section 34, the rural district of the district council concerned, and that the definition of agricultural population had to be construed in this context. The suggestion, as I understood it, was that in this context the definition was capable of a definite meaning which, in the absence of any such context, was not possible in this town planning condition. On the contrary I think there is considerable correspondence in the respective situations in which the definitions fall to be construed. Under section 34 (2) of the Housing Act an estimate has first of all to be made of the number of houses likely to be required by the district council for the housing of the agricultural population of the district. If matters had stood thus there might have been no great difficulty in forming an estimate in light of the definition. The difficulty would arise under the latter part of the subsection and this has, I think, great relevance in the present case. Within the ceiling estimated the county council had to undertake to pay to the district council, and I quote, "in respect of each of the forty "years next following the completion of the houses a contribution "at the rate of one pound per house payable, subject as herein-"after provided, in respect of so many of the houses provided "with the approval of the Minister as are in that year occupied "for a period or periods exceeding nine months by members of "the agricultural population: Provided that no such contribution "shall be payable in respect of a number of houses greater than "the number of houses so determined as aforesaid to be required "for the accommodation of the agricultural population of the "district."

That means that each year for forty years a calculation had to be made of the number of houses provided under the Act occupied by members of the agricultural population, before the subsidy could be paid in respect of a particular house. Thus the definition had to be considered with reference to each occupant of the respective houses every year to see whether or not he came within the definition. If the definition fitted he was necessarily a member of the agricultural population "of the

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"district," for he was living "in the district." The same questions, as I see it, would arise there as here. In particular the county council might have to consider the question which was so much stressed in argument, whether some of the occupants were employed "in an industry mainly dependent upon agriculture." This particular requirement disappeared with the Housing Act, 1935, but that does not touch the matter and the definition of agricultural population was left standing for the other purposes of the Acts. The question as I see it is precisely the same as arises in the present case. The houses are in the area of the planning authority and the only question is, are they occupied by persons who come within the definition?

I should find it difficult, as the Court of Appeal found it difficult, to say that the definition in the Housing Acts had no intelligible or ascertainable content, in which case it could not have been applied to the important matter of ascertaining, in some cases at least, whether subsidy was payable to the district council. And if it had a definite and ascertainable meaning in the statute I should find it impossible to say that it could not have the same meaning for the purposes of this town planning condition.

In my opinion, the argument that the condition is void for uncertainty fails and your Lordships are left with the other grounds on which the condition is attacked. It is said that the condition is not related to the permitted development or to the reason given for imposing the condition. Prima facie I should have thought there was a close relationship between the permission to erect a pair of farm-workers' cottages, the condition imposed and the reason for the condition. Under section 14 of the Act the planning authority may grant permission to develop land "subject to such conditions as they think fit." I agree with what my noble and learned friend Lord Denning said in *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government*[21] that "conditions, to be valid, must fairly and reasonably relate "to the permitted development." The condition here would cover the occupation of the cottages by farm-workers on adjacent land or by such workers when unemployed, and the condition does not, in my opinion, become invalid because some persons may creep under the umbrella of the condition who may not have been contemplated as normal occupants of the houses. Some of the illustrations that were given in argument were, I thought, somewhat far fetched and unlikely to arise and, as I indicated when dealing with the question of uncertainty, probably not covered by the condition at all. The policy of the planning authority was to protect the green belt by limiting the kind of buildings that should be built there and the kind of occupier that should occupy them and I cannot say that that was not a reasonable and proper exercise of the powers of the planning authority under the Act.

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[21] [1958] 1 Q.B. 554, 572.

It was said that there was no power to restrict the occupation of the cottages by reference to the personal circumstances of the occupants. This I have covered in what I have already said. There might be personal attributes or circumstances required of the occupants which had no conceivable relevance to planning policy and, if so, such requirements would be bad. But that cannot, in my opinion, be said here. The power to impose conditions is given by the statute and if exercised with due regard to the principles already mentioned cannot be successfully challenged.

I agree also that the point taken that the condition is spent and has now no operative effect must be rejected, for the reasons stated by the Court of Appeal.

I would dismiss the appeal.

LORD DENNING. My Lords, in 1952 Mr. Clark, a farmer at Chalfont St. Giles, sought permission from the Buckinghamshire County Council to build two cottages for farm-workers. His farm was somewhat isolated and he needed the cottages for his men. The Buckinghamshire County Council, as the local planning authority, gave him permission to build a pair of farm-workers' cottages. But the land was in the green belt and the county council were anxious to preserve its character. They wanted to see the cottages occupied by persons connected with the land. So when the county council granted the farmer permission to build the cottages, they attached a condition which was intended to ensure that the cottages were occupied by members of the agricultural population.

In pursuance of this permission the farmer built the cottages, and they were occupied at first by farm-workers. But five years later they were acquired by a property company called Fawcett Properties Ltd. who now seek to remove the condition, saying that it is bad. If this contention is correct it means that the property company can sell or let the cottages to town workers, and this part of Buckinghamshire will see a piece of " sporadic "and isolated residential development" which is the very thing which the county plan condemned.

Now, the whole of the attack on the condition springs from this: when the county council framed their condition limiting the cottages to members of the agricultural population, they took the definition of "agricultural population" straight out of the Housing Acts. They used the self-same words as were used in those statutes. And these words are said by the property company to be so riddled with uncertainty that the condition is void for uncertainty: or alternatively that the condition is so unrelated to any planning purpose that it is ultra vires the planning authority. To support these contentions, Mr. Megarry gave your Lordships a series of examples of difficulties that might arise in the application of the condition.

My Lords, it is a bold suggestion to make that these words, taken as they are from a statute, are void for uncertainty. Mr. Megarry was unable to point to any case where a statute had ever been held void for uncertainty. There are a few cases where a statute has been held void because it is meaningless but none because it is uncertain. Thus in *Rex* v. *King*[22] a statute was so "inaccurately penned" that the judges thought that no conviction ought to take place upon it. And in *Green* v. *Wood*[23] and *Salmon* v. *Duncombe*[24] a phrase in a statute was rejected because no sensible meaning could be given to it. But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meanings the statute is to bear, rather than reject it as a nullity. As Farwell J. put it when speaking of a statute: "Unless the words were so "absolutely senseless that I could do nothing at all with them, "I should be bound to find some meaning, and not to declare "them void for uncertainty": see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*[25] Following the guidance of these authorities I should have thought it quite impossible to suggest that the definition of "agricultural population" in the Housing Acts was void for uncertainty.

Mr. Megarry sought to overcome this difficulty by saying that the words in the planning condition were used in a different context from the Housing Acts: and he pointed out, truly enough, that the planning condition had something of a penal character to it. The breach of it could—at one remove—be made the subject of a criminal prosecution. If the condition was not complied with, the local authority could serve an enforcement notice: and then if the enforcement notice was not complied with, the offender could be brought before the magistrates and fined. The condition was therefore, said Mr. Megarry, to be construed subject to the same rule as a penal statute which prescribes a duty and a penalty for the breach of it. The rule, he said, was that "a man is not to be put in peril upon an "ambiguity," see *London & North Eastern Railway Co.* v. *Berriman.*[26] But it seems to me that there is a short answer to this contention. The rule thus quoted by Mr. Megarry may be a perfectly good reason for construing a penal statute narrowly, but it is no reason at all for holding it to be void. Let alone is it a reason for holding this condition to be void. Mr. Megarry was on stronger ground when he likened the condition to a by-law. It is a local rule laid down by a local authority and enforceable by a penalty. And he said, rightly enough, that a by-law might be held to be invalid not only because it was unreasonable but also because it was uncertain. The only case which he cited for this proposition was *Scott* v. *Pilliner*,[27] but when examined it turned out that the by-law there was held void, not as being uncertain, but as being unreasonable. I can well understand that a by-law will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But if the uncertainty stems only from the fact that the words of the by-law are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid. Lord Wensleydale said so in this House in *Reg.* v. *Saddlers' Co.*[28]: "As in one "sense of the word the by-law is good and in the other not, "the rule is that it ought to be construed so as to make it valid, "not to defeat it."

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[22] (1826) 2 C. & P. 412.

[23] (1845) 7 Q.B. 178.

[24] (1886) 11 App.Cas. 627, P.C.

[25] [1900] 2 Ch. 352, 360–361; 16 T.L.R. 429.

Finding such slender support from by-laws, Mr. Megarry turned to defeasance clauses and showed truly enough that they could be avoided for uncertainty. He cited *Sifton* v. *Sifton*[29] for his purpose. But I do not think they advanced his case in the slightest: for it is apparent on the most casual examination that defeasance clauses are treated with peculiar stringency.

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[26] [1946] A.C. 278, 313–314.

[27] [1904] 2 K.B. 855; 20 T.L.R. 662, D.C.

[28] (1863) 10 H.L.C. 404, 463.

[29] [1938] A.C. 656.

They work a forfeiture: and the courts have insisted that they must be so worded that the persons affected can know with certainly the exact event which will give rise to the forfeiture: see *Clayton* v. *Ramsden.*[30]

Lastly, when he came to his reply on uncertainty, Mr. Megarry mentioned the contract cases such as *In re Vince.*[31] But here again he got nowhere: because in cases of contract, as of wills, the courts do not hold the terms void for uncertainty unless it is utterly impossible to put a meaning upon them. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty: see *Doe* d. *Winter* v. *Perratt*[32] by Lord Brougham, *In re Roberts*[33] by Jessel M.R.

Reverting now to the examples given by Mr. Megarry, all of these were, it seemed to me, examples of ambiguity or absurdity and not of uncertainty, or at any rate, not of such uncertainty as makes a condition void. For I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents. If you should take any of Mr. Megarry's examples the courts, I am sure, could say whether the case came within the condition or not. They would not have to give up the task in despair.

Next I turn to the question of ultra vires. The local planning authority is empowered to grant permission to develop land "subject to such conditions as they think fit." But this does not mean that they have an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion they must, to paraphrase Lord Greene's words in the *Wednesbury* case,[34] have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat my own words in the *Pyx* case,[35] the conditions, to be valid, must fairly and reasonably relate to the permitted development: or yet again, to borrow the words of Lord Macnaghten and Lord Wrenbury in this House, a public authority which is entrusted with a discretion must act reasonably, see *Westminster Corporation* v. *London & North Western Railway Co.*,[36] *Roberts* v. *Hopwood*[37]; and I take it that if the authority acts reasonably the result will be reasonable. Out of these various shades of meaning I am not sure that the last is not the best: for it puts planning conditions on much the same footing as by-laws made by a local authority, to which they are so closely akin. Indeed, I see no difference in principle between them. As with by-laws so with planning conditions. The courts can declare them void for unreasonableness but they must remember that they are made by a public representative body in the public interest. When planning conditions are made, as here, so as to maintain the green belt against those who would invade it, they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered: see *Kruse* v. *Johnson*.[38]

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[30] [1943] A.C. 320, 326, 329; 59 T.L.R. 75; [1943] 1 All E.R. 16, H.L.

[31] [1892] 2 Q.B. 478; 8 T.L.R. 334; 67 L.T. 70, C.A.

[32] (1843) 6 M. & G. 314, 361, H.L.

[33] (1881) 19 Ch.D. 520, 529, C.A.

[34] [1948] 1 K.B. 223, 233–234.

[35] [1958] 1 Q.B. 554, 572.

Such being the tests, how does this condition measure up to them? Mr. Megarry contended that the condition was totally unrelated to any legitimate planning considerations. He put forward the wide proposition that the statute gives the planning authority power to say in what *way* property is to be used: but no power to say by what *persons* it is to be used. I cannot subscribe to this proposition for a moment. I should have thought that a planning authority could very reasonably impose a condition that cottages were to be reserved for farm-workers and not let to city dwellers: for this would help to preserve the green belt. Forced from his wide proposition, Mr. Megarry took up the issue on a narrower front. He said that this condition was so expressed that it carried out no conceivable planning policy. For this purpose he resorted again to his examples. He concentrated his main attack on the words "an industry mainly "dependent upon agriculture," though he did not neglect the others. If these words are capable of any ascertainable meaning, he said, it is a meaning which is totally unrelated to any planning considerations. Agriculture is defined so widely that it includes the growing of cotton in Egypt, the raising of sheep in

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[36] [1905] A.C. 426, 430; 21 T.L.R. 686, H.L.

[37] [1925] A.C. 578, 613; 41 T.L.R. 436, H.L.

[38] [1898] 2 Q.B. 91, 99; 14 T.L.R. 416, D.C.

Australia and the breeding of chinchilla in South America: with the result that the industries which are mainly dependent upon agriculture include the textile industry, the leather industry, the fur industry and many others. If this be right, he said, many London workers will be eligible to occupy the cottages. And take the word "latest." It means that a retired farmer from Australia would be eligible for the cottages equally with a retired furrier from London. But a telephone operator from Chalfont St. Giles would not. How can such distinctions, it is asked, be fairly related to any legitimate planning considerations?

My Lords, I think the true answer to this attack on the condition is that Mr. Megarry is giving it too wide an interpretation altogether. The definition of "agricultural population" in the Housing Acts is limited by the context to the agricultural population "of the district," that is, of the locality. So here the words of the condition are to be read in the light of the reasons which the planning authority are enjoined to give, see *Crisp from the Fens Ltd.* v. *Rutland County Council.*[39] So read, I am clearly of opinion that the word "agriculture" does not include world-wide agriculture, nor even all-England agriculture, but means agriculture *in the locality.* And "industry" does not mean far-off industry in London or the big towns. It means *local* industry. The condition, properly construed with the reason, means, I think, that the occupation of the cottages must be limited to persons who are employed in agriculture in the locality or in a local industry mainly dependent upon agriculture in the locality. The word "occupation" is used to denote the head of the household. The word "latest" to show that he may stay on in the cottages after his retirement. The word "dependants" to show that he may have with him his wife and family and anyone else dependent on him. So construed it seems to me that the condition fairly and reasonably relates to the permitted development. Its effect is to ensure that the cottages will be occupied by persons who will help to maintain the normal life and character of this part of the green belt and not by outsiders to use as a dormitory. The cottages are for farm-workers or for men who work at the smithy shoeing horses, at the mill grinding the corn, or at the saw mills cutting up wood; or in modern times at the milk depôt bottling the milk or at the repair shop mending the tractors; and so forth. They are not for people who go up and down to London every day.

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[39] (1950) 1 P. & C.R. 48, C.A.

There is only one further point. Mr. Megarry suggested that this condition was spent. It was satisfied, he said, as soon as the first occupant was installed in compliance with it. The only alternative, he claimed, was to hold that the condition applied in perpetuity: and this was an unreasonable construction seeing that the condition could not be modified. If this contention were correct, it would provide an easy escape from planning control, for the first occupant might only stay for a week or a fortnight. In my opinion this contention is not correct. The condition is a continuing condition and applies to the land indefinitely. I am not prepared, as at present advised, to accept the suggestion that a planning condition can never be modified. When conditions are imposed limiting the purposes for which the property can be used, and afterwards fresh circumstances arise in which the owner seeks to use it for different purposes, he may well be able to apply for permission under section 12 on the ground that he wishes to make a "material change in the use."

In my opinion, therefore, the challenge to this planning condition should fail and this appeal should be dismissed.

LORD JENKINS. My Lords, this appeal concerns the validity of a condition imposed by the respondent council, as local planning authority under the Town and Country Planning Act, 1947, in granting permission to the appellant company's predecessor in title, Mr. Donald Decimus Clark, to erect a pair of farm-workers' cottages on freehold land belonging to him at Dibden Hill Lane, Chalfont St. Giles in the County of Buckinghamshire.

The permission in question was granted on December 5, 1952. At that date the council had (in February 1950) published a provisional document described as an "Outline Development "Plan for Buckinghamshire," but had not as yet submitted to the Minister the development plan called for by section 5 of the Act. It was nevertheless incumbent on Mr. Clark (under section 12) to obtain the permission of the council (under section 13 (1) (*b*)) for the development constituted by the erection of the proposed pair of cottages.

The section of the Act upon which the present dispute mainly turns is section 14 (1). [His Lordship read the subsection and continued:] By article 5 (9) of the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728) which was made under powers contained in the Act: "Every such "notice [of the local planning authority's decision] shall be in "writing and (*a*) in the case of an application for planning permis-"sion or approval, where the local planning authority decide to "grant such permission or approval subject to conditions or to "refuse it, they shall state their reasons in writing. . . ." Reference should also be made to section 36. [His Lordship read the section and continued:]

It should be observed that no such directions as are mentioned in section 36 had been given by the Minister at the material time, but that the "Outline Development Plan" to which I have already referred recognised that certain parts of the county, including the site of the proposed cottages, should form part of the "Metropolitan Green Belt" and should be preserved against building development so as to form a barrier against the further outward spread of London.

The combined effect of sections 14 (1) and 36 in the circumstances of the present case therefore was that in dealing with Mr. Clark's application the council were to have regard to the provisions which in their opinion would be required to be included in the development plan for securing the proper planning of the area (such opinion having been to some extent indicated in their "Outline Development Plan"), and to any other material considerations.

At this point I should mention, to show I have not forgotten it, the circumstance that Mr. Clark had on July 22, 1952, obtained permission from the council for a similar development on a different site, but had abandoned this project owing to some difficulty as to his rights in regard to building upon it, and had substituted as the site of his proposed development the land to which the permission now in question relates. Notwithstanding some argument to the contrary, I am of opinion that differences in the terms of the abortive permission of July 22, 1952, and the effective permission of December 5, 1952, are for present purposes irrelevant, and that your Lordships are concerned only with the terms of the latter document.

The effective permission of December 5, 1952, was signed by the clerk to the Amersham Rural District Council as agents for the county council and omitting formal parts was in these terms: "In pursuance of their powers under the above-mentioned Act "and Order the Bucks County Council as Local Planning "Authority hereby permit erection of pair of farm-worker's "cottages at Dibden Hill Lane, Chalfont St. Giles in accordance "with your application dated November 22, 1952, and the plans "and particulars accompanying it subject to the following "conditions: (1) The occupation of the houses shall be limited "to persons whose employment or latest employment is or was "employment in agriculture as defined by section 119 (1) of the "Town and Country Planning Act, 1947, or in forestry, or in an "industry mainly dependent upon agriculture and including also "the dependants of such persons as aforesaid. The reasons for "imposing the above conditions are: (1) Because the council "would not be prepared to permit the erection of dwelling-"houses on this site unconnected with the use of the adjoining "land for agriculture or similar purposes."

The condition to which the permission was expressed to be subject was duly registered in the register of local land charges.

For some time after the erection of the cottages they were occupied by farm labourers whose employment undeniably complied with the terms of the condition.

On December 31, 1956, the appellant company bought the freehold interest in the cottages, with vacant possession, from Mr. Clark's mortgagees, admittedly buying with notice of the condition as registered.

The cottages being vacant, the company wanted to let them to persons not qualified as occupants by the terms of the condition. The council refused to allow this, and after considerable correspondence the present action was brought by the appellant company as plaintiffs against the council as defendants, claiming substantially as follows: (1) A declaration that the condition was ultra vires or alternatively void for uncertainty, and that the cottages might be lawfully occupied without regard to the nature of the employment of the occupants; (2) alternatively, a declaration that the condition had been fulfilled and that its force was now spent, with similar results; and (3) rectification of the local land charges register.

The case was heard by Roxburgh J., who on October 29, 1958, gave judgment for the company on the ground that the condition was "ultra vires as not fairly or reasonably relating to any local "planning considerations."[40] That aspect of the ultra vires argument may be called the "narrow" ultra vires claim, turning as it does on the terms and apparent scope of the particular condition in question. An alternative argument on ultra vires, which may be called the "broad" ultra vires claim, proceeds on the more general ground that the council had no power under the Act to impose a condition restricting the occupation of premises according to the personal circumstances of the occupant. The learned judge rejected the "broad" ultra vires claim, and reached no conclusion on the submission to the effect that the condition had been fulfilled and its force was now spent, or on the submission to the effect that the condition was void for uncertainty, his decision on the "narrow" ultra vires claim making it unnecessary for him to do so.

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[40] [1958] 1 W.L.R. 1161, 1170; [1958] 3 All E.R. 521.

The Court of Appeal (Lord Evershed M.R., Romer and Holroyd Pearce L.JJ.) agreed with the judge in rejecting the "broad" ultra vires claim, and also rejected the claim to the effect that the condition was spent, with which the learned judge had not dealt, and which had not been seriously pressed before them. I find myself in complete agreement with the conclusions expressed by both courts on the former, and by the Court of Appeal on the latter, of these two points, and no useful purpose would be served by discussing them further.

There remain the more difficult matters of the "narrow" ultra vires claim and the claim of uncertainty, both of which were rejected by the Court of Appeal, who accordingly by the judgment now under appeal (delivered on April 27, 1959) discharged the judgment of Roxburgh J. and dismissed the action. The considerations advanced in support of these two claims to some extent overlap.

The law relating to the "narrow" ultra vires claim is not in dispute, and may be thus summarised:

(1) Under section 14 (1) of the Act of 1947 the council as local planning authority were empowered to grant permission for the proposed development either unconditionally or subject to such conditions as they thought fit or might refuse permission, and under section 36 they were enjoined in the exercise of their functions to have regard to the provisions which in their opinion would be required to be included in the development plan for securing the proper planning of the area.

(2) The power to impose conditions though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy. This accords with the concluding passage in section 36

above referred to. As was said by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[41]: "The "principles to be applied are not, I think, in doubt. Although "the planning authorities are given very wide powers to impose "'such conditions as they think fit,' nevertheless the law says "that those conditions, to be valid, must fairly and reasonably "relate to the permitted development. The planning authority "are not at liberty to use their powers for an ulterior object, "however desirable that object may seem to them to be in the "public interest."

(3) This does not mean that the wisdom or merits of a condition imposed in any given case can be made the subject of an appeal to the court at the instance of a person objecting to the condition. See *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*,[42] the effect of which is for the present purpose sufficiently indicated in the following passage from the headnote: "Held, that the local authority had not acted "unreasonably or ultra vires in imposing the condition. In "considering whether an authority having so unlimited a power "has acted unreasonably, the court is only entitled to investigate "the action of the authority with a view to seeing if it has taken "into account any matters that ought not to be or disregarded "matters that ought to be taken into account. The court cannot "interfere as an appellate authority to override a decision of such "an authority, but only as a judicial authority concerned to see "whether it has contravened the law by acting in excess of its "power."

While fully accepting the principle of the *Wednesbury* case,[43] Mr. Megarry (for the appellants) submits that in the present case the persons to whom the condition purports to limit the occupation of the two houses are defined in such comprehensive terms that on the face of it the condition (though it cannot be said to be entirely unrelated to any planning considerations) bears as a whole no fair or reasonable relation to any conceivable planning policy and is therefore beyond the powers of the local planning authority, and open to review by the court under the limited jurisdiction described in the *Wednesbury* case.[43] Moreover, the terms of the condition do not accord with the reason given for imposing it, or in other words are not related to the respondents' own statement of their planning policy as set forth in the reason.

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[41] [1958] 1 Q.B. 554, 572.

[42] [1948] 1 K.B. 223.

[43] [1948] 1 K.B. 223.

The features of the condition mainly relied on by Mr. Megarry in support of this branch of his argument for the appellants were these. The condition includes amongst the persons eligible to occupy the cottages persons whose latest employment was employment in agriculture as defined in section 119 (1) of the Act. There is no geographical limit as to the place of such latest employment. Accordingly the condition would permit occupation of either cottage by (e.g.) a retired sheep farmer from New Zealand. Occupation by such a person (said Mr. Megarry) could have no possible relevance to the use of the green belt in the respondents' area, or anywhere else, for agricultural purposes. Again, the condition permits occupation by persons currently employed in agriculture, with no geographical limit as to the place of such employment. This means that an agricultural labourer could be let into occupation of either cottage notwithstanding that his place of work was many miles away in a different county, so that his activities could have no relevance to the use of the green belt in the respondents' area for agricultural purposes. Mr. Megarry also contended that the definition of "agriculture" in section 119 (1) of the Act was wide enough to include (e.g.) an assistant in a boot-shop in a town in any part of the country on the ground that "agriculture" as so defined includes the production of skins, that leather is made from skins, and that bootmaking is an industry mainly dependent on leather. He submitted that the condition would allow occupation by the supposed boot-shop assistant, although in this and other imaginary cases of persons employed in industries mainly dependent upon agriculture the employment of the individuals concerned could have no possible relevance to the use for agricultural purposes of the green belt in the respondents' area. This last category of hypothetical forms of employment was also strongly relied on by Mr. Megarry in support of the claim based on uncertainty. As I have said, the two arguments to some extent overlap, and Mr. Megarry gave us a large number of examples of varying degrees of probability or improbability in support of one or other or both of them.

I cannot accept Mr. Megarry's argument, or Roxburgh J.'s conclusion, on the narrow ultra vires claim.

As I understand the position, it would have been open to the council as local planning authority simply to grant unconditional permission for the erection of the two cottages, relying on their situation and character as sufficient for practical purposes to ensure that they would in fact be occupied by agricultural workers or persons engaged in kindred employments in the locality. If the council had taken that course, so far as I can see, they would clearly have been acting within their powers. But, as stated in the reason, the council's policy was "not to "permit the erection of dwelling-houses" on the site in question "unconnected with the use of the adjoining land for agriculture "or similar purposes." They therefore thought it expedient to impose an express condition designed to implement that policy, and accordingly did impose the condition now said to be ultra vires. The question, then, is whether (apart from the question of uncertainty, which at this stage I ignore) this condition with all its faults could fairly and reasonably be held to make it more likely that the policy stated in the reason would be implemented than it would have been if the council had simply given unconditional permission for the erection of the two cottages. In my opinion the answer to that question must clearly be in the affirmative, and if I am right in that opinion it follows in my judgment that the narrow ultra vires claim must fail. The condition, no doubt, fell short of perfection, but so far as it went it was designed to carry out, and in practice might reasonably be expected to carry out, the respondents' planning policy. The various imaginary cases in which the council's object might be defeated without breach of the condition loomed large in argument but appeared to me to be for the most part of little importance from a practical point of view, judged, that is to say, by reference to what would be likely to happen, as distinct from what might conceivably happen. Be that as it may, so far as these examples demonstrate that the condition might in various hypothetical cases fail to achieve its object, they merely show that the condition was imperfect, and not that it was ultra vires.

I may now turn to the argument that the condition was void for uncertainty, which seems to me to be the difficult point in the case. It is said that the condition is so imperfectly expressed and defines the persons to whom the occupation of the cottages is to be limited with such lack of precision that many cases might occur in which no owner of the cottages could tell, and no court could decide, whether by letting a given person into, or permitting him to remain in, occupation, the owner would be committing a breach of the condition.

Mr. Megarry pointed out the penal consequences which would or might ensue from such a breach under the provisions of sections 23 and 24 of the Act, and placed in the forefront of his argument the principle that "a man is not to be put in peril "upon an ambiguity," see *per* Lord Simonds in *London & North Eastern Railway Co.* v. *Berriman.*[44] He pointed out further the difficulties which in his submission would confront the owner and the occupier in the event of the latter having been let into occupation while pursuing some plainly agricultural employment, but thereafter changing to a different employment with respect to which it was impossible to determine whether it did or did not exclude the occupier from the permitted range.

But it is first necessary to consider whether the condition ought in all the circumstances of the case to be held uncertain to the point of invalidity. If it was, then the present appeal must succeed. If it was not, then it cannot be invalidated on the ground that in certain hypothetical cases it might be fraught with untoward consequences. I will read it again: "The occu- "pation of the houses shall be limited to persons whose employ- "ment or latest employment is or was employment in agriculture "as defined by section 119 (1) of the Town and Country "Planning Act, 1947, or in forestry, or in an industry mainly "dependent upon agriculture and including also the dependants "of such persons as aforesaid."

Mr. Megarry claimed that this language is "riddled with "uncertainty." He contended that the word "occupation" was in itself an expression of doubtful import and also criticised reference to "dependants" as lacking in precision. These two points, though not without force, were in my view rightly rejected by the Court of Appeal and I say no more about them, except to observe that this part of Mr. Megarry's argument involves the proposition that a simple condition to the effect that the occupation of the cottages was to be limited to persons employed in agriculture, uncomplicated by the other provisions included in the condition, would have been void for uncertainty —a proposition which, for my part, I find impossible of acceptance. I have already mentioned Mr. Megarry's point as to the possibility of an occupier changing his employment after being let into occupation on the strength of undeniable employment in agriculture, but this, as I think, goes to the consequences of uncertainty rather than the question whether the condition ought to be held void for uncertainty. Mr. Megarry also (as I understood him) instanced the case of a person who divided his time with mathematical equality between agriculture and some other employment. But this does no more than indicate a possible (and highly improbable) case not provided for by the condition, and I cannot regard the remote possibility of such a casus omissus as a ground for holding the condition void for uncertainty.

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[44] [1946] A.C. 278, 313–314.

But Mr. Megarry's main attack was upon the word "employment . . . in an industry mainly dependent upon agriculture," the expression "agriculture" being defined in the condition by reference to the definition of that expression in section 119 (1) of the Act of 1947. Mr. Megarry contended that no certain meaning could be attached to the words "dependent upon agriculture," and a fortiori to the words "mainly dependent upon agriculture."

These words considered in vacuo are no doubt capable of a very wide interpretation. They might be said on the one hand to include any industry depending on agriculture for the raw materials used in the trade or manufacture which it carries on, and on the other hand also to include any industry which provides goods (e.g., fertilisers and agricultural machinery) required to enable agriculture to be carried on, and depends on persons engaged in agriculture as customers for such goods. Moreover, the former construction might be extended to include not merely raw materials received from agriculture in their original state, but any materials used in the industry concerned at no matter how many removes from agriculture, so long as they could be shown to have been in origin derived from agriculture. It could thus be plausibly claimed that the imaginary boot-shop assistant referred to in argument would be employed in an industry dependent on agriculture, because under section 119 (1) agriculture includes the keeping of livestock for the production of skins, leather is made of skins and boots are made of leather. The same could be said (with the substitution of wool for skins) of the manufacture and sale of woollen garments and I do not know how many other industrial activities.

By way of reductio ad absurdum my noble and learned friend, Lord Keith, suggested in the course of the argument that all industry might be said to be dependent upon agriculture, inasmuch as no industry could be carried on without food.

Speaking for myself, I confess I have been attracted by the view that one aspect of the argument on uncertainty could be met by construing the words "dependent upon agriculture" in close conjunction with the statutory definition of agriculture expressly adopted by the condition. That definition defines agriculture as including a number of activities, e.g., "horti-"culture, fruit growing" . . . "the breeding and keeping of "livestock" . . . "the use of land as grazing land meadow land "osier land market gardens and nursery grounds . . ." and so forth. True it is that the definition is not exhaustive, but that only means that there are or may be other activities proper to be classed as "agriculture." On this view it would follow that by the expression "an industry . . . dependent upon agriculture" the condition means an industry which depends on some one or more of these activities for its raw materials as distinct from an industry which depends on people engaged in agriculture as customers for the agricultural necessaries which it supplies, e.g., in the form of agricultural machinery or fertilisers. Thus a fruit-canning factory would be carrying on an industry dependent on agriculture because it would depend for its supplies of fruit on agriculture in the shape of the agricultural activity of "fruit "growing" to which the definition refers. On the other hand a company selling fertilisers to farmers would not be carrying on an industry dependent on agriculture within the meaning of the condition, for the definition of agriculture does not expressly include and cannot be regarded as including by implication, the provision of fertilisers for agricultural use.

In short, I am tempted to hold that in the examples given the hypothetical fruit-canning factory would for the purposes of the condition be dependent on agriculture (i.e., fruit-growing), while agriculture (as represented by the farmers concerned) would be dependent on the hypothetical company for its supplies of fertiliser.

This reasoning, if accepted, would dispose of so much of the argument on uncertainty as turns on the view that an industry is dependent on agriculture within the meaning of the condition if the demand for the goods or services which it supplies depends on the continuation of agricultural activities. It must, however, be admitted that the words of the condition literally read are wide enough to include dependency in this sense, and for the purposes of this case I am content to assume, without deciding, that they do include it.

There remains the argument, already touched upon, that no sure line can be drawn to enable the point at which dependence on agriculture ceases in a case in which a particular agricultural product after leaving the farm is put (perhaps by several stages) into a different state, in which it is sold or, it may be, subjected to some further manufacturing process. The examples of leather boots and woollen garments have already been mentioned, but many others could be devised. The miller depends on agriculture (i.e., wheat-growing) for making flour. The baker buys flour from the miller and makes it into bread. Is the bread-making industry, as carried on by the baker, dependent on agriculture within the meaning of the condition? A jam manufacturer is dependent on agriculture (i.e., fruit-growing) for the fruit he makes into jam. Is the business of a grocer who buys jam from the manufacturer and sells it by retail dependent quoad the jam on agriculture within the meaning of the condition? One may add the case of a tailor making suits out of cloth which originated as sheep's wool, and has since passed through many processes. Is the tailors' business dependent on agriculture within the meaning of the condition?

I think the answer is that the dependence on agriculture contemplated by the condition is a direct dependence. The condition is capable of that meaning, and if construed as including any degree of dependence, however remote or indirect, it would lead to manifest absurdity. I would say that in the examples given the miller and the jam manufacturer would be dependent on agriculture, but that the baker and the grocer would be dependent not on agriculture but on the miller and the jam maker respectively. Each actual case would no doubt turn on its own facts, but I see no reason for supposing that if the question ever arose in practice it would be incapable of decision on the lines I have indicated.

As to the qualification of the word " dependent " by the word " mainly " in the condition, I do not think it gives rise to any real difficulty. I think that, as Mr. MacKenna (for the respondents) submitted, the question whether a given industry was " mainly " dependent on agriculture could legitimately be resolved by looking at the particular manifestation of that industry in which the potential occupier was employed, and determining by reference to that particular example whether the industry concerned was mainly so dependent. Approached in that way, I cannot believe that the court would find it impossible to decide whether the use of the word " mainly " was warranted by the facts.

As to the argument to the effect that in view of the absence from the condition of any geographical limit as to the place in which a person must be employed, or must have been employed, in agriculture, or in an industry mainly dependent upon agriculture, in order to be eligible to occupy one of the cottages, a retired sheep farmer from New Zealand, or a farm labourer whose place of work was many miles away in a different county, would be eligible for that purpose, I do not see how this submission, if accepted, could assist the claim on uncertainty. Moreover, I find it impossible to accept. I think the condition must be construed as relating to employment in agriculture, or in an industry mainly dependent upon agriculture, in the area falling within the jurisdiction of the county council as local planning authority, and moreover (I am disposed to think but need not now decide) in the part of that area which was to form part of the green belt. The object which the county council had in view was that if the cottages were built in the green belt contrary to the general rule against building there, they were to be used for the purpose of providing living accommodation for persons employed or last employed in agriculture, or in an industry mainly dependent thereon, in the green belt. I think the council's much criticised reasons support this view.

It remains to consider whether, if and so far as the condition contains any element of uncertainty, the degree of uncertainty involved is sufficient in all the circumstances of the case to justify your Lordships in holding the condition void.

In determining this question it is right to remember that this is not a case comparable to that of a condition subsequent which, if valid, would create a forfeiture of a beneficial interest under a settlement or will, or that of a trust in favour of a class of persons so imperfectly described as to make it impossible to ascertain its composition.

In cases of the former description the condition is construed with the utmost strictness and, to be valid, " must be such that " the court can see from the beginning, precisely and distinctly, " upon the happening of what event it was that the preceding " vested estate was to determine ": see *Sifton* v. *Sifton*,[45] *per* Lord Romer citing Lord Cranworth in *Clavering* v. *Ellison*.[46] See also *Clayton* v. *Ramsden*[47]: " The modern idea, perhaps, is that " the beneficiary should be in a position to know what he is to do " or not to do if he is to avoid a forfeiture," *per* Lord Wright.

In cases of the latter description it is obviously impossible to carry out the trust if the members of the class cannot be ascertained, and the result is no different if the trust is for such members of an unascertainable class as the trustees may select: see *Inland Revenue Commissioners* v. *Broadway Cottages Trust*.[48] So far as cases of these kinds have any bearing at all on the present case, it seems to me that *In re Gestetner*[49] is nearer in point. In that case it was held—I quote from the head-note, "that, where a power does not impose a trust on the "donor's conscience, it is not necessary to know all the objects "to appoint to one of them, and that a power may be good "although in favour of an indefinite class."

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[45] [1938] A.C. 656, 670.

[46] (1859) 7 H.L.C. 707, 725.

[47] [1943] A.C. 320, 329.

In the present case there is no question of a trust for an undefined class, or of a condition operating, if valid, to bring about the forfeiture of a beneficiary's interest. It clearly cannot be necessary to the validity of the condition here in question that it should be possible to identify all the persons who, according to the terms of the condition, are at any given time eligible in point of employment or latest employment to be let into occupation of the cottages. The owner is under no obligation to let anyone into occupation, and, in particular, is under no obligation to any person who satisfies the condition to let such person into occupation on that account. If the owner was indeed subject to such an obligation, it might well be necessary to the validity of the condition that it should be possible to decide with certainty as regards each and every claimant, whether he satisfied the condition or not. But as the case stands, the owner's obligation is merely not to allow occupation by any person who does not fall within the limit as regards occupation imposed by the condition. That means that it behoves the owner to satisfy himself that any proposed occupier does fall within the prescribed limit before he lets him into occupation. If, on investigation, the owner finds that the proposed occupier is clearly within the prescribed limit he can, if he chooses, let him into occupation. If, on the other hand, the owner finds that the proposed occupier is clearly outside the prescribed limit he must, in order to comply with the condition, refuse the application. Again, if it appears doubtful whether the proposed occupier does or does not fall within the prescribed limit, the owner will be well advised to refuse, and will be perfectly free to do so. Such being the position of the owner, I see no reason why the possible occurrence of doubtful cases, which he would be free to reject, should be held to invalidate the condition so as to entitle him to let into possession persons clearly outside the permitted limit. The question should perhaps be regarded to some extent as one of degree. The above line of argument would, of course, have no application to a condition framed in such terms that it would be ex facie impossible to attribute satisfaction of it to anyone, for in such a case the result would be to preclude the owner from letting altogether. But where, as here, the character and situation of the cottages are such as to make it highly improbable that there will be any lack of would-be occupants who do demonstrably satisfy the condition (e.g., as farm-workers, in actual employment as such, on neighbouring farms in the green belt, with or without wives and children (the latter, if any, under 21)), I think it would be unreasonable to hold the condition invalid on account of the theoretically possible emergence of cases in which the eligibility of the would-be occupants, whom, be it remembered, the owner would be under no obligation to accept, might be open to doubt.

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[48] [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120, C.A.

[49] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.

As regards the hypothetical case, on which Mr. Megarry placed much reliance, of the occupant who is qualified when he goes in but later becomes disqualified by a change in his employment, or through the industry in which he is employed ceasing to be mainly dependent on agriculture, I think the owner would be substantially protected by granting no more than weekly tenancies, and perhaps also making the tenancy expressly subject to the condition, and requiring the tenant to report any change in his employment. Having done this, I think the owner would have done all that in him lay to comply with the condition, apart from serving notice to quit and taking proceedings in ejectment if and when he deemed it necessary to do so, or was required to do so by an enforcement notice. If ejectment proceedings were precluded by some other enactment he would not be to blame. In these circumstances I can attach no great importance to the possibility of penal consequences. The opening words of the condition—" The occupation of the houses shall be limited "—are not, in my view, to be construed as obliging the owner to do the impossible.

I would add that, as a matter of common sense, if there is any room for such in a case of this kind, timely consultation between the owner and the council would probably suffice to resolve most difficulties.

In conclusion, I would observe that in common with the Court of Appeal and the majority of your Lordships, I attach great importance to the circumstance that the language of the condition from the words " persons whose employment " down to the words " the dependants of such person as aforesaid " (omitting the words from " as defined " down to " or in forestry ") are borrowed ipsissimis verbis from the definition of the expression " agricultural population " contained in section 34 (2) of the Housing Act, 1930, which definition is reproduced in section 115 (2) of the Housing Act, 1936, and section 114 (5) of the Housing Act, 1957. Having regard to the close similarity between the language of the condition now under consideration and that of the Housing Act definition to which I have just referred, I think it would be very difficult for your Lordships to hold the condition void for uncertainty. To do that it would be necessary (in effect) to overrule the implied opinion of the leglislature that the definition in section 34 (2) of the Housing Act, 1930, was sufficiently precise and certain to make it possible to determine by reference to that definition the question whether any given house was required for the accommodation of the agricultural population of the district so as to rank for subsidy under the same subsection. The context in which the definition in section 34 (2) occurs is, of course, different from that of the condition, and it occurs in an Act of Parliament while the condition does not. The difference in context is not, I think, such as to be material for the present purpose, and while your Lordships are not bound to accept the validity of the condition as if it was a statutory provision, the definition in section 34 (2) does provide the language of the condition with statutory sanction which your Lordships should be slow to reject. For these reasons, although I confess that I have found the case a difficult one, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Phillips & Co.; Sharpe, Pritchard & Co. for R. E. Millard, Aylesbury.*

F. C.

H. L. (E.)*

1960
Oct. 17, 18,
19, 20;
Nov. 22.

[HOUSE OF LORDS.]

INSTITUTION OF MECHANICAL ENGINEERS APPELLANTS;

AND

CANE (VALUATION OFFICER) AND ANOTHER . . RESPONDENTS.

Rating—Science or fine art—Exemption—Society "to promote the "development of mechanical engineering"—Supported mainly by annual subscriptions—Whether instituted for purposes of science exclusively—Whether subscriptions voluntary—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The Institution of Mechanical Engineers was founded in 1847 as a voluntary association and was later incorporated by royal charter, the object being "to promote the development of mechanical "engineering and to facilitate the exchange of information and "ideas thereon," for which purpose the institute was empowered to encourage invention and research, to hold meetings for reading and discussing communications, to distribute proceedings, reports and papers, to co-operate with educational bodies and to do other things conducive to the attainment of its object. Membership was of great advantage to engineers, as they had the benefit of the educational facilities provided, of associating with other members of the profession, of receiving reports of proceedings and other publications, and of enjoying a special professional status by virtue of their membership. The income of the institution was some £168,000, of which £138,000 came from members' subscriptions. The cost of the publications distributed to members was about 30 per cent. of the annual subscriptions. The local valuation officer contended that the premises of the institution should be included in the valuation list on the ground that it was not entitled to the benefit conferred by section 1 of the Scientific Societies Act, 1843, as a society "instituted for purposes of science . . . exclusively" and "supported "wholly or in part by annual voluntary contributions":—

Held, (1) that the institution was not instituted for the purposes of science exclusively. The phrase "development of mechanical "engineering" included all the activities which encouraged its growth, not only as a science, but also as an art, an industry or a profession (post, p. 708).

Per Viscount Simonds and Lord Tucker. The purposes for which the institution was instituted are to be determined solely from the terms of its charter (post, pp. 707, 722).

Per Lord Reid. I desire to reserve my opinion as to whether or how far it is relevant to consider the present activities of the institution (post, p. 718).

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* *Present:* VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD DENNING.

Per Lord Radcliffe. There is something unsatisfactory about deciding a claim to exemption from a current year's rating merely by construing words in its charter. It would be more satisfactory if the word "instituted" were read as meaning "having as its "institutional purpose" (post, p. 719).

Per Lord Denning. The question is: For what purposes is the society at present instituted? (post, p. 723).

(2) That the institution was not supported by voluntary contributions, since the subscriptions of the members were not "voluntary" within the meaning of the Act; membership carried substantial professional advantages and a main object in becoming a member was the acquisition of those advantages (post, pp. 709 to 713, 717, 718, 725 et seq.).

Per Lord Radcliffe. What is or is not voluntary is a matter of degree, advantages being weighed against the value of the subscriptions paid and, possibly, the responsibilities undertaken (post, p. 721).

Savoy Overseers v. *Art Union of London* [1896] A.C. 296; 12 T.L.R. 377, H.L.; and *Inland Revenue Commissioners* v. *Forrest* (1890) 15 App.Cas. 334; 6 T.L.R. 456, H.L. applied and explained.

Per Viscount Simonds. Cases on the Act of 1843 must be distinguished from cases on the Customs and Inland Revenue Act, 1885, since in the former, but not in the latter, the voluntary character of contributions is an expressly relevant consideration (post, p. 712).

Decision of the Court of Appeal [1960] 1 Q.B. 388; [1960] 2 W.L.R. 48; [1960] 1 All E.R. 129 affirmed.

Appeal from the Court of Appeal (Hodson and Ormerod L.JJ. and Wynn-Parry J.).

This was an appeal from an order of the Court of Appeal dated December 1, 1959, whereby appeals by the now respondents, T. S. Cane and the Westminster City Council, on a case stated by the Lands Tribunal, pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, were allowed and a decision of the Central London Local Valuation Court was restored. The first-named respondent was the valuation officer authorised by the Commissioners of Inland Revenue pursuant to the Local Government Act, 1948, to act for the rating area of the City of Westminster and the second-named respondents were the rating authority for that area. The appellants, the Institution of Mechanical Engineers, were at all material times the occupiers of a hereditament at 1, Birdcage Walk and 5, Storey's Gate, described and assessed in the valuation list for the City of Westminster as follows: "Professional institu-"tion offices and premises (including basement, ground, first "and second floors of 2/4 Old Queen Street and second and third "floors of 6 Old Queen Street) at £6,000 gross value and £4,997 "rateable value."

The appellant institution was incorporated by royal charter in 1930.

In the charter the objects and purposes of the institution are thus stated: "7. The objects and purposes for which the institution is hereby constituted are to promote the development of "mechanical engineering and to facilitate the exchange of information and ideas thereon and for that purpose: (A) To "encourage invention and research in matters connected with "mechanical engineering and with this object to make grants "of money or books or otherwise to assist such invention and "research. (B) To hold meetings of the institution for reading "and discussing communications bearing upon mechanical "engineering or the application thereof or upon subjects relating "thereto. (C) To print publish and distribute the proceedings or "reports of the institution or any papers communications works "or treatises on mechanical engineering or its application or subjects connected therewith. (D) To co-operate with universities, "other educational institutions and public educational authorities "for the furtherance of education in engineering science or "practice. (E) To do all other things incidental or conducive "to the attainment of the above objects or any of them."

The charter also provided for the government of the institution and for membership of it. There were to be two classes, namely, members and associate members, to be known collectively as corporate members, and there were to be also honorary members, companions, associates, graduates and students, to be known collectively as non-corporate members. Members were to be entitled to the use after their name of the initials "M.I.Mech.E.," associate members of "A.M.I.Mech.E.," and so on through the grades. The corporate members were empowered by clause 19 of the charter to make by-laws for the regulation, government and advantage of the institution, its members and property, and for the furtherance of its objects and purposes as therein mentioned.

The income of the institution was about £168,000, of which about £138,000 represented annual subscriptions. The cost of the issue to members of "The Chartered Mechanical Engineer" and "Proceedings" represented about 30 per cent. of this amount. In 1955 (the last year for which the annual report was produced in these proceedings) there were about 5,000 members, 20,000 associate members, 15,000 graduates and 5,000 students. This report stated that: "The correct use of the institute's "initials of membership is a matter of grave concern to members "and it is on their vigilance and co-operation that the institution "must mainly depend for information concerning instances of "misuse."

The respondent institution published, recommended and sold model forms of general conditions of contract of which the main object was found by the tribunal to be to protect the material interests of the engineer in his professional capacity. It was also concerned with the education of mechanical engineers, both on the professional side and in the training of technicians and craftsmen, and with the industry of mechanical engineering.

Bernard MacKenna Q.C., *F. A. Amies* and *N. D. Banks* for the appellants. This institution falls within section 1 of the Scientific Societies Act, 1843. The expression in the institution's charter "to promote the development of mechanical engineering" denotes, in its natural meaning, a wholly scientific object, when read in the light of (A) to (E) which follow. The development of the science of mechanical engineering is no different from the development of its techniques. Developments do not always originate in the laboratory. Anyone may be confronted with practical problems and by trial and error he finds a solution. The underlying principles are studied and the results become part of the science of engineering which may be taught. There is a close connection between the science of engineering and its practice. The development of its practice cannot be a separate and distinct object from the development of the science, which is achieved by the discovery of new techniques and the improvement of old techniques. It is therefore not sound to say that the appellants were instituted not merely to serve the purposes of science but also to serve other purposes, including the practice of engineering and the purposes of the persons following the profession of mechanical engineers. There is nothing to show that the institution was established to serve the purposes of its members. Save in so far as the purposes of the members coincide with those of the institution, it has no power to serve their purposes. Further, the question also arises whether the substantial motive of a member subscribing to the institution is his own benefit or the forwarding of the science of mechanical engineering. The publication of the model forms of conditions of contract provide no reason for a man becoming or continuing to be a member of the institution.

The relevant authorities are as follows: *St. Anne (Churchwardens)* v. *Linnaean Society*[1]; *St. Marylebone Vestry* v. *Zoological Society*[2]; *Russell Institution* v. *St. Giles Vestry*[3]; *Reg.* v. *Royal Medical and Chirurgical Society of London*[4]; *Reg.* v. *Institution of Civil Engineers*[5]; *In re Duty on the Estate of the New University Club*[6]; *In re Duty on the Estate of the Institution of Civil Engineers*[7] and *Inland Revenue Commissioners* v. *Forrest.*[8]

The institution was established for the purposes of science exclusively. This appears from the words of clause 7 of the charter "to promote the development of mechanical engineering" in the context of that clause and other relevant parts of the charter. The institution's activities are wholly consistent with this view.

The Court of Appeal wrongly construed the decision in *Savoy Overseers* v. *Art Union of London,*[9] regarding it too narrowly. It was not a decision that only subscriptions made from wholly disinterested and altruistic motives can be regarded as "voluntary subscriptions." Lord Halsbury said that a payment is voluntary to the extent to which nothing is received in return. But that cannot be applied to a case where a person is subscribing to a society, the sole object of which is the promotion of science, and all he gets in return is the right to co-operate with the other members in the promotion of its objects. Here the subscribers obtained the right to co-operate in the work of the institution. Although subscriptions which are simply payments for full value received in personal advantages to the subscribers are not voluntary, the mere fact that some personal advantages are received does not destroy the voluntary character of the subscriptions or the quality of disinterestedness and altruism.

Reliance is placed on *Royal College of Music* v. *Westminster Vestry,*[10] where *Reg.* v. *Institution of Civil Engineers*[11] was distinguished on the ground that there the primary object of the institution was held as a matter of fact not to be charitable. Reliance is also placed on *Institution of Civil Engineers* v. *Inland Revenue Commissioners*,[12] where the Court of Appeal, applying *Forrest's* case,[13] held that the institution was established for charitable purposes only. Contrast *Battersea Borough Council* v. *British Iron and Steel Research Association.*[14] Reliance is also placed on *In re Royal College of Surgeons of England*[15] and *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[16] *O'Sullivan* v. *English Folk Dance and Song Society*[17] turned on the finding that traditional folk dancing is not a fine art. It indicates that the question in such cases as this is one of degree and fact and so is essentially one for the tribunal below. *Institute of Fuel* v. *Morley*[18] and *Cane* v. *Society of Chemical Industry*[19] are in favour of the appellant institution.

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[1] (1854) 3 E. & B. 793.

[2] (1854) 3 E. & B. 807.

[3] (1854) 3 E. & B. 416.

[4] (1857) 30 L.T.O.S. 133; 21 J.P. 789.

[5] (1879) 5 Q.B.D. 48, D.C.

[6] (1887) 18 Q.B.D. 720, 734; 3 T.L.R. 570, D.C.

[7] (1888) 20 Q.B.D. 621, 630; 4 T.L.R. 423, C.A.

[8] (1890) 15 App.Cas. 334, 344–345, 347, 353, 354; 6 T.L.R. 456, H.L.

[9] [1896] A.C. 296; 12 T.L.R. 377, H.L.

[10] [1898] 1 Q.B. 304, 311; 14 T.L.R. 136; [1898] 1 Q.B. 809; 14 T.L.R. 351, C.A.

[11] 5 Q.B.D. 48.

London Library v. *Cane*[20] illustrates the difference between the two questions which arise in this case, namely, whether the object of this institution is wholly scientific and whether the subscriptions of the members are annual voluntary contributions. On the question what is the test whether the subscriptions of members to a society are annual voluntary contributions, the relevant cases are *St. Marylebone Borough Council* v. *Institute of Public Administration*,[21] *Institution of Naval Architects* v. *Cane*[22] and *Battersea Borough Council* v. *British Iron and Steel Research Association.*[23] Where motives are mixed one must find the substantial motive: see *St. Anne* (*Churchwardens*) v. *Linnaean Society.*[24]

Where members have organised themselves into a society, one should assume that their purposes are those of the society unless the contrary is shown.

Maurice Lyell Q.C. and *Patrick Browne Q.C.* for the respondent valuation officer. The Court of Appeal was right in holding that the words in the charter "to promote the development of "mechanical engineering" must be given their ordinary connotation. So read, they are not limited to the science of mechanical engineering, for they are very wide. One definition of "engineer-"ing" in the Oxford English Dictionary is: "The action of the "verb engineer: the work done by, or the profession of, an "engineer." If that be right, the expression "mechanical "engineering" covers not only a scientific connotation but also a professional one and a trade or industrial one. A man is doing mechanical engineering if he is supervising the building of factory plant. The expression is apt to cover many activities. The annual report for 1955 refers to mechanical engineering as a profession. In trade or industry a foreman is as much employed in mechanical engineering as the designer of the machine he is working on. Among the honorary members who may be admitted to the institutions under by-law 14 are not only (a) "persons of "distinguished scientific attainments" but also (b) "persons "of distinction in the practice, organisation or administration of "engineering." The activities carried on by the institution are not exclusively scientific, even if "the development of mechanical "engineering" be held to be entirely scientific. The onus is on the appellant institution to show that it is entitled to the exemption, but its activities negative its entitlement. Thus in clause 7 (D) of the charter one of its objects is stated to be "To co-operate with universities . . . for the furtherance of "education in engineering science or practice"; but "practice" would cover technical education, which is not necessarily pursuing science: see *Battersea Borough Council* v. *British Iron and Steel Research Association*; *British Launderers' Research Association* v. *Hendon Borough Rating Authority*.[25] The evidence shows that the activities of the institution are largely practical and not scientific. For example, it took part in forming an appointments bureau, and it published model forms of conditions of contract. The institution's transactions and other publications show that much of its activity is related to commercial, practical and manufacturing matters. One must look not only at the purposes for which the institution was first established but also at the purposes pursued at the present time: see *Purvis* v. *Traill*.[26] If this institution is in fact pursuing objects alien to those for which it was instituted, it ceases to be entitled to exemption.

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[12] [1932] 1 K.B. 149, 156 et seq.; 47 T.L.R. 466, C.A.

[13] 15 App.Cas. 334.

[14] [1949] 1 K.B. 434; 65 T.L.R. 183, C.A.

[15] [1899] 1 Q.B. 871; 15 T.L.R. 317, C.A.

[16] [1952] A.C. 631, 641–642; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984, H.L.

[17] [1955] 1 W.L.R. 907; [1955] 2 All E.R. 845, C.A.

[18] [1956] A.C. 245; [1956] 2 W.L.R. 64; [1955] 3 All E.R. 843, H.L.

[19] (1956) 1 R.R.C. 106; 49 R. & I.T. 462, C.A.; (1957) 2 R.R.C. 105; 50 R. & I.T. 506, H.L.

[20] [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A.

[21] (1951) 23 D.R.A. 56, 65.

[22] (1953) 29 D.R.A. 403.

[23] [1949] 1 K.B. 434, 456.

[24] 3 E. & B. 793.

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[25] [1949] 1 K.B. 434, 451, 454, 456, 468.

[26] (1849) 3 Ex. 344, 349–350.

Next comes the question whether the members' subscriptions are annual voluntary contributions. They are not. The decision in the *Art Union* case [27] excludes from the scope of the words "annual voluntary contributions" the case of a society the members of which gain in exchange for their subscriptions a contractual right to some benefit or advantage which would not be disregarded under the de minimis rule. Subscriptions must be gratuitous in the full sense. The right to receive the proceedings and papers of the institute without charge is a direct personal advantage to the member and he buys it with his subscription. After that decision the Linnaean Society would not be held exempt, as it was in *St. Anne (Churchwardens)* v. *Linnaean Society*,[28] because the members were entitled to receive the society's publications. See also *Battersea Borough Council* v. *British Iron and Steel Research Association*; *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [29] and the *Art Union* case [30] in the Court of Appeal. Here one of the advantages which the members get from their subscriptions is the use of the appointments bureau. In the case of an institution like this, where all persons qualified may engage in a profession without becoming members of the institution, there is an obvious reason why persons are prepared to pay to become members and think the subscription worth their while. It is because they think that it will be an advantage in their profession. Prestige in one's profession has a pecuniary value, though it is hard to assess: see *Forrest's* case,[31] *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [32] and *Institute of Fuel* v. *Morley*.[33] The Court of Appeal in the present case [34] dealt with the matter correctly. The professional engineers who join the institution would not do so if it were not very much worth their while.

R. W. Bell for the City of Westminster. Reliance is placed on *Forrest's* case,[35] which indicates that the Act should be construed strictly. If there is an element of doubt, the benefit of it should be given rather to the ratepayers who would bear the burden of the exemption than to the societies which would escape it.

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[27] [1896] A.C. 296, 305, 310–311, 311–312, 312–313, 313–314.

[28] 3 E. & B. 793.

[29] [1949] 1 K.B. 434, 457, 472.

[30] [1894] 2 Q.B. 609, 628–629; 10 T.L.R. 576, C.A.

[31] 15 App.Cas. 334, 354.

[32] [1932] 1 K.B. 149, 163, 172.

[33] [1956] A.C. 245, 254.

[34] [1960] 1 Q.B. 388, 406–409.

[35] 15 App.Cas. 334, 352–353.

The construction of this charter should be approached on the same principles as those applied in *Institute of Fuel* v. *Morley*[36] and *Cane* v. *Society of Chemical Industry*.[37] The words in it should be given their ordinary and natural meaning. Here the expression " mechanical engineering " covers industry and the profession as well as science. In clause 7 of the charter, (A) to (E) cannot be read as qualifying the main object, since, to do so, they would have to be framed with some words of limitation, whereas they merely represent a further description. On the ordinary and natural meaning of the words the objects are not exclusively scientific. A fair test of the construction of the objects clause would be to ask whether, if some act which was entirely practical and not scientific were done by the institute, a member could stop it. He could not. In mechanical engineering there is an empirical art element as well as a scientific element. If the activities of the institute in promoting the former are within the charter, then it must authorise something which is not science exclusively, while, if those activities are carried on without the authorisation of the charter, the premises are not being used for science exclusively.

As to the question whether the subscriptions were " annual " voluntary contributions," when one has no evidence as to the motive of the subscribers, one cannot determine what it is. A subscription may be not wholly a matter of business or wholly bounty but in between the two. To assess the motive here one should first look at the sort of person who is offered the benefits which the institution confers and also at the material advantage to that sort of person. Then one must decide on a common-sense judgment and on experience whether or not the benefit is more than a trivial inducement to the kind of person to whom it is offered. The words do not cover such a benefit. Here membership offers a powerful inducement to members of the profession. In particular, the use of the institute's letters after a man's name enhances his professional status. There is the use of the library. There is the issue of the institute's proceedings. Such benefits as these prevent the subscriptions from being voluntary, although the value of the subscription need not be equated with the material advantage. But the value of the proceedings alone, judged by the standard of what persons outside the institution would be prepared to pay for them, represents a full return for the subscription.

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[36] [1956] A.C. 245.

[37] 2 R.R.C. 165; 50 R. & I.T. 595.

Further, the words do not cover the case where members assume a contractual obligation to pay their subscriptions. Even apart from a contribution being compulsory in the legal sense, there may be a compulsion about paying each annual subscription in that the subscriber has a strong motive not to wish to lose what he has already gained: see *In re the Duty on the Estate of the New University Club.*[38]

Bernard MacKenna Q.C. in reply. The expression used in the charter "to promote the development of mechanical engineering" means the science of mechanical engineering. The institution was founded exclusively for the purposes of science and, even if it could be proved that something was done on its premises which was ultra vires, that would not prove that the premises were occupied for purposes other than those of science. A slight lapse for a short time is not enough: see *Society of Chemical Industry* v. *Cane.*[39]

The institution has co-operated with educational authorities for the furtherance of the scientific study of mechanical engineering. The issue of the model forms of contract is not enough to justify the conclusion that the premises were used for non-scientific purposes, nor is the connection with the appointments bureau.

On the question whether or not the subscriptions were "annual voluntary contributions"; a subscription falls within that description when the member gains by his subscription rights incidental to membership of a society instituted for scientific purposes only. A subscription also falls within the description where the substantial motive for being a member of a society is to promote its scientific purpose.

If it were right that the expression could not include the case where a member gains by his subscription a contractual right to some benefit beyond the scope of the de minimis rule, no scientific or learned society dependent on members' subscriptions could claim exemption under the Act. That would be inconsistent with the *Linnaean Society's* case[40] and with the case of the *Royal Medical and Chirurgical Society.*[41] Nor would it be consistent with what was said in the *New University Club's* case[42] and in the Court of Appeal in the *Art Union* case.[43] It would also be inconsistent with the test laid down by Jenkins L.J. in the case of the *British Iron and Steel Research Association*[44] and with the dicta of the Master of the Rolls in *O'Sullivan* v. *English Folk Dance and Song Society.*[45]

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[38] 18 Q.B.D. 720, 738–739.

[39] 2 R.R.C. 106, 117–118; 49 R. & I.T. 462, 467.

[40] 3 E. & B. 793.

[41] 30 L.T.O.S. 133.

[42] 18 Q.B.D. 720, 734, 736.

[43] [1894] 2 Q.B. 609, 628–629.

The same objections are valid against the submission that the words in question do not cover the case where members assume a contractual obligation to pay their subscriptions.

The proposition that the words do not cover the case where the members acquire by their subscriptions a right to benefits which are more than trivial inducements to pay them is only consistent with the *Linnaean Society's* case[46] if the right to attend meetings or to use the library is trivial. Since such benefits are not trivial the proposition is inconsistent with that case and with the case of the *Royal Medical and Chirurgical Society.*[47]

In the present case every member of the institution did not apply for all its publications and the cost of those applied for by each member was far less than his subscription.

To say that the motive for paying the subscriptions as distinct from the contractual consideration received for them is the right test is consistent with the test laid down by Jenkins L.J. in the case of the *British Iron and Steel Research Association.*[48] Prestige is relevant to motive but not the consideration, which is the right to use the society's facilities.

The tribunal found that these subscriptions were annual voluntary payments and neither the Court of Appeal nor the House of Lords should substitute for that finding the reverse.

There is a presumption that a member's purpose is the same as that of the society and there is here no evidence to rebut that presumption.

Their Lordships took time for consideration.

November 22. VISCOUNT SIMONDS. My Lords, the question raised in this appeal is whether the appellants, the Institution of Mechanical Engineers, whom I will call "the institution," are entitled in respect of their occupation of certain premises at 1, Birdcage Walk and 5, Storey's Gate, in the City of Westminster, to exemption from rating under section 1 of the Scientific Societies Act, 1843. The Lands Tribunal, reversing a decision

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[44] [1949] 1 K.B. 434.
[45] [1955] 1 W.L.R. 907.
[46] 3 E. & B. 793, 797.
[47] 30 L.T.O.S. 133.
[48] [1949] 1 K.B. 434.

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of the Local Valuation Court, held that they were so entitled, but upon case stated the Court of Appeal allowed the appeal of the valuation officer and the corporation of the City of Westminster and restored the assessment to the valuation list. From the decision of the Court of Appeal which thus denied exemption the institution appeals to this House. I entertain no doubt that the appeal must be dismissed, but it is not easy to formulate the grounds of dismissal without using language that may be applied to circumstances which I have not in mind and do not intend, at least without further consideration, to cover.

I will first set out the relevant section. It is as follows: "(1) No person or persons shall be assessed or rated, or liable "to be assessed or rated, or liable to pay, to any county, borough, "parochial, or other local rates or cesses, in respect of any land, "houses, or buildings, or parts of houses or buildings, belonging "to any society instituted for purposes of science, literature, or "the fine arts exclusively, either as tenant or as owner, and "occupied by it for the transaction of its business, and for "carrying into effect its purposes, provided that such society "shall be supported wholly or in part by annual voluntary "contributions, and shall not, and by its laws may not, make "any dividend, gift, division, or bonus in money unto or between "any of its members, and provided also that such society shall "obtain the certificate of the barrister-at-law or lord advocate, "as hereinafter mentioned."

Upon this section two questions arise: (a) whether the institution was instituted for purposes of science, literature or the fine arts exclusively, and (b) whether, if it was so instituted, it is supported wholly or in part by annual voluntary contributions. If both these questions were answered in the affirmative, it would be necessary to consider also a third question, whether the premises are in fact occupied by the institution for the transaction of its business and the carrying into effect of its purposes. It is not, however, necessary to decide this question and I abstain from doing so, for I am not satisfied that it has been fully considered in all its aspects.

Upon the first question, which can be reduced to asking whether the institution was instituted for purposes of science exclusively, it is the charter that must be looked at first and last. I see no reason to suppose that it is necessary or legitimate to look at subsequent conduct in order to construe its language.

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That language is plain enough and I decline to apply the rule of contemporanea expositio to a royal charter of the year 1930.

[His Lordship read clause 7 of the charter and referred to other relevant provisions and continued:] I ask, then, at once whether this institution was instituted exclusively for purposes of science. It must first be noted that nothing could have been easier than to say so, but the vital word was not said: an omission the more noteworthy when it is observed that in comparable institutions which have been before the courts prominence has been given to the word. In the whole of clause 7 of the charter which I have set out the word "science" occurs once only, and then in the phrase "education in engineering science or practice," where the collocation of "science" and "practice" indicates their distinction and the dual character of the education to be given. So far as "mechanical engineering" connotes scientific work, it must, since it can be described as applied science, involve art and practice also. It is necessarily experimental. But that does not mean that it is exclusively scientific. On the contrary, I think that according to the ordinary use of language the "development of mechanical engineering" is a phrase apt to cover all the activities which encourage its growth as a science, an art, an industry or a profession. It is at least satisfactory, though I do not invoke the conduct of the institution as an aid to the interpretation of its charter, to find that no less wide a permitted range of activities would justify all that it has done.

A number of cases were cited to us. Some arising out of the Act we are now considering, others out of the relevant Income Tax Act, in which somewhat similar institutions have obtained the benefit of exemption from rates or income tax, as the case might be. I do not propose to burden your Lordships by a citation and examination of them, as we are affirming the judgment of the Court of Appeal and I am content to adopt as my own that part of the judgment which dealt with them. Each case must be decided on the language of its constitutive instrument. Some cases must be near the line and I should myself have found some difficulty in concurring in all the decisions that have been given. But the present case is not, I think, near the line but, on the contrary, is one in which the structure of the institution, its avowed purposes and its actual practice place it altogether outside the scope of the Act. I reject the idea that the legislature intended the neighbours of such a society to bear the burden of rates which it did not share.

There, my Lords, I might leave the matter, for the first condition of exemption is not satisfied. But your Lordships heard so much argument upon the second question, namely, whether the institution is supported wholly or in part by annual voluntary contributions, that I ought not to neglect it altogether. If I say a few words, I do so with little hope of reconciling past pronouncements, some of them of the highest authority. In the present case the Lands Tribunal dealt with the matter very shortly. It found as a fact that the income of the institution was some £168,000, of which about £138,000 represented annual subscriptions and that the cost of the issue to members of the publications "The Chartered Mechanical Engineer" and "Proceedings" represented about 30 per cent. of this amount and then proceeded: "In the numerous cases which have come before it, this tribunal "has held that subscriptions do not cease to be voluntary because "the subscribers obtain the publications of the society free or at "a reduced rate unless the value of the publications approximates "closely to the amount of the subscriptions. I do not regard 30 "per cent. as anywhere near approaching the limit the tribunal "has set as adequate to deprive the contribution of a claim to be "voluntary, and I hold that the subscriptions here are voluntary "within the meaning of the Act."

With great respect to the learned tribunal, I cannot regard this as a satisfactory way of dealing with this aspect of the case, though I can well understand the desirability of having some sort of yardstick. I doubt whether the judgment shows a correct appreciation of the value of the benefit derived by members from the free distribution of the publications. As I read the evidence the average value to each member of the publications received free by him was a very small sum. But I do not think that the issue turns only on this factor. It is at this point that the matters which I disregarded for the purpose of construing the charter become relevant. At once there is seen to be a glaring distinction between this institution and such societies as the Linnaean Society, which I take as typical because it was so much discussed in argument and was adjudicated on over 100 years ago: see *St. Anne (Churchwardens)* v. *Linnaean Society*.[1] In that case as in this the members got free copies of the transactions but in that case that was the only recorded benefit. It was clearly possible to regard the subscription of a member as voluntary, that is as gratuitous, notwithstanding that he got this incidental advantage, though it might be difficult to reconcile this view with every word that fell from Lord Macnaghten and Lord Watson in *Inland Revenue Commissioners* v. *Forrest* [2] and *Savoy Overseers* v. *Art Union of London*.[3] In the former of these cases it was not the Act of 1843 but the Customs and Inland Revenue Act, 1885, that was under review, and it was clearly the view of Lord Macnaghten [4] that advantages that would not count against exemption for the purpose of the latter Act would be a formidable objection under the earlier. I do not, however, think that it would be right in view not only of the *Linnaean Society* case [5] but of the many other cases that were cited to us to regard the free distribution of the publications of the institution, at whatever sum that may be quantified, as by itself disentitling the institution to exemption.

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[1] (1854) 3 E. & B. 793.

But, my Lords, that is by no means the end of the matter, though the Lands Tribunal did not think any other benefit worth mentioning. If the question is asked: "Is a member's subscription a gratuitous contribution in the sense in which a subscription to a hospital can be so described?" Or, put the other way round: "Is it from the material point of view worth while for a man who intends to pursue the profession of a mechanical engineer to become a member? Does he get any material benefit from it?" the answer seems quite plain. Here is a great professional organisation whose numbers in 1955, the last year for which I have seen the annual report, included approximately 5,000 members, 20,000 associate members, 15,000 graduates and 5,000 students. Why did they join? It is this that matters. As Lord Macnaghten pointed out in the *Art Union* case,[6] the purpose of the society is one thing, the object of the members in joining it is another. What is that object? My Lords, it appears to me to strain credulity too far to claim that members, associate members, companions, graduates and students or any one or more of these classes of corporate or non-corporate members pay their annual subscriptions in a spirit of altruism and without regard to the advantages that they obtain from membership. "Do you not think," Professor Saunders was asked, "the benefits are such that it is worth somebody's while to join the institution if he is a mechanical engineer?," to which he gave the only possible answer: "Yes." It is a question which can

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[2] (1890) 15 App.Cas. 334; 6 T.L.R. 456, H.L.

[3] [1896] A.C. 296; 12 T.L.R. 377, H.L.

[4] 15 App.Cas. 334, 354.

[5] 3 E. & B. 793.

[6] [1896] A.C. 296, 313.

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only be surveyed objectively: for it is clearly impossible to examine and cross-examine 40,000 persons about their motives in joining the institution. The benefits are largely intangible, for I am disregarding the receipt of free copies of publications. I will mention one advantage which alone seems to place the annual subscription outside the range of gratuitous offerings. I refer to the right to use the initials which indicate membership of the institution. There may well be societies, learned societies not connected with any particular profession, membership of which confers the right to the use of initials, yet no material benefit is thereby conferred. But where, as in the present case, the institution is associated with a particular profession and the use of initials indicates the attainment of certain qualifications, it is not to be believed that a material benefit is not derived from it. In the annual report for 1955 I find it said that: "The correct use "of the institute's initials of membership is a matter of grave "concern to members and it is on their vigilance and co-operation "that the institution must mainly depend for information con-"cerning instances of misuse." I do not think that this proper care for the privileges of members is inspired by any desire to protect the fair name of science. It recognises that members have paid for and won a valuable right which should not be depreciated by unauthorised use. It is, in fact, part of the professional equipment of a mechanical engineer: its acquisition is (to use a hackneyed phrase) a matter of business, not of bounty. If I select this material advantage to discuss at some length, it is not because there are not many other advantages of membership, each one perhaps trivial in itself but the sum of them amounting to substantial benefit. I would again select one fact which, though truly it may be described (and was described by the tribunal) as a minor activity, yet indicates how far from the realm of pure science or even applied science the institution may travel and how carefully to their great advantage it regards the material interests of its members. I refer to the publication of a model form of conditions of contract, which it recommends to them. Considering this and other matters which were brought to our notice, I can come to no other conclusion than that the institution in a number of ways had regard to the material interests of its members, and that its efforts were recognised by them. I must altogether dissent from the contention urged upon us by counsel for the institution that, if it can be assumed—a doubtful assumption—that its object was altruistic, the presumption must be made that its members were inspired by the same motive.

My Lords, I have said little of the numerous authorities that were cited to us. As I have already said, I wish to add nothing to what has been said by the Court of Appeal about those that bore on the first part of the case. The question can only be answered by reference to the constitutive document if there is one, as there invariably is, and the answer must depend on the construction of that document. I find in the authorities no principle of construction which impels me to say that this institution is instituted for scientific purposes exclusively.

Upon the second question there is more difficulty. In *Savoy Overseers* v. *Art Union of London*[7] language was used in this House which was, on one side, interpreted as meaning that any benefit received by a member prevented his subscription being voluntary and, on the other, as meaning that it was voluntary unless the member received its full equivalent in money or money's worth. Both views depend on an unjustifiable detachment of words from their context. The truth lies between them and is not capable of scientific precision. It is, as Lord Evershed M.R. said in *O'Sullivan* v. *English Folk Song and Dance Society*,[8] a question of substance and degree. Saying this he echoed what Jenkins J. had said in *Battersea Borough Council* v. *British Iron and Steel Research Association.*[9]

I will allow myself some further, perhaps desultory, observations on the authorities. Care must be taken to distinguish between cases upon the Act of 1843 and those upon the Customs and Inland Revenue Act. In the former, but not in the latter, the voluntary character of contributions is an expressly relevant consideration. It is, therefore, essential to regard observations in the latter class of case to the effect that the incidental advantages of members do not deprive an institution of its claim to exemption from income tax as irrelevant to the question whether the subscription of a member is voluntary. And I would observe in regard to the case of *Institute of Fuel* v. *Morley*[10] (a rating case) that there the voluntary character of members' subscriptions does not appear to have been in issue. The sole question was whether the institute was instituted for the purposes of science exclusively. This House came to the conclusion that it was. It did so upon a consideration of the institute's charter and the decision no doubt is relevant to what I have called the first question in this appeal, so far at least as the construction of one document is relevant to the construction of another. But for the reason that I have stated it has no bearing upon the question of the voluntary character of members' contributions.

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[7] [1896] A.C. 296.

[8] [1955] 1 W.L.R. 907, 923; [1955] 2 All E.R. 845, C.A.

[9] [1949] 1 K.B. 434, 457; 65 T.L.R. 183, C.A.

[10] [1956] A.C. 245; [1956] 2 W.L.R. 64; [1955] 3 All E.R. 843, H.L.

The appeal should, in my opinion, be dismissed with costs.

LORD REID. My Lords, the appellants claim exemption from local rates under the Scientific Societies Act, 1843. Two questions arise: first, whether they are a scientific society within the meaning of that Act, and secondly, whether they satisfy the proviso to section 1 of the Act. The latter raises a question of general importance. I agree with the decision of the Court of Appeal but on rather different grounds and I shall, therefore, state my own view.

The proviso is in the following terms: "Provided that such "society shall be supported wholly or in part by annual voluntary "contributions and shall not, and by its laws may not, make "any dividend gift division or bonus in money unto or between "any of its members." The argument turned on the meaning of "annual voluntary contributions," and on the proper interpretation of the speeches in this House in *Savoy Overseers* v. *Art Union of London*.[11] In that case the contributions which were alleged to be "voluntary" were the subscriptions of the members, who received in return a variety of pictures, busts and prizes. Lord Halsbury L.C. said[12]: "It hardly admits of debate that "the Art Union gives to every subscriber full value for his money. "The document published by the Art Union itself appears to "establish very clearly that the subscriber obtains as an equivalent for his contribution money's worth at least equal to if not "beyond the amount he has subscribed. I cannot therefore "regard this as a voluntary contribution; it is a prudent and "well-rewarded investment." But the ratio decidendi is said to go far beyond that and to establish that contributions are not voluntary unless they are given without receiving anything in return, as gratuitous offerings for the benefit of others.

That would be a perfectly clear and very far-reaching decision. It would mean that members' subscriptions can rarely be regarded as voluntary contributions. There must be few societies instituted for purposes of science, literature or the fine arts and occupying rateable hereditaments in which members are entitled to no benefit beyond what can be regarded as negligible. One normally expects members at least to be entitled to use the society's premises to attend discussions and to consult a reference library. These are not negligible benefits. The purpose of such a society is to increase and disseminate knowledge of the subject which it has been established to promote, and the increased knowledge which a member gains from membership may be his main reason for joining the society.

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[11] [1896] A.C. 296.

[12] Ibid. 306.

Before further examining the speeches in the *Art Union* case,[13] I think it necessary to see what was said in the earlier case of *Inland Revenue Commissioners* v. *Forrest*,[14] and also to see whether later authorities have regarded the *Art Union* case [15] as laying down so definite a rule. *Forrest's* case [16] arose under a somewhat similar provision in the Customs and Inland Revenue Act, 1885, and a good deal was said in this House about the 1843 Act. Lord Halsbury took one view and Lords Watson and Macnaghten took a different view of it. Lord Halsbury said [17]: "I cannot concur with the argument which has found favour with "one of your Lordships, that the condition under which a society "obtained exemption under the Act of 1843 was that in some "degree it partook of the character of a charitable institution. "I think it would be a surprise to the members of, for "example, the Linnaean Society to hear their society so described." Yet what Lord Halsbury said in the *Art Union* case [18] is now said to mean the opposite of what he said in *Forrest's* case.[19]

Lord Watson said in *Forrest's* case [20]: "I do not think "the legislature intended that fixed yearly payments which "individuals agree to make in consideration of their being "admitted to a society and allowed to share in its management "(there being a legal obligation to make such payments as long "as their membership continues), should be regarded as voluntary "contributions within the meaning of the Act. But the contrary "was decided, after some hesitation, and to that circumstance the "difficulties subsequently encountered in construing the exemption appear to me to have been mainly due." What Lord Watson said is precisely what is now alleged to have been decided by the *Art Union* case.[21] But in the latter case none of their

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[13] [1896] A.C. 296.

[14] 15 App.Cas. 334.

[15] [1896] A.C. 296.

[16] 15 App.Cas. 334.

[17] Ibid. 340.

[18] [1896] A.C. 296.

[19] 15 App.Cas. 334.

[20] Ibid. 348.

[21] [1896] A.C. 296.

Lordships cited this passage and none said anything resembling it, so I do not think that they can have agreed with it.

Later cases have generally turned on the nature of the purposes of the society, but in *Battersea Borough Council* v. *British Iron and Steel Research Association*,[22] the question whether subscriptions were voluntary contributions was raised. Jenkins J. (as my noble and learned friend then was) said[23]: "It is clear "from the cases of *Inland Revenue Commissioners* v. *Forrest*[24] "and *Savoy Overseers* v. *Art Union of London*[25] that in order "to qualify as a voluntary contribution for this purpose a contri-"bution must in substance be charitable or altruistic in character "—a payment made in support of the society for the sake of "the public utility of its purposes, as opposed to a payment "comparable to the subscription made by a member of a club "for the sake of the private advantages of membership. In other "words, the Act in effect stipulates that there must be members "of the public prepared to put their hands in their pockets to "support the society from motives of public spirit as opposed to "private gain. This does not, however, mean that a subscription "is prevented from being a voluntary contribution merely because "it carries with it membership of the society and certain inci-"dental advantages are conferred by membership. The substance "of each case must be looked at to see whether the payments "claimed to be voluntary contributions are, in substance, made "as a matter of business, or as a matter of bounty." And later he said[26]: "Having regard to the obvious and important business "advantages calculated to accrue to members from the promotion "of the objects of the association as defined in its memorandum, "I do not think their ordinary subscriptions could be classed "as 'voluntary contributions.'"

I regard this as a valuable pointer to the true interpretation of the *Art Union* case,[27] but it does not solve all the problems. For instance, are we to consider the motives of the various subscribers which it would be impossible to discover in practice, or the nature of the benefits available to them? And what if the benefits consist of the discovery and dissemination of scientific results which are of equal use or interest to the subscribers and many others?

The *Art Union* case[27] undoubtedly decided that the word "voluntary" is not used in the Act as the opposite of compulsory, and it undoubtedly decided that, where a member obtains full value in goods for his subscription to a society, that subscription is not a voluntary contribution. But how much further does it go? Their Lordships in that case had no need to consider, and they do not appear to have considered in any detail, cases where benefits to members, though not negligible, are small in comparison with the amounts of their subscriptions, or cases where the main benefits to members consist in the dissemination to them of information which it is the object of the society to discover and disseminate. I find it difficult, therefore, to regard this case as laying down any hard and fast rule governing such cases.

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[22] [1949] 1 K.B. 434.
[23] Ibid. 457.
[24] 15 App.Cas. 334.
[25] [1896] A.C. 296.
[26] [1949] 1 K.B. 434, 458.
[27] [1896] A.C. 296.

In Lord Halsbury's speech in the *Art Union* case,[27] it is true that in dealing with the meaning of the word "voluntary" he spoke of people giving their money "without receiving anything "in return towards the encouragement of objects which the "legislature approved." But I see nothing to indicate that he had altered the opinion which he had expressed in the passage I have already quoted from *Forrest's* case,[28] where he appeared to approve the decision in the *Linnaean Society* case,[29] and clearly it is not true that the members of that society got nothing in return for their subscriptions.

Lord Herschell examined the earlier authorities without clearly indicating which of them he thought to have been wrongly decided. He expressed the view [30] that the "essential idea" conveyed by the words "supported by voluntary contributions" was "that the payments are a gratuitous offering for the benefit "of others, and not the price of an advantage purchased by the "contributor." But he went on to stress the value of the advantages purchased by the members of the Art Union and I do not think he had in mind to exclude a case where subscriptions, though not wholly gratuitous, would not normally be called "the "price of an advantage purchased." If he had intended to overrule cases like the *Linnacan Society* case,[31] I think he would have said so.

Lord Macnaghten said [32] that the phrase "supported wholly "or in part by annual voluntary contributions" is "an old and "familiar acquaintance" and means that "the institution on "whose behalf the statement is put forward depends for its "support on free-will offerings—on the generosity of persons "acting from disinterested motives, and not looking for any return

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[27] [1896] A.C. 296.
[28] 15 App.Cas. 334.
[29] 3 E. & B. 793.
[30] [1896] A.C. 296, 310.
[31] 3 E. & B. 793.
[32] [1896] A.C. 296, 312.

"in the shape of direct personal advantage." But then he went on to say: "It is only natural to suppose that the enactment "points to contributions partaking of a similar character and "made in a similar spirit." This is guarded language. He does not follow Lord Watson's opinion in *Forrest's* case,[33] he only rules out "direct" personal advantage and only requires that contributions shall "partake" of a charitable character.

Lord Shand said [34] that the question "involves a consideration "of the object and purpose which the persons who give the "annual contributions have in view in becoming contributors." He contrasted contributions "for the benefit of others"—he did not say the "sole benefit of others"—with "what is in sub-"stance a business transaction or investment."

I do not think that, on the authority of the *Art Union* case,[35] it is sufficient to decide this case to say that members of this institution receive some benefit from their membership: one must go on to ask what are the character and extent of the benefits which they receive. I do not doubt that the object and purpose of those who become members of this institution is, in part, an altruistic desire to promote the development of mechanical science. One cannot, of course, ascertain the precise object and purpose of each member: the question must generally be dealt with broadly and objectively. So regarding it, can one infer that this is their sole object and purpose or even that any other is of comparatively minor importance? Lord Macnaghten said in *Forrest's* case,[36] with regard to the Institution of Civil Engineers: "It may be that the advancement of the interests of the profes-"sion of civil engineering is inseparably bound up with the "advancement of mechanical science. Probably the founders of "the society were not insensible of the advantages which such an "institution was likely to confer upon its members in their "professional capacity. That would have been a formidable "objection if the language of the Act of 1885 had been the same "as that of the Act of 1843."

I will not delay your Lordships by reciting again the facts of the present case: I think that it is quite clear that Lord Macnaghten's words apply equally to this case. Membership of this institution does carry with it substantial professional advantages and a main object and purpose in becoming a member must be held to be the acquisition of such advantages. There is nothing

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[33] 15 App.Cas. 334.
[34] [1896] A.C. 296, 314.
[35] Ibid. 296.
[36] 15 App.Cas. 334, 354.

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to show that any substantial number of members are uninfluenced by this consideration. So, in my opinion, the members' subscriptions are not "voluntary contributions" and the appellants fail to satisfy the proviso to the Act.

On the other point I agree with your Lordships that this appeal cannot succeed. The purposes of the institution are expressed in its charter in very general words which, to my mind, are not wholly free from ambiguity. I would, therefore, construe them in light of the circumstance of the institution when the charter was granted. But taking these circumstances into consideration does not lead me to doubt the conclusion at which your Lordships have arrived. I desire to reserve my opinion as to whether or how far it is relevant to consider the present activities of the institution: taking those activities fully into account, I would still reach the same conclusion.

In my judgment this appeal should be dismissed.

LORD RADCLIFFE. My Lords, I wish to say as little as I can about this case. The subject is one where it is difficult to find any fresh ground upon which to stand, so much has been trampled down by armies of conflicting words. And yet peace has not come to this poor section of the Act of 1843. What I do say is only to make clear, without elaboration, my reason for agreeing that the appeal fails and to guard against being told later, when the next case on this section reaches the House, that I have endorsed some proposition which I do not, at any rate yet, accept.

I concur fully in what has been said by my noble and learned friend, Viscount Simonds, as to the meaning of the words "the "development of mechanical engineering"; and I do not wish to add to it. So far, then, as the issue of the institution's exemption depends upon construing those governing words of its charter, it is not entitled to say that it is instituted exclusively for purposes of science. It would probably be a less effective body if it were.

I do not think that these words are "ambiguous" in the sense that the interpretation of their meaning can be aided by an elaborate inquiry into everything that the institution does. Of course, the two parties do not agree in their arguments as to what the words mean: if I may say so, it is not their business that they should. They are certainly vague and general words, and people may legitimately differ as to what their interpretation is to be: but if that in itself is enough to let in all this evidence of current practice for the purpose of interpreting the original phrase, we might as well say outright that such evidence is always admissible in cases under this section.

Yet most courts, I believe, are conscious that there is something unsatisfactory about deciding a claim to exemption from a current year's rating merely by construing words in a charter, memorandum of association, etc., which may itself date back 50 or 100 years. I would myself find it equally unsatisfactory to have to deny exemption to a society which was, in fact, devoting itself to nothing but science, literature or the fine arts merely because its governing instrument authorised the possible pursuit of other purposes. I have always thought that these difficulties could be avoided if the word " instituted " were to be read not as referring solely to the historic occasion of the society's foundation, but as meaning in a more general way " having as " its institutional purposes." So understood, the section would allow a direct inquiry as to what institutional purposes were being pursued by the society in the year when exemption was claimed; by which I mean activities of sufficient stability and substance in the context of the society's work as a whole to justify the view that it was really accepting them as part of its function. The answer to that sort of inquiry would be essentially a question of fact, to be found as such by the Lands Tribunal. Such an approach would remove the necessity for the unsatisfactory kind of argument to which counsel were forced to resort in this case (I do not criticise them in any way: they must do what judicial observations have encouraged them to), in the course of which quite trivial circumstances—the heading of some learned paper read to some members of the society a year or so ago, the fact that the council of the society " took part in forming " an appointments bureau, to which they contributed neither premises nor money nor staff—are assembled before the appellate court, as they were before the Lands Tribunal, as if by themselves or even in association they could determine any relevant issue one way or the other.

If " instituted for the purposes of " could be read in the way that I have suggested, it would also absolve the courts from throwing what I regard as mistaken emphasis on the words " occupied " by it for the transaction of its business and for carrying into " effect its purposes." I cannot believe that this was ever intended to open a second and independent inquiry as a result of which a society, though held to be instituted for the purposes of science, literature or the fine arts exclusively and in full occupation of its premises, could be nevertheless deprived of exemption for any part because some phase of its current activities did not altogether correspond with the purposes so found. The emphasis of the words seems to be on the point that the society must be in actual occupation of the whole of the premises for which exemption is claimed and must not have turned them to some different use. The obvious example is that it must not have let off the premises or given some equivalent occupation to outside interests. This was, after all, the instance given in *Purvis* v. *Traill*,[37] which seems to be the only direct authority on this point.

I ought to add that so far as, for one purpose or another, it is proper for us to inform ourselves as to what purposes the institution is currently pursuing, I agree with the view that those purposes are not exclusively scientific.

I hope that our decision in this case is not going to be regarded as any final authority on the meaning of the words "voluntary "contributions." As at present advised, I do not at all agree with the way that this question is dealt with in the Court of Appeal's judgment.[38] I think their attitude much too restrictive. As I understand the matter, the major effect of the decision of this House in *Savoy Overseers* v. *Art Union of London*[39] was to put an end to the controversy that had persisted until then as to whether the emphasis of the word "voluntary" turned on the distinction between "voluntary" and "compulsory." It was held that that was not the point. Accordingly, any considerations that give weight to that distinction are now illegitimate. The House might have chosen to follow the view as to the meaning of the words "voluntary contributions" which had already been suggested, though obiter, by Lord Watson in *Inland Revenue Commissioners* v. *Forrest*,[40] where he said: "I do not think "the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to "a society and allowed to share in its management (there being "a legal obligation to make such payments as long as their "membership continues), should be regarded as voluntary contri"butions within the meaning of the Act." His observations must have been before them. It is clear that they did not adopt them. I see no reason to suppose then that either an obligation to subscribe or the benefit of participating in active management of a society is to be treated as a disabling element.

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[37] (1849) 3 Ex. 344.

[38] [1960] 1 Q.B. 388, 408–409; [1960] 2 W.L.R. 48; [1960] 1 All E.R. 129.

[39] [1896] A.C. 296.

[40] 15 App.Cas. 334, 348.

The House did lay down a test in the *Art Union* case[41] for determining whether a subscription is voluntary, and I do not at present see what further legal propositions can usefully be added to it. It does require, I think, that a comparison should be made between what a member or any class of members subscribes and what direct personal benefit the subscriber receives in return. When that comparison has been made a "typical" subscriber has to be imagined and a decision made as to what should be supposed to be his object in making his subscription. No doubt, if he gets individual benefit of equal value to what he pays, his object is likely to be held to be not to make a voluntary subscription. That was the *Art Union* case.[41] In my opinion, however, it would be a misuse of that authority to think that it lays down any rule to the effect that a subscription cannot be a voluntary subscription once any individual benefit is obtained. That would lead to the absurd result that, though the Act exempts a society despite the fact that it is only partly supported by voluntary subscriptions, a society would fail to get exemption even though all but a small portion of each of its members' subscriptions were attributable to no expectation of individual advantage and could be attributed only to the object of furthering the society's own purposes. Moreover, I think that it is a false antithesis to treat advantage to a member arising out of his membership as if it were necessarily opposed to the spirit of a voluntary subscription. Such an approach leads to the argument, which I regard as mistaken, that a member's right to have supplied to him, free of cost, the printed record of his society's proceedings and papers is a direct personal advantage which he buys with his subscription. If the knowledge or the pursuit of science or literature or the fine arts is to be developed or maintained at all it is at least as likely, I would say a great deal more probable, that the members themselves will be vehicles of grace rather than some vague and unidentifiable entity known as the general public. I am not at all persuaded that it is right to equate such subscriptions with charitable doles at all.

So far as I can see, the decision of this House in the *Art Union* case[41] has been understood as requiring that the decision what is or is not voluntary is a matter of degree, advantages obtained being weighed against the value of the subscription paid and, possibly, the responsibilities undertaken; see *Battersea Borough Council* v. *British Iron and Steel Research Association*,[42]

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[41] [1896] A.C. 296.

[42] [1949] 1 Q.B. 434, 457.

per Jenkins J., *O'Sullivan* v. *English Folk Song and Dance Society*,[43] *per* Lord Evershed M.R. This seems to me correct in principle and I do not see what further principle is needed.

Having regard to what we have found to be the purposes of the institution and what we have learnt as to the width of its current activities, I do not think that the question whether its members pay voluntary subscriptions properly arises. I do not say by any means that they do: but as what they are subscribing towards is primarily a professional association I regard the case as concluded by that consideration.

Lord Tucker. My Lords, in order to qualify for exemption from rateability under section 1 of the Scientific Societies Act, 1843, it is necessary for the society to prove (1) that it is instituted for purposes of science, literature or the fine arts exclusively; (2) that the premises in question are occupied by it for the transaction of its business and for carrying into effect its purposes; (3) that it is supported wholly or in part by annual voluntary contributions; (4) that it shall not and by its laws may not make any dividend, gift, division or bonus in money to its members; and (5) that it shall obtain the necessary certificate.

Whether the first requirement is satisfied is, I think, to be determined solely from the terms of its charter or other document by which it is constituted; the second requirement is, in my view, distinct from the first and evidence as to what the society is in fact doing during the relevant period of assessment is only admissible in order to determine the second requirement. In the present case I am satisfied, for the reasons which have been stated by my noble and learned friend, Viscount Simonds, that on the proper construction of its charter the Institution of Mechanical Engineers does not qualify for exemption under the first requirement and consequently the second requirement does not call for consideration.

I also agree with my noble and learned friend that the institution does not qualify under the third requirement as being supported wholly or in part by voluntary contributions. It may not be possible to frame a definition of the words "voluntary contributions" which will suffice in every case but I have no doubt that the material professional and industrial advantages to be obtained from membership of this institution make it impossible to regard the members' subscriptions as voluntary contributions or as having the character of gratuitous payments, to use the paraphrase adopted in the case of *Savoy Overseers* v. *Art Union of London*,[44] the decision in which is binding on your Lordships.

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[43] [1955] 1 W.L.R. 907, 923.

I agree that the appeal should be dismissed.

LORD DENNING. My Lords, the first question is whether the Institution of Mechanical Engineers is a "society instituted for "purposes of science exclusively." I do not think this question is to be solved by looking at the royal charter alone and construing it as if you were sitting aloft in an ivory tower, oblivious of the purposes which the institution has in fact pursued. That would be proper enough if you had only to consider the purposes for which the society was *originally* instituted. But that is not the test. A society may be originally instituted for certain purposes and afterwards adopt other purposes. You then have to ask yourself this question: for what purposes is the society *at present* instituted? And it is only exempt from rates if it is at present instituted for the purposes of science exclusively. Parke B. made that clear in *Purvis* v. *Traill*[45]: "The term 'institution' does not "mean merely the original institution on the first establishment "of a society, since that may be altered, as many institutions "have been, but the purposes to which it is applied at the present "time."

When Parke B. used those words, he was considering an unincorporated society, a voluntary association of individuals called the Greenwich Society for the Acquisition and Diffusion of Useful Knowledge: and such a society is very different from a limited liability company. Nearly all the societies with which the courts have been concerned under this Act have started off as unincorporated societies; and some have remained such: others, when they have become well established, have been incorporated by royal charter. Very few have been incorporated under the Companies Acts. The Linnaean Society, the Zoological Society, the Institution of Civil Engineers, the Art Union, the Royal College of Music, the Institute of Fuel and the Society of Chemical Industries were all of them societies incorporated by royal charter, just as is this Institution of Mechanical Engineers.

It is quite plain that when Parliament in 1843 passed the Scientific Societies Act, 1843, it only had in mind societies which were either voluntary associations of individuals or societies incorporated by royal charter. It was a dozen years or more later that limited liability companies, as we know them, saw the light of day; and even then they were nearly all companies concerned with the acquisition of gain and therefore outside the scope of the 1843 Act. It is only in the last 30 years that we have seen the incorporation of limited companies—limited by guarantee —which do not seek to make profits for their members; and hence there have appeared in the books the cases of trade research associations and the like.

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[44] [1896] A.C. 296.

[45] 3 Ex. 344, 349–350.

There is very real difference in law between these various societies. If you are considering a limited liability company, such as the British Iron & Steel Research Association, you know that the purposes of the company are determined exclusively by its memorandum of association. No fresh purpose can in law be pursued, even with the assent of all the shareholders, see *Ashbury Railway Carriage & Iron Co.* v. *Riche*.[46] So naturally enough you look at the purposes for which the company was *originally* instituted. But when you are dealing with a voluntary association of individuals, the doctrine of ultra vires has no place. The purposes of such a society can be changed after its original institution, by the mutual assent of the members, without any record in the formal documents. If the society, without such assent, does in fact pursue a new or additional purpose, not fairly incidental to its original purposes, any member can object and take proceedings to stop it: but no one else can. If no member objects, then you may assume that its new purposes are duly authorised: and, in order to see if it is exempt from rating, you look at the purposes which it in fact pursues. If these differ from its original purposes, it is in effect a new institution. That is how Pollock C.B. put it in *Purvis* v. *Traill*[47]: "If a society is instituted for literary "purposes, it becomes a new institution when used for other "and different purposes." So you look at the new purposes for which it—the society—is used.

So also in the case of a society incorporated by royal charter, the doctrine of ultra vires has no place. Such a society, when duly created by the charter, has in law the self-same capacity as a natural person. The "divers clauses," as Lord Coke says, "are not of necessity, but only declaratory, and might well have "been left out," see *The Case of Sutton's Hospital*.[48] If it should pursue purposes other than those set out in the charter, its activities are perfectly valid. True it is that any member or any person who is injured by a violation of the charter can take proceedings in the name of the Crown to repeal the charter: but if the Crown takes no such steps, it does not lie in the mouth of the society to say that the purposes which it in fact pursues are ultra vires or beyond its powers, see *Riche* v. *Ashbury Railway Carriage & Iron Co.*[49] by Blackburn J.

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[46] (1875) L.R. 7 H.L. 653.

[47] 3 Ex. 344, 349.

[48] (1612) 10 Co.Rep. 23a.

In the case therefore of voluntary associations and chartered societies the rating authority, like anyone else, is entitled to assume that the present purposes have been authorised by the members and to charge the society with rates accordingly. In short, no such society can get exemption from rates by saying that what it does is ultra vires.

There is also another way in which it may often be legitimate to consider the *present* purposes of the society. The section requires not only that the society should be instituted for scientific purposes only, but also that the premises should be occupied for carrying out its purposes. This is a useful approach in the case of a limited liability company which carries on an ultra vires activity: for it means that even such a company cannot get exemption from rates by saying that what it does on the premises is ultra vires. But I prefer to put my opinion on the broader ground that, in order to see whether a society is instituted for scientific purposes exclusively, it is legitimate always to consider the present purposes which the society in fact pursues: for I read the word "instituted" not as meaning "originally instituted," but as meaning "at present instituted," that is to say, "at present instituted" for purposes of science exclusively. This means that I read the word in much the same way as is suggested by my noble and learned friend, Lord Radcliffe, and I would wish, if I may, to adopt the way he puts it.

Now I come to the next question. Are the annual subscriptions of the members "annual voluntary contributions"? Here I take as my guide the words of Lord Macnaghten in the *Art Union* case[50] approving as he did the view of A. L. Smith L.J.[51]: for it appears to me to express the natural and ordinary meaning of the words. In order that a society should be supported wholly or in part by annual voluntary contributions, it must "depend "for its support on free-will offerings—on the generosity of "persons acting from disinterested motives and not looking for "any return in the shape of direct personal advantage." Applying this test to annual subscriptions, it does not, I think, involve

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[49] (1874) L.R. 9 Ex. 224, 263–264.

[50] [1896] A.C. 296, 312–313.

[51] [1894] 2 Q.B. 609, 630; 10 T.L.R. 576, C.A.

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an inquiry into the motives of a few individual subscribers but into the motives of the generality of them. Nor would it be helpful to receive evidence from individuals after the issue was raised, concerned as they might be then to secure exemption for the society. The motives of the generality can best be found by asking, as most subscribers do—What does the society do? What are its purposes? What inducements does it hold out to subscribers? Few, if any, subscribers study the objects for which it was *originally* instituted. They look to seek what it is doing *now* and is *proposing* to do; and—sometimes—what they are going to get out of it. So on this head it is certainly legitimate to consider the present purposes which the society in fact pursues: and I am glad to find that my noble and learned friend, Viscount Simonds, takes this view.

So I turn to consider the present purposes of the Institution of Mechanical Engineers. The charter itself is so vague as to leave it open to the institution to pursue many purposes which may or may not be those of science exclusively. But when I turn to the purposes which it in fact pursues, it is plain at once that it is not concerned exclusively with the *science* of mechanical engineering. It is greatly concerned with the *profession* of mechanical engineering, in that it seeks always to uphold proper standards of professional skill and integrity, and for this purpose it grants its own professional qualifications, coupled with the right to use the coveted letters "M.I.M.E.," and so forth. It is also much concerned with the *education* of mechanical engineers, not only on the professional side, but also the training of technicians and craftsmen. It is concerned too with the industry of mechanical engineering as is shown by the model forms of contract which it issues. None of these can be disregarded as being merely incidental to the purposes of science. They are in their own right some of the main purposes of the society.

And why do the members pay their annual subscriptions? Principally, I should think, in order to gain a professional standing which is recognised everywhere and to use the letters after their names. In addition, I expect, to receive the literature issued by the institution and to be able to attend its lectures and meetings. Some may pay for higher motives. But few, if any, I should imagine, pay their subscriptions from disinterested motives, so as to help the institution keep going lest it founder. Its finances look as if it is well able to carry on its work without making an appeal for voluntary contributions.

I regard this professional institute as very different from a learned society such as the Linnaean Society, where the subscriptions have long been held to be annual voluntary contributions. The receipt of the published transactions by many of the members of that society is not a direct personal advantage but merely evidence of the work the society is doing for the advancement of science.

I am well aware that some societies such as the Institute of Fuel (*Institute of Fuel* v. *Morley* [52]) and the Society of Chemical Industries (*Cane* v. *Society of Chemical Industry* [53]) have recently been exempted by this House from payment of rates; but it is to be noticed that the only point argued in those cases was whether the purposes for which the society was *originally* instituted were or were not exclusively scientific. Those cases cannot be considered as authorities on the points which we have discussed today.

I am clearly of opinion that this Institution is not entitled to exemption from rates and I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Bristows, Cooke & Carpmael; Solicitor of Inland Revenue; Allen & Son.*

F. C.

[52] [1956] A.C. 245.

[53] (1956) 1 R.R.C. 106; 49 R. & I.T. 462, C.A.; (1957) 2 R.R.C. 165; 50 R. & I.T. 506, H.L.

[HOUSE OF LORDS.]

PHILIPSON-STOW AND OTHERS . . . . APPELLANTS;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*
1960
Oct. 11, 12, 15;
Nov. 30.

Revenue — Estate duty — Property chargeable — Immovable property situate outside Great Britain—Settlement—Testamentary disposition—Property passing on death of tenant for life—Whether property excluded for estate duty purposes—Proper law of disposition—Finance Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 47), *s.* 28 (2).

* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD DENNING.

Conflict of Laws—Immovable property—Will—Settlement—Trust for sale—Proper law.

Statute—Construction—Tautology—Of little weight—Complex revenue statute (post, pp. 741, 749, 762).

Conflict of Laws—Administration—Construction of will—Governed by domicile of testator when will was made (post, p. 761).

Conflict of Laws—Contract—Proper law—Whether intention of parties conclusive doubted (post, p. 760).

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person "shall be deemed for the purposes of estate "duty not to include any property passing on the death which is "situate out of Great Britain if it is shown that the proper law "regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither "of England nor of Scotland and . . . (*c*) that the property so situate "is by the law of the country in which it is situate, immovable "property."

By his will made in English form, a testator, having declared that inasmuch as he had an English domicile, his will should operate so far as the case admitted according to English law, devised certain property in England, defined in the will as "settled estates," to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator devised and bequeathed the residue of his estate to his trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his "settled estates." He died on May 17, 1908, domiciled in England. His wife died on December 22, 1930, and his eldest son on September 23, 1954. The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained. This land was, by the law of South Africa, immovable property:—

Held (Lord Radcliffe dissenting), (1) that succession to movables was regulated by the law of the domicile of the deceased, and that succession to immovables was regulated by the lex situs (post, pp. 745, 748, 761).

Per Viscount Simonds. Section 28 (2) may contemplate cases—and there may be such cases—where the law of a country may in certain circumstances regulate the devolution of immovables by reference to another law (post, p. 741).

Per Lord Denning. A will may nevertheless fall to be construed according to the law of the testator's domicile at the time when he made it (post, p. 761).

(2) That, accordingly, the "proper law," for the purpose of section 28 (2), was that of South Africa, both on the death of the testator and similarly on the passing of the property on the death of the tenant for life (post, pp. 749, 762), and the land was entitled to exemption from estate duty.

Quaere, whether when the land was sold and the proceeds were gathered in, the proper law regulating the disposition would be English law (post, pp. 743, 749, 762).

In re Moses [1908] 2 Ch. 235; *In re Miller* [1914] 1 Ch. 511, and *In re Berchtold* [1923] 1 Ch. 192 applied.

Attorney-General v. *Johnson* [1907] 2 K.B. 885 distinguished.

Decision of the Court of Appeal [1960] Ch. 313; [1960] 2 W.L.R. 32; [1959] 3 All E.R. 879, C.A. reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R. and Sellers L.J., Harman L.J. dissenting).

This was an appeal by the appellants, Guyon Philipson-Stow, Sir Walter Charles Norton M.B.E., M.C., and Dame Audrey Frances Philipson Worsley-Taylor, widow, the trustees of the will of Sir Frederic Samuel Philipson Philipson-Stow, the testator, from an order of the Court of Appeal dated November 20, 1959, which dismissed an appeal by the appellants from an order of the Chancery Division of the High Court of Justice (Upjohn J.), made on February 10, 1959, on an application by the appellants by originating summons pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933, to have two questions of liability to estate duty determined.

The question raised by this appeal was whether (as the appellants contended) certain immovable property consisting of seven one-eighth undivided shares in a farm called Steenbokspan situate in the Orange Free State in the Union of South Africa, which passed on the death on September 23, 1954, of Sir Elliot Philipson Philipson-Stow (hereinafter called " the deceased ") under a disposition in the will of his father, Sir Frederic Samuel Philipson Philipson-Stow, the testator, who died in 1908, ought to be treated for the purposes of estate duty as excluded by virtue of section 28 (2) of the Finance Act, 1949, from property passing on the death of Sir Elliot. This question in turn depended on the question whether the proper law regulating the devolution of that property or the disposition under or by reason of which it passed on the death of Sir Elliot was the law of South Africa (as the appellants contended and as Harman L.J. would have held) or of England (as the respondents, the Commissioners of Inland Revenue, contended and as Upjohn J. and the majority of the Court of Appeal held).

At the date of the death of the deceased these shares were vested in the trustees of the will of the testator upon trust for sale and on certain other trusts declared by or by reference to that will.

The facts, stated by Viscount Simonds, were as follows: By his will of March 14, 1898, the testator made the following relevant provisions. By clause 2 he declared that he had an English domicile and that it was his wish and intention that his will and any codicil thereto should be construed and operate so far as the case should admit according to the law of England. By clause 3 he appointed executors and trustees. By clause 4 he devised certain property in Sussex to his trustees to the use of his wife for life, with remainder to his trustees for a term of 100 years upon trusts which have been satisfied with remainder to the use of the deceased for life, with remainder to the use of the first and every other son of the deceased one after the other according to their respective seniorities in tail male with remainders over. By clause 5 he cut down the estate in tail male of any person born in his lifetime to a life interest. By clause 25 he devised and bequeathed all his real and personal estate whether situate in the United Kingdom or in South Africa or elsewhere, except as therein mentioned, to his trustees upon trust for sale and conversion with the fullest power of postponement, and directed them to hold the proceeds of such sale and conversion upon trust to make such payments thereout as were therein mentioned and to retain or invest the residue thereof in manner therein authorised. By clause 37 he directed his trustees to hold the ultimate residue of the investments representing his residuary estate after setting aside such sums and making such payments as were therein mentioned upon trust to pay the annual income to his wife during her life, and after her death to hold such ultimate residue as if the moneys or investments representing them were capital moneys arising under the Settled Land Acts, 1882 to 1890, from his settled estates. By clause 39 he gave his trustees a very wide power of investment, by clause 40 he provided that in a certain event the equitable doctrine of election should apply to the dispositions made by his will, and by clause 44 gave to his trustees power to delegate to trustees resident in Cape Colony or elsewhere abroad the execution of the trusts or powers in Cape Colony or elsewhere abroad.

The testator died on May 17, 1908, without having altered his will except by a codicil which is not material. He was at his death absolutely entitled to five equal undivided one-tenth shares of the farm known as Steenbokspan. Two further shares were acquired and vested in the trustees of the testator's will and one share was acquired by the deceased personally. There was then a partition whereby certain plots were allotted to the holders of the two remaining shares and the remainder of the farm to the trustees and the deceased in the proportion of seven-eighths and one-eighth. The widow died on December 22, 1930, and, as has already been stated, the deceased died in 1954. His eldest son, having been born in the lifetime of the testator, succeeded to a life estate only in the settled estates. The undivided shares in the South African property to which the testator was entitled at his death were duly registered in the Register of Deeds in Bloemfontein in the names of the trustees, as at a later date were the seven-eighth shares to which they were ultimately entitled. The formal deed of partition was also duly registered. The trustees had not exercised the trust for sale. It followed, and was conceded by the respondents, that the only property, if any, which for estate duty purposes could be deemed to pass on the death of the deceased was the seven-eighth shares of the farm, the South African property.

J. A. Plowman Q.C. and *R. Cozens-Hardy Horne* for the appellants. The proper law regulating the devolution of the testator's immovable property in South Africa or the disposition under or by reason of which it passed on the death of the deceased was the law of South Africa and " is neither the law of Scotland " nor of England " within section 28 (*c*) of the Finance Act, 1949, and so this property, which is situate outside Great Britain, is exempt from duty. In the case of a disposition by will of immovable property situate outside Great Britain, the proper law regulating that disposition is not necessarily the law which the testator intended to govern it. Until the administration is completed the disposition of land is governed by the lex situs, because it is the lex situs which makes the disposition effective or ineffective. There is no sound analogy between the present case and *Duke of Marlborough* v. *Attorney-General,*[1] which was concerned not with immovables but with movable property and related to a contract inter vivos and not to a will. The question arose out of a marriage settlement entered into in the United States and the trust funds remained there. A devise to trustees is much more like a devise directly to beneficiaries than a marriage settlement.

The test of liability to estate duty is still that which was applied in *Wallace* v. *Attorney-General.*[2] The parties here differ in the application of the test. Intention may affect a disposition but not a devolution.

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[1] [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165, C.A.

[2] (1865) L.R. 1 Ch. 1.

Attorney-General v. *Johnson* [3] is an unsatisfactory case on a different Act of Parliament. If necessary it should be overruled.

The relevant enactment as to questions of estate duty on foreign immovables is section 2 (2) of the Finance Act, 1894, now replaced by section 28 (2) of the Finance Act, 1949.

The observations in *Wallace's* case [4] as to the limitation to be placed on the liability to succession duty indicate that the proper law is the law by virtue of which the beneficiary becomes entitled. Lord Cranworth there said that, "in order to be brought within "that section, he must be a person who becomes entitled by "virtue of the laws of this country." As a result of that decision a direct devise of foreign immovable property was never charged before 1949. Section 24 of the Finance Act, 1936, retained all the existing exceptions in respect of foreign immovables. As to the practice before 1949, see Green's Death Duties, 2nd ed., pp. 628–629, where *Johnson's* case [5] is referred to. The Act of 1949 abolished succession duty and a new criterion of liability to estate duty had to be adopted. That chosen was the proper law regulating the devolution of the property or the disposition under or by reason of which it passed.

As to the court's approach to the proper law, see *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*,[6] but that was a case of contract. As to the law which regulates the title to foreign movables, see Dicey's Conflict of Laws, 7th ed., rule 85, pp. 512, 514, 516, 517, 518, 520, 524. The incidents of real estate depend exclusively on the law of the country where the estate is situated: see *Nelson* v. *Bridport* [7] and *In re Moses*.[8] The principles there laid down are not affected by the fact that the land in question is subject to a trust for sale: *In re Berchtold*.[9] That case shows that the trust for sale in the will of the testator in the present case does not alter the quality of the property in South Africa from immovable to movable. It remains immovable property and so it must be dealt with as such.

In re White [10] (on appeal *Skinner* v. *Attorney-General* [10]) does not make *Johnson's* case[11] any easier to understand by the suggestion that there is a notional conversion, because that would not prevent the property being an immovable. *Attorney-General* v. *Belilios*[12] does not help either and the passages referred to by Upjohn J. are obiter. *Johnson's* case[13] is very unsatisfactory because the only point on which it is an authority is as to the location of the property, and it was erroneous in holding that it was situate in England. It is no authority on the further points which might have arisen if the property had been held to be situate in Assam.

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[3] [1907] 2 K.B. 885.

[4] L.R. 1 Ch. 1, 7.

[5] [1907] 2 K.B. 885.

[6] [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 1 All E.R. 206, P.C.

[7] (1846) 8 Beav. 547, 570.

[8] [1908] 2 Ch. 235, 239.

[9] [1923] 1 Ch. 192, 199, 204 et seq.

[10] [1939] Ch. 131, 136, 141; 54 T.L.R. 838; [1938] 2 All E.R. 691, C.A.; [1940] A.C. 350; 55 T.L.R. 1025; [1939] 3 All E.R. 787, H.L.

The proper law of the "disposition" of movables is necessarily the lex situs. It is not to be accepted that this renders the words "is the law neither of Scotland nor of England" otiose, for if they were otiose in relation to the word "disposition" they would be otiose in relation to "devolution" also, and devolution must be a matter of the lex situs. The explanation is that section 28 (2) of the Act of 1949 is an omnibus sweeping-up section applying to many things, and perhaps in framing so comprehensive a section the language has fallen short of perfection.

In summary: (1) The question is whether the proper law regulating the devolution or the disposition in terms of the Act of 1949 refers to the law which makes effective the disposition under which the property passes. The problem is an echo of the *Marlborough* case,[14] which was an echo of the *Wallace* case,[15] in which it was held that the test of liability to succession duty is to ask what was the law which makes the disposition effective. (2) The test has different results when applied to a disposition of immovables by will and when applied to a contract inter vivos affecting movables, as in the *Marlborough* case.[16] Movables by definition can be moved. (3) In a case of the disposition of immovables by will the law which makes the disposition effective is the lex situs: see Dicey's Conflict of Laws, rule 85, and *Nelson* v. *Bridport*[17] and *In re Moses*.[18] The lex situs is thus the proper law within section 28 (2). (4) The fact of there being a trust for sale makes no difference. In the case of a direct devise the proper law is necessarily the lex situs. A trust for sale does not turn immovables into movables. The only authority against the

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[11] [1907] 2 K.B. 885.

[12] [1928] 1 K.B. 798, 809, 821–822, 827; 44 T.L.R. 214, C.A.

[13] [1907] 2 K.B. 885.

[14] [1945] Ch. 78.

[15] L.R. 1 Ch. 1.

[16] [1945] Ch. 78.

[17] 8 Beav. 547.

[18] [1908] 2 Ch. 235.

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appellants on this point is *Johnson's* case.[19] There is no sufficient reason for departing from the well-established principle in Dicey.

R. Cozens-Hardy Horne following. Section 28 (2) could have been differently drafted but, as drafted, it imposes two sets of conditions, first the condition as to the proper law regulating the devolution of the property, following *Wallace's* case,[20] and then three subsidiary conditions. Section 28 (2) (*c*) dealt with the case of immovable property not dealt with up to that point. For the present purpose what passed was immovable property situate abroad and not a chose in action which can be regarded as situate in this country. In those circumstances, one asks what is the proper law regulating or governing the devolution. It must be the law of South Africa.

Peter Foster Q.C. and *E. B. Stamp* for the respondents. Where the passing of the property involves no change in the legal estate the court can give effect to the testator's intention. Here the legal estate in the farm vested in the trustees of the testator after his death; the legal estate remained in them on the death of the tenant for life and the beneficiary was another tenant for life. This passing is regulated by the proper law, using the phrase in its ordinary sense, of the testator's will, which is the law of England, because that was provided in the will.

In ascertaining the proper law, whether in connection with a contract, a voluntary disposition or a settlement created by will (such as is here in question), one should not admit any difference between a settlement inter vivos and one created by will, once it has come into effect and is operating. Once the law of South Africa has allowed the trustees to take the property, there is no longer any regulation of it by that law, so that the passing of this property on the death of the tenant for life was purely regulated by English law.

In the case of a contract dealing with a mortgage on land in a foreign country, one looks at the intention of the parties gathered from all the circumstances in ascertaining the proper law.

But for this matter of the proper law, all the conditions required to exempt this land from estate duty are fulfilled. But one must look at the intention of the parties even in the case of a contract which deals with land abroad: see *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[21] The fact that a

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[19] [1907] 2 K.B. 885.

[20] L.R. 1 Ch. 1.

[21] [1910] 2 Ch. 502, 512 et seq., 517 et seq., 522 et seq.; 26 T.L.R. 591, C.A.; [1912] A.C. 52; 28 T.L.R. 114, H.L.

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contract may deal with immovable property abroad does not mean that the proper law of the contract is necessarily the lex situs and one must go through the process of finding what it is.

As to the consideration of the proper law in the case of commercial contracts, see *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [22] and *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*,[23] which indicate that in the case of contracts one should look at the intention of the parties. The intention is to be derived from the form of the disposition read in the light of the surrounding circumstances, including the character and domicile of the parties. In the case of a marriage settlement also one must look at the intention of the parties: *Duke of Marlborough* v. *Attorney-General.*[24] See also *Iveagh* v. *Inland Revenue Commissioners.*[25]

Here all the indications are that the proper law of this disposition is English law. The testator thought that was the proper law: see clause 2 of his will. He left all his residuary estate, including the land in South Africa, in one mass on trust for sale: see clause 25. All the beneficiaries were English and the trustees were English. Clause 40 deals with election. Apart from the fact that part of the property is abroad, there is nothing to bring in the law of South Africa.

The proper law of a disposition is determined, once and for all, at the date when it becomes operational, and in the case of a testamentary disposition that is the date of the death: see the *Marlborough* case [26] and the *Belilios* case.[27]

If the appellants were right and in every case of immovable property the proper law regulating or governing its devolution must be the law of the country where it is situate, section 28 (2) would be tautologous. For their purposes, to produce a universal exemption property situate abroad, the subsection should have been differently phrased and expressed. The phrase beginning "the disposition under . . ." would be otiose if all one had to do, in order to discover the proper law, was to look where the land was situate. If that were so it would have been sufficient to enact paragraph (*c*) of subsection (2). But what must be looked at is the proper law which regulates the disposition in question, that is here the cesser of the life interest of the deceased, when a new life interest came into operation. The disposition is the effect of the instrument. *In re Moses*,[28] *In re Miller*[29] and *Nelson* v. *Bridport*[30] were cases of true conflict, but in the present case there is no such conflict, since, once South African law allows the English trust to come into operation, the South African law falls out altogether.

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[22] [1937] A.C. 500, 528–529; 53 T.L.R. 507; [1937] 2 All E.R. 164, H.L.

[23] [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206, P.C.

[24] [1945] Ch. 78, 88.

[25] [1954] Ch. 364, 369 et seq.; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.

[26] [1945] Ch. 78, 85.

[27] [1928] 1 K.B. 798, 822.

If the appellants are right, the effect of section 28 (2) has been to bring into existence an important exemption from estate duty which did not operate before the Act of 1949 came into force. As the law then stood, there would have been a claim for estate duty in the circumstances of the present case. As to the previous law, the appellants are reading more into *Wallace's* case[31] than it contained: see how Lord Cranworth[32] defined the question. Note particularly the words "becoming entitled." *Johnson's* case[33] is relied on. In 1949 it was treated as authoritative. Beneficiaries under a trust "become entitled" by virtue of a trust which is in England, although land held on trust is abroad. It is admitted that this disposition would not have come into effect if the law of South Africa had forbidden it, but once it had come into effect the English law governed it: see the reference to *Johnson's* case[34] in Hanson's Death Duties, 8th ed. (1931), p. 96. See also the *Belilios* case,[35] *per* Lord Hanworth M.R. and Lawrence L.J. The test of exigibility under the earlier law now repealed is the same as that to be applied to the present case, and by it duty is exigible because succession duty would have been exigible. Further, the legislature did not intend, by substituting a new criterion, to alter the area of the tax. If it had been intended that immovable property situate abroad was always to be exempt, it would have been easy for the Act to say so. But at the time of the passing of the Act the law laid down in *Johnson's* case[36] was such that duty would have been leviable in respect of this particular land. If the appellants were right, then in the case of an English settlement made in England the trustees by investing in foreign land might change the proper law. That would produce a curious effect.

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[28] [1908] 2 Ch. 235, 239.
[29] [1914] 1 Ch. 511.
[30] 8 Beav. 547.
[31] L.R. 1 Ch. 1.
[32] Ibid. 7.
[33] [1907] 2 K.B. 885, 893–894.
[34] [1907] 2 K.B. 885.
[35] [1928] 1 K.B. 798, 809, 827.
[36] [1907] 2 K.B. 885.

There is a distinction between what occurs on death and what occurs as a result of the clauses of the will coming into operation. The vesting of the land on the testator's death, the devolution, depended on South African law. On his death the immovables vested according to the lex situs in the person entitled according to that law, and the administration must be in accordance with that law. But, once that duty has been performed, the assets must be treated according to the English trusts set out in the testator's will. That situation occurred on the death of this testator. On the death of the life tenant there was the cesser of one equitable life interest and the start of another.

Harman L.J. in the Court of Appeal expressed the view that the proper law regulating the devolution of property situate abroad or the disposition under or by virtue of which it passes is always the lex situs. If that were right the exemption conferred by section 28 (2) so far as it related to immovable property situate abroad would, contrary to the wording of the section, be unlimited and no effect could be given to the condition of exemption that it must be shown that the proper law regulating the devolution of the property or the disposition by reason of which it passes is the law neither of England nor of Scotland, for, if Harman L.J. were right, the proper law could never be the law of England or Scotland.

The proper law of the administration and of the execution of the trusts may be different: see *Attorney-General* v. *Campbell.*[37]

Reliance is placed on the liability to estate duty as expressed in sections 1 and 2 (1) (*b*) of the Finance Act, 1894.

E. B. Stamp following. Under the Act of 1894 there was a charge on property situate abroad (see section 8), but it was unenforceable because the law of one country does not recognise the fiscal laws of another. The exception in section 20 (2) dealt only with British possessions, thus distinguishing between property in British possessions and property in a foreign country because it might be possible to enforce fiscal claims in British possessions. See also section 8 (4).

Even if an owner of property cannot choose the law by which a conveyance of it will be regulated, he can create interests which are regulated by English law behind the curtain of a trust for sale. A testator cannot create a series of limitations of immovable property situate abroad and direct that the relations of the trustees to the property shall be governed by English law, but he can devise land to trustees on a trust for sale, directing that, pending the sale, the income shall be held on certain trusts. Two parties to a contract relating to immovables situate abroad can choose the law regulating their equitable interests: see *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[38] Here the testator has shown the intention that the rights and interests under his will should be governed by English law. The trustees of his will are subject to the jurisdiction of the courts here. If they had failed to account for all the income and had claimed that by the law of South Africa trustees were entitled to deduct a proportion of it for expenses, the courts would not have allowed that. The courts will not inquire in South Africa what are the obligations of trustees under a trust for sale, for that cannot affect the rights of beneficiaries inter se under English law. The South African courts cannot alter the trusts of an English will. The disposition under or by reason of which this property passed was the testator's will.

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[37] (1872) L.R. 5 H.L. 524, 527–528, H.L.

Section 28 (2) should be construed as a whole. Even divorced from the expression "proper law," the word "regulating" is not strictly apt to describe the law which makes the disposition effective. The reference to "regulating" the disposition presupposes the existence of a disposition under which the property does pass. If so, it is not apt to describe the disposition by which the interest comes into existence or under which it acquires its validity. "Regulating" is not an apt expression to describe the law which determines the validity of the disposition. There is no significant difference between "regulating" and "governing." In relation to a contract the word "governing" is used, not in relation to the determination of the validity of a contract, but always in relation to its construction and the rights of the parties.

In Dicey's Conflict of Laws, 7th ed., p. 717, it is stated in rule 148 that the "proper law of a contract" means the law by which the parties intended it to be governed. This was approved in *Kahler* v. *Midland Bank Ltd.*[39] See also the *Marlborough* case.[40] The proper law of the contract, when ascertained by the intention of the parties, governs its construction and their rights and obligations. So, too, in the case of a disposition, when it is shown, by whatever process, what is the proper law, that governs the construction of the document and the rights of the parties.

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[38] [1910] 2 Ch. 502, 513.

[39] [1950] A.C. 24, 28–29; 65 T.L.R. 603; [1949] 2 All E.R. 621, H.L.

[40] [1945] Ch. 78, 89–90.

If the law of South Africa did not recognise the rights of the new beneficiary in this case, the duty of the trustees would be to sell under the trust for sale. The rights of the beneficiary under the English trust cannot be affected by South African law. The expression "regulating" does not connote the capacity to make the disposition: see Dicey's Conflict of Laws, rule 149, p. 751, rule 151, p. 769, and rule 152, pp. 774–777.

This property passed by reason of clause 37 of the will.

By the effect of sections 1 and 2 of the Act of 1894, what passed and became liable to duty was the property itself. In the terms of the Act that was an artificial conception because in a case like the present the title to the farm remained the same.

J. A. Plowman Q.C. in reply. The proper law regulating the disposition of foreign immovables is normally the lex situs and it makes no difference that there is a trust for sale. Cases of contract were distinguished in the *British South Africa* case.[41] Here intention does not enter into the matter, because this is a case not of a contract but of a disposition. All the indications are that the testator intended the proper law to be English, but intention is irrelevant when dealing with a disposition by will of foreign immovables.

As to section 28 (2) of the Act of 1949, the respondents' argument depends on whether *Johnson's* case [42] was rightly or wrongly decided. Even if it was right, one is now considering a different Act, which, as a matter of construction, has altered the law laid down in that case. If, as is submitted, the case was wrongly decided, the Act has not altered the law. It was considered in *In re White*,[43] but on appeal the House of Lords threw no light on the matter (*Skinner* v. *Attorney-General* [44]).

Whoever was regarded by the courts of South Africa as being entitled to the property would be put into possession by the South African courts and it would be of no use for the English courts to say that the trustees should sell the property and remit the proceeds to England because in such circumstances the South African court would prevent the sale by injunction. In the last resort, therefore, the law regulating the disposition remains the South African law: see what Harman L.J. said in the Court of Appeal.[45]

[41] [1910] 2 Ch. 502, 513.

[42] [1907] 2 K.B. 885.

[43] [1939] Ch. 131.

[44] [1940] A.C. 350.

[45] [1960] Ch. 313, 336–337; [1960] 2 W.L.R. 32; [1959] 3 All E.R. 879.

Dicey's Conflict of Laws, rule 156, p. 814, deals specifically with the effect of a contract with regard to immovables.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS stated the facts and continued: The question whether this property is to be deemed to pass on the death of the deceased so as to make estate duty exigible on that event depends on the meaning and effect of a few words in section 28 (2) of the Finance Act, 1949. That subsection is as follows: "As respects property passing on the death of a person "dying after the commencement of this Part of this Act, sub-"section (2) of section 2 of the Finance Act, 1894, (which "exempts from estate duty property situate abroad and not "chargeable with legacy duty or succession duty), and section "24 of the Finance Act, 1936 (which restricts the exemp-"tion conferred by the said subsection (2)), shall not have "effect; but that property shall be deemed for the purposes of "estate duty not to include any property passing on the death "which is situate out of Great Britain if it is shown that the "proper law regulating the devolution of the property so situate, "or the disposition under or by reason of which it passes, is the "law neither of England nor of Scotland and that one at least of "the following conditions is satisfied, namely,—(*a*) That the "deceased did not die domiciled in any part of Great Britain; "(*b*) that the property so situate passes under or by reason of a "disposition—(i) made by a person who, at the date at which "the disposition took effect, was domiciled elsewhere than in "some part of Great Britain; and (ii) not made, directly or "indirectly, on behalf of, or at the expense of, or out of funds "provided by, a person who at that date was domiciled in some "part of Great Britain; (*c*) that the property so situate is, by "the law of the country in which it is situate, immovable "property; or if the property so situate passes only by virtue of "paragraph (*c*) of subsection (1) of section 2 of the Finance "Act, 1894, as having been the subject of a gift inter vivos and "it is shown that one at least of the said conditions is satisfied."

It would not be proper to come to a final conclusion upon the meaning of what I think are the vital words of this section—"proper law regulating the devolution of the property so situate "or the disposition under or by virtue of which it passes"—without some reference to the earlier law. But it is legitimate first to see whether the positive enactment in the section has by itself a sufficiently clear meaning. In my opinion, it has.

To obtain exemption, property situate abroad must by the law of the country in which it is situate be immovable property. That condition is satisfied in the present case.

But it must further be established that the "proper law" regulating its devolution or the disposition under which it passes is not the law of England or of Scotland. It is urged, as I understand the argument, that, if in every case it is a corollary of the property being immovable by the law of the country in which it is situate that the proper law regulating its devolution, etc., should be the law of that country, the section is tautologous. I do not think that this is so. The section may contemplate cases—and there may be such cases—where the law of a country, though it regards certain property as an immovable, may yet in certain circumstances regulate its devolution, etc., by reference to another law. Nor, even if there is some tautology, does it have much weight with me. That is a common feature of legislation and in this very section there appear to be other examples of it. But, tautology or not, the question is, what was the proper law regulating the devolution of the South African property or the disposition under which it passed?

First, the question suggests itself, what is the "proper" law? Does it add anything to "law" simpliciter? It relates to both devolution and disposition. In regard to the former, I cannot see, and no one has been able to suggest, that it has any meaning at all: in regard to the latter, some assistance may be got from what was said in *Duke of Marlborough* v. *Attorney-General*.[1] There is the underlying suggestion that, just as in relation to a contract the intention of the parties is an important factor in determining what is its proper law, so in relation to a settlement the intention of the settlor is to be ascertained by admissible evidence and, if possible, given effect to. This may well be so and the same principle may be applicable to a will. But in the present case at least it is otiose, for the testator has by clause 2 of his will declared his wish and intention to be that his will should operate and be construed according to the law of England. The question remains whether, so far as the South African property is concerned, his disposition is "regulated" by the law of South Africa. I find myself unable to give any effective meaning to

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[1] [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165, C.A.

"proper." It may be added that, whatever the settlor's intention it cannot prevail against the relevant law.

The next question is, what is the meaning of "disposition"? I accept the view that devolution and disposition are mutually exclusive and are exhaustive of the ways in which property can pass on death, and further (to use the words of Upjohn J.[2]) that it is perfectly clear that the property passed on the death of the son under or by reason of a disposition (the testator's will) and not by devolution. What, then, does "disposition" mean? Is it the instrument, will or settlement, by which property is disposed of? Or is it the provision in an instrument which deals with particular property? In the latter case there can presumably be several dispositions in a single instrument. Linked with this question is another, namely, is the "proper law" regulating the disposition ascertainable once and for all, or may it change from time to time as successive interests take effect in possession? It appeared to me that on both sides the argument shifted from time to time to get the advantage of a favourable wind. I do not myself find it possible to say that the instrument, be it will or settlement, is the "disposition" intended by the section. Such a construction would be impossible to apply, for example, to a will which, being in other respects an "English will," purported to devise in strict settlement land in South Africa. For to part of it English law, to another part South African law, would apply. I say "apply" not "regulate" because I do not wish to beg any question. I am driven, then, to conclude that "disposition" does not mean "instrument," unless some such words are added as "quoad the particular devise or bequest." That, in effect, is to say that "disposition" means the particular devise or bequest.

Does this conclusion lead to the further conclusion that in respect of a single disposition the relevant law is not ascertained once and for all when the instrument becomes effective? I think that almost inevitably it does. We have seen that there may be two relevant laws at the date of the instrument taking effect. This very case supplies an illustration. For it is as certain that at the death of the testator South African law applied to his South African as English law to his Sussex property. If the relevant law was determined once and for all, that would be the end of this case; for then South African law would continue to apply to the South African property. But, difficult as the question is and anomalous as are the results that may follow any answer to it,

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[2] [1959] Ch. 395, 405; [1959] 2 W.L.R. 427; [1959] 1 All E.R. 583.

I have come to the conclusion that the proper law may change with a change in the subject-matter. Applying that to the present case, I should not exclude the possibility that, if and when the South African property is sold and the proceeds are gathered in, the proper law regulating the disposition will be English law. It is not necessary for the purpose of this case to decide that question.

Until, however, the subject-matter has changed its nature and, having been an immovable, it has become a movable, I see no justification for saying that the relevant law has ceased to be South African. What is it that passed on the death of the deceased? Inasmuch as the Crown is claiming duty upon the land in South Africa, it is not admissible to contend that anything passed except that land or that duty, if exigible at all, is exigible upon anything except its value. By English law it may be regarded as converted into personalty: it remains by South African law immovable property as in fact it is. Therefore, though, as I have said, a future sale of the land may result in a change of the relevant law, I am of opinion that, until that event, the law remains that of South Africa.

Some difficulty has been caused, unnecessarily, as I think, by the use of the word "regulating." It was freely conceded that it means no more and no less than "governing," a more familiar word in this context. If so, whether the question is one of capacity or formality or validity, it is South African law which governs the disposition, and it is in the courts of South Africa that the ultimate sanction for its enforcement lies. It is irrelevant (if it is the fact) that there is no conflict upon any material point between the law of England and that of South Africa. If there was a conflict, that of South Africa would prevail. If the disposition is operative according to its terms as understood by English law, that is because South African law permits it. Though it permits it now, a change in the law of South Africa in regard to the disposition or tenure of land in that country would be effective to change the position.

There is little authority directly in point. I do not think that the word "regulating" has been commonly used in this context. But, as I have said, it appears to mean no more than "governing," or perhaps "determining." If so, such cases as *In re Moses*[3] and *In re Miller*[4] are helpful. It is true that they do no more than illustrate the general rule which is thus stated by

[3] [1908] 2 Ch. 235.

[4] [1914] 1 Ch. 511.

Dicey in his Conflict of Laws, 7th ed., in regard to contracts—rule 156—"The formal and material validity, interpretation and "effect of a contract with regard to an immovable are governed "by the proper law of the contract. The proper law of such "contract is, in general, though not necessarily, the law of the "country where the immovable is situate (lex situs)." I am assuming that, so far as may be, the same rule applies to a will or settlement. The first-named case is interesting as the decision of a very learned judge who plainly thought the case too clear for argument. There the subject-matter of a settlement made by a will was in part leasehold property, an immovable, situate in the Transvaal. The tenant for life, if English law had applied, would have had her enjoyment limited by the so-called rule in *Howe* v. *Lord Dartmouth.*[5] "In *Freke* v. *Lord Carbery,*[6]" said the learned judge,[7] "Lord Selborne L.C. decided that the validity "of a testamentary disposition of an English leasehold was "governed by the law of England, i.e., the lex loci rei sitae, and "not by the law of the testator's domicil. The same principle "was applied in *In the Goods of Gentili*[8] and the same principle "is applicable here." He therefore held that the widow was entitled to enjoy the leaseholds in specie during her widowhood.

I may also refer to the case of *In re Piercy,*[9] which I must state somewhat more fully. It appears from the headnote that an English testator who owned some land in Sardinia by his will gave all his real and personal estate upon trust for sale, and to hold the same until conversion and the proceeds of sale after conversion upon trusts for his children for their respective lives with remainder to their issue. These trusts were to a great extent invalid under Italian law as regarded land in Italy with the result that the tenants for life took their shares absolutely. But part of the land in Sardinia had been sold. In the result it was held that the trustees having power under Italian law to sell the land must hold the proceeds upon the trusts of the will, but that the rents of the unsold land until sale would devolve according to Italian law. I quote one passage from the judgment of North J.[9a]: "Then the next question is, as to the application of "the proceeds of sale. With respect to that, in my opinion, the "will is perfectly good, because the application of the proceeds "is not in any way inconsistent with the Italian law. The Italian

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[5] (1802) 7 Ves. 137a.

[6] (1873) L.R. 16 Eq. 461.

[7] [1908] 2 Ch. 235, 239.

[8] (1875) Ir.R. 9 Eq. 541.

[9] [1895] 1 Ch. 83; 11 T.L.R. 21.

[9a] [1895] 1 Ch. 83, 88.

"law relates to the land: it determines how the land is to go, and "regulates the rights of the various persons interested in it. "When an absolute sale has taken place, the Italian law still "applies to the land in the hands of the then owner or owners; "but it has nothing whatever to do with the proceeds of sale, "after the land has been placed outside the scope of the will by "a disposition which is valid according to Italian law."

As in *In re Moses*[10] the rights of the widow were governed, regulated or determined by South African law in respect of an immovable situate in that country, so in *In re Piercy*[11] the rights of the persons interested were governed, regulated or determined by Italian law just so long as the trust property was an immovable situate in Sardinia. So also in the case before us the rights of all persons claiming under the testator's will are, so far as the land in South Africa is concerned, regulated by the law of that country as long as the land is unsold. It made no difference in *In re Piercy*,[11] and it makes no difference in this case, that a trust is created. The validity of the trust itself is a matter to be determined by South African law. Assume it to be valid, its existence cannot affect the fact that the land itself remains subject to the same law. I come then to the clear conclusion that South African law "regulates" the disposition under or by reason of which the property passed on the death of the deceased. It is of some significance that the claim for duty is made in respect of the land itself: it is that which is said to "pass" and it is that upon which (since it does not pass to the executors as such) the statutory charge would, if the claim is well founded, fasten. I should hesitate to adopt a view of the section which would have a result so strange and contrary to international comity. The fact that the charge would not be enforceable does not make it more likely that the legislature intended to impose it.

I have so far, my Lords, tried to understand and interpret the positive enactment of section 28 (2), and, though there are some difficulties which are not easily resolved, they do not touch the main question. I am clearly of opinion that while foreign land is foreign land its disposition and its devolution are regulated by the law of the country where it is situate. But it is said that I must not come to this conclusion because in doing so I ignore the opening or negative part of the subsection. My Lords, I concede, as I said at the opening of this opinion, that I must look at the whole subsection before coming to a final conclusion. I will do so. The opening words of section 28 (2) are: "As respects "property passing on the death of a person dying after the "commencement of this Part of this Act, subsection (2) of section "2 of the Finance Act, 1894 (which exempts from estate duty "property situate abroad and not chargeable with legacy duty or "succession duty), and section 24 of the Finance Act, 1936 (which "restricts the exemption conferred by the said subsection (2)), "shall not have effect." Then follows the enactment that I have already read which established a new criterion for the exigibility of duty. The argument is, first, that if the test of exigibility under the earlier and now repealed law were applied, duty would be exigible in the present case, because succession duty would have been exigible; and, secondly, that it is not to be supposed that the legislature intended by substituting a new criterion to alter the area of tax.

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[10] [1908] 2 Ch. 235.

[11] [1895] 1 Ch. 83.

My Lords, I am not impressed by this argument. I see no reason to suppose that the legislature did not intend to alter the area and incidence of tax. At any rate, it is so speculative an argument that, unless the new enactment was much less plain than I consider it to be, I should not be deflected from what I otherwise should consider its meaning. And I am the less disposed to give weight to the argument when I find, as I do, that it must be a matter at least of grave doubt whether, if the question was raised in your Lordships' House, it would be held that under the old law succession duty and therefore estate duty would have been payable upon the South African property on the death of the deceased. Your Lordships will remember that the generality of the language of the Succession Duty Act, which would have made duty payable upon any succession arising out of any disposition whatsoever, required that some limit should be implied, and that in *Wallace* v. *Attorney-General* [12] that limitation was supplied by Lord Cranworth in words that have been often quoted "that limitation can only be a limitation confining the "operation of the words to persons who become entitled by virtue "of the laws of this country." These words were used by Lord Cranworth in reference to the facts of the case before him, in which a testator had died domiciled in France and the Crown had claimed duty in respect of his personal property situate in England at his death. But they have been applied generally, though not without criticism, to other cases where the condition was not satisfied that the beneficiaries "became entitled by virtue of the

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[12] (1865) L.R. 1 Ch. 1, 9.

"laws of this country." Taking these words at their face value I should have thought it impossible to hold that they covered the case of a succession to foreign land whether or not the disposition purported to create a trust. But undoubtedly in *Attorney-General* v. *Johnson*[13] the contrary was decided. In that case it was, in effect, held that land in Assam, which was held upon trust for sale under the will of a domiciled Englishman but remained unsold, was liable to duty upon the death of certain persons who were entitled to shares of the surplus income. This decision was criticised by Lord Greene M.R. in *In re White*[14] and, though it was apparently approved by the Court of Appeal in *Attorney-General* v. *Belilios*,[15] it does not appear that the only reason that was given for the decision commended itself to the court. However, it is not necessary to adjudicate on the correctness of this decision. Succession duty has gone, estate duty exigible by reference to it has gone, and estate duty has been reimposed in words widely different from those which were introduced by Lord Cranworth into the statutory language of the Succession Duty Act. It is true that they are not in all respects easy to construe, but I have been able to give them a sufficiently clear meaning which at least accords with the principles upon which the courts (and the legislature) have purported to deal with foreign land. I see no reason why I should give it up in order that the new law may agree with what is very doubtfully thought to be the old.

I would allow this appeal with costs here and below, subject to a reservation as to costs which I will make when I come to put the questions to the House.

LORD REID. My Lords, this case turns on the proper interpretation of section 28 (2) of the Finance Act, 1949, which deals with exemption from estate duty of certain property situate out of Great Britain. Previously such exemption had involved reference to succession duty and the abolition of succession duty in 1949 made it necessary to enact new provisions for such exemption. Section 28 (2) deals with a wide variety of cases. The property may be movable or immovable and it may pass by intestate succession or by a variety of kinds of disposition—will, inter vivos disposition or settlement or settlement based on contract. To find words equally appropriate for all such cases would be difficult if not impossible, and it does not surprise me that some of the words used by the draftsman are not entirely appropriate for the present case.

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[13] [1907] 2 K.B. 885.

[14] [1939] Ch. 131; 54 T.L.R. 838; [1938] 2 All E.R. 691, C.A.; [1940] A.C. 350; 55 T.L.R. 1025; [1939] 3 All E.R. 787, H.L.

[15] [1928] 1 K.B. 798; 44 T.L.R. 214, C.A.

The first requirement for exemption is that "the proper law "regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither "of England nor of Scotland." The expression "proper law" is not entirely appropriate for all cases covered by the subsection if it is read in the sense in which it is generally used. In the law of contract the expression is familiar as denoting the law which the parties have selected to govern their contract. But clearly there can be no selection by anyone of the law which is to apply on intestacy and I know of no authority to the effect that a testator can select the law which is to regulate the provisions of his will. He can, of course, "make his own dictionary." It may appear from the terms of his will that he is using some word or phrase in an unusual sense. But it appears to me that the law which regulates his disposition of movables must be the law of his domicile and the law which regulates his disposition of immovables must be the lex rei situs. In this case it is not disputed that a disposition by a testator of the legal estate of immovables abroad must be governed or regulated by the lex rei situs, whatever intention to the contrary he may have expressed in his will. But it was argued that effect can be given to the testator's intention where the passing of the property involves no change in the legal estate. In this case the legal estate in the testator's farm in the Orange Free State vested in his trustees after his death: the property has now passed by reason of the death of a tenant for life, the legal estate remains in his trustees, and the beneficiary is now another tenant for life. It is argued that this passing is regulated by the "proper law" (in its ordinary sense) of the testator's will and that the proper law is the law of England by reason of the testator's having so provided in his will. I cannot read the subsection as introducing a new conception into the law of testamentary succession and I do not think that in such a case the "proper law" means any more than the law regulating the disposition under or by virtue of which the foreign immovable passes. What, then, is that law in this case? Is it the law of South Africa or the law of England? If it is the former this appeal must be allowed, if it is the latter this appeal must be dismissed.

As I understood it the argument for the Crown was that any regulation by the law of South Africa was at an end when that law permitted the trustees to take the property, and that the regulation of the passing of the property on the death of the tenant for life was purely a matter of English law. I do not agree. The law of South Africa might for any reason prevent the succession of the new tenant for life. In that case the South African courts would determine who was to have the property. It is no answer that the trustees could operate their trust for sale and remove the price from South Africa because any sale to be effective must comply with the law of South Africa. Although there is a trust for sale it is not disputed that the property which passed was the land in South Africa, and that this must still be dealt with as an immovable within the meaning of the section so long as the land remains unsold. So it appears to me that the "disposition under or by reason of which" the land passed is equally regulated by the law of South Africa whether it contains a trust for sale or not.

I must notice two other arguments for the respondents. First, it is said that, if the passing of immovable property in another country is held always to be regulated by the law of that country, the requirement which I have quoted from the section is redundant and it would have been sufficient merely to enact paragraph (*c*) of the subsection "that the property so situate is by the law "of the country in which it is situate immovable property." I am not entirely satisfied of this but, even if that is so, I do not regard it as a strong argument in this case. The section deals with three matters, devolution in intestacy, disposition of movable property and disposition of immovable property. In the first case there is redundancy on any view, in the second case there is redundancy also, and in the third case admittedly there is redundancy where there is a disposition of the legal estate. In so complicated a matter I do not think that the presumption that provisions are not redundant is at all strong.

Finally, it is said that before 1949 estate duty would have been payable in this case and in the circumstances one ought not to hold that the previous law has been altered. There would be some force in this if the previous law had been clearly established, but the only authority cited was *Attorney-General* v. *Johnson.*[16] That is an unsatisfactory case in that admittedly the grounds of judgment of Bray J. cannot be supported. Even if the language of section 28 (2) were more ambiguous than I think it is, I would attach little weight to this argument. So, in my opinion, this appeal should be allowed.

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[16] [1907] 2 K.B. 885.

LORD RADCLIFFE. My Lords, we have here a case of some undivided shares of land in South Africa being held upon trust for sale under the will of a testator who died many years ago, having settled the resulting proceeds of sale as part of his residuary estate upon successive life tenants with ultimate remainders over. On September 23, 1954, the life tenant in possession died and the settled fund still represented by the unconverted land passed to a successor, again for his life. The testator was domiciled in England, he declared it to be his wish and intention that his will should be construed and operate as far as the case should admit according to the law of England, his residuary estate was settled so as to devolve with a family property in Sussex, and his trustees were and are English residents. So far as the adjective is of any importance in this case, the settlement created by his will was "English." I think that those are all the facts that need record.

The Commissioners of Inland Revenue have claimed estate duty on these shares as property passing on the death in 1954. I shall have to consider later whether their true claim, the claim that is consistent with the arguments on which they rely, is correctly expressed as arising in respect of the land itself, a subject which they admit to be immovable property both by our law and by the law of South Africa. At any rate, the answer which the appellants make is that the land, being property situate out of Great Britain, is exempt from duty under section 28 (2) of the Finance Act, 1949, because the "proper law regulating the ". . . disposition" under or by virtue of which it passed was not the law of England or Scotland and also the property is immovable property by the law of the country in which it is situate.

This answer depends upon the acceptance of one simple proposition, that in the case of an immovable the "proper law" intended by section 28 (2) is necessarily the law of the country in which it is situate. To my mind, the fact that this is a simple proposition tells neither for nor against its acceptance: but at the same time, if the argument is right, I can see no meaning in the word "proper" at all.

In my opinion, "proper law" does not have this meaning in this context. As it appears to me, there are three main reflections upon such a construction which are bound to occur to anyone who sets out to read the section as a whole and as a contribution to the existing corpus of estate duty legislation. All of them tell against the proposition which is thus advanced.

First, such a reading involves the conclusion that the section is intended to change the law about exemption of foreign property from duty in a not unimportant respect. Up to its passing the general chargeability of property situate abroad had been governed by the test imposed by section 2 (2) of the Finance Act, 1894: if legacy or succession duty was payable "in respect thereof" it was also to be charged with estate duty. Neither immovable property nor real property was exempt eo nomine: nor was personal property situate abroad constructively brought within the conception of property situate within the United Kingdom by the principle "mobilia sequuntur personam." It was early appreciated that this principle could not be applied to estate duty: see *Winans* v. *Attorney-General*.[17] Indeed, in the case of settled property there was no scope for applying it, since the property that passed was not within the ownership of the "persona" whose death was the occasion of the passing.

There are certain obvious difficulties attendant upon the idea of adopting as the test of liability to estate duty the same test as had previously been applied to legacy or succession duty, since the latter duties were commonly regarded as being charged on interests or successions in or to property rather than on property itself. I am not sure that in the case of settled property the difficulty was of any practical importance. In any event, the test was imposed by the statute and judges have had to make the best of it. From 1894 to 1949 no relevant amendment had been made that affected the applicability of the test, except for section 24 of the Finance Act, 1936, which, while not touching "immovable "property" (the first time, I believe, that this phrase was used in estate duty legislation), brought in for other foreign property a new condition of liability depending on the domicile of the person whose death caused the passing.

So long as the provisions of section 2 (2) were operative, I think that it would have been impossible to say that in no circumstances could real property abroad attract a claim to estate duty if a passing took place, since there were known cases in which legacy or succession duty were exacted in respect of it. The circumstances which permitted such a claim were special and I shall have to consider them in more detail later. In effect, they came down to cases where foreign land formed part of the capital of an English partnership and to cases where foreign land was held upon an effective trust for sale under an English settlement.

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[17] [1910] A.C. 27; 26 T.L.R. 133, H.L.

The latter point was, of course, the subject of the decision in *Attorney-General* v. *Johnson*,[18] which covered both succession duty and estate duty. I am myself of opinion that that case was rightly decided and was in accordance with a number of earlier authorities which led up to it. But, putting my own opinion aside, I am quite satisfied that in 1949 *Attorney-General* v. *Johnson* [18] stood as established law; which is the immediate point. What are the facts with regard to it? It had never been overruled. It had twice been noticed in Court of Appeal decisions without disapproval: by Sargant L.J. and Lawrence L.J. in *Attorney-General* v. *Belilios*,[19] and by Lord Greene M.R. in *In re White*.[20] In each case the decision was explained as attributable to the existence of the trust for sale which converted the realty in Assam into English personalty. As it did in fact depend upon that principle, this is not a very damaging criticism. It was followed in 1935 in the Chancery Division by Luxmoore J. in *In re Duff's Settlement Trusts*.[21] It is noticed and treated as constituting an effective rule of the law in all the textbooks on death duty which were current in 1949—see Hanson on Death Duties, 9th ed. (1946), Green on Death Duties, 2nd ed. (1947), Dymond on Death Duties, 10th ed. (1946). In none of them is there any suggestion that *Attorney-General* v. *Johnson* [22] is to be regarded with dubiety or that there is any practice on the part of the revenue to make concessions in its application.

I think it an unexceptionable statement, therefore, to say that if section 28 (2) of the Finance Act, 1949, does exempt foreign land from duty in all cases by virtue of this phrase about "proper "law," it has brought about a change in the existing law. So it may have done, if its true construction so requires. But the occasion of introducing this new section was the abolition of the legacy and succession duties by the immediately preceding section of the same Act and the consequent destruction of the existing statutory test. There is nothing to suggest that a substantive change in the law is about to take place; least of all that a simple new rule, all foreign land to be exempt, is concealed within the texture of the elaborate formulae laid down.

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[18] [1907] 2 K.B. 885.
[19] [1928] 1 K.B. 798.
[20] [1939] Ch. 131.
[21] (1935) Unreported.
[22] [1907] 2 K.B. 885.

This leads on to the second reflection that forces itself upon the reader. The drafting of the section does not read at all like an attempt to say that no immovable situate outside England and Scotland is to be liable to duty. The point can be put in more than one way, but, however put, I do not see how it can be brushed away as unimportant. It is not a question of tautology, which in itself is of little significance: it is rather that the whole structure of the section runs counter to the idea that it is meant to convey what it must mean according to the argument of the appellants. In the Court of Appeal, the Master of the Rolls expressed this point as follows [23]: " The difficulty, to my mind, " of accepting Mr. Plowman's argument is that the consequence " of its acceptance must be that in every case of a disposition by " will or settlement of a foreign immovable, the proper law " regulating the disposition must always be the lex situs. . . . " But the conclusion seems to me to render futile the obvious " and apparent intention of the subsection. . . ." I agree with that comment; but I think too that the same point might be put in another way without less cogency. I find it impossible to read the section without inferring that it does contemplate the contingency that property situate abroad, even though immovable, might still not be exempt from duty if the proper law of the disposition under which it passed was English or Scottish. If the appellants are right, that could never be, unless, conceivably, there was some conflict of doctrine between the two jurisdictions as to what was an immovable. I do not think that that can be what proviso (*c*) is directed to.

Thirdly, there is the difficulty of finding any certain meaning for this strange phrase, " proper law regulating the devolution . . . " or the disposition." While it is indeed true that the effectiveness of any disposition which purports to dispose of the title to land or whatever ranks as an immovable is governed by the lex situs (see, for instance, *In re Moses*,[24] *In re Miller* [25]), I am not aware that the description " proper law " had ever been given to the law in this relation. Nor would it occur to me as an apt description when used in connection with the disposition itself, a word which I take to refer to the instrument, will or inter vivos settlement,

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[23] [1960] Ch. 313, 326; [1960] 2 W.L.R. 32; [1959] 3 All E.R. 879, C.A.

[24] [1908] 2 Ch. 235.

[25] [1914] 1 Ch. 511.

H. L. (E.)

1960

PHILIPSON-STOW *v.* INLAND REVENUE COMRS.

Lord Radcliffe.

which is the source of the passing. Under English law settlements can be created by will as well as by instrument inter vivos; and in connection with such settlements "proper law" is used, I think, as the equivalent of the adjectival "English," "Scottish" or "foreign" law. It was so used in the leading case *Duke of Marlborough* v. *Attorney-General*,[26] which was decided only four years before the present enactment. So used, proper law denotes something which is not only not necessarily the same as the lex situs, where an immovable is concerned, but is also so far different in conception that the two systems may each have to be given effect to in respect of the same disposition. *In re Piercy* [27] offers an illustration of this. In that case land in Sardinia was devised by the will of an English testator to trustees upon trust to sell and hold the net proceeds of sale upon successive interests for life tenants and remaindermen. By the Italian law operative in Sardinia the will was ineffective to limit the land over, the tenants for life being by that law converted into absolute owners of the land. If the lex situs had been the proper law that would have been the end of the matter; but despite this it was held by North J., in the Chancery Division, that the trustees were under a duty to carry out their trust for sale and, having obtained and invested the proceeds, to hold them upon the trusts of the settlement declared by the will, the tenants for life being thus reduced again to mere limited owners. On the other hand, the rents of the Sardinian land until sale would devolve according to Italian law. Curious as the case is, I think that if one were to ask what was the "proper law" of the settlement which affected this Sardinian land and its proceeds of sale, one would really be forced to answer that, so far as the phrase was appropriate at all, the proper law was English, not Italian. The Italian law, said the judge,[27a] "has nothing whatever to do with the proceeds of "sale, after the land has been placed outside the scope of the will "by a disposition" (the sale) "which is valid according to Italian "law."

If, then, "proper law" in section 28 (2), when applied to "disposition" were to have the sense of "English," "Scottish" or "foreign," the three alternatives offered, would this reading accord with any known rules about the incidence of legacy and succession duty, and so of estate duty, as they stood in 1949? In my opinion, it would reproduce the succession duty rules as then understood. The following propositions are perhaps adequate to state what they were:

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[26] [1945] Ch. 78.

[27] [1895] 1 Ch. 83.

[27a] Ibid. 88.

(1) Both succession duty and legacy duty were imposed ex facie in the widest possible terms. The Acts creating the respective charges were, apparently, unlimited in their ambit. It was left to the courts by interpretation to determine what their limits were. For the purposes of succession duty, the general test of its incidence was that laid down by Lord Cranworth L.C. in *Wallace* v. *Attorney-General* [28]: it taxed only those persons " who " become entitled by the laws of this country."

(2) In ascertaining what persons became entitled within this category, the equitable rule that realty is converted into personalty as from the date when a trust for sale becomes effective (whether or not subject to a power to postpone) was applied without reservation. It was as much a binding principle for fiscal purposes as it was for the determination of beneficial rights inter partes, see *Attorney-General* v. *Dodd*,[29] *Forbes* v. *Steven*.[30]

(3) Foreign land, though an immovable, was therefore not exempt from duty when a succession fell in if at that date it was held on a binding trust for sale under an " English " settlement, that is, a settlement the trusts of which were regarded as having for their natural forum the Court of Chancery in England. Although the land was unsold, the succession was treated as being essentially a succession to an " English " asset, the notional fund of personalty. In the words of Mathew J., in *Attorney-General* v. *Dodd*,[31] " For all purposes, land converted into money " is to be treated as money, either for the purpose of a settlement " or for fiscal purposes, because equity, and now law following " equity, regards the land as money."

(4) This principle, if esoteric, was well recognised and was regularly enforced in death duty cases. Thus, in *Forbes* v. *Steven*,[32] a testator domiciled in England died leaving his share in a partnership which owned warehouses in Bombay. James V.-C. upheld a claim to legacy duty in respect of this asset. By the law regulating the partnership the land which formed part of its capital was regarded as held in trust for sale: and conversion for one purpose was conversion for all. In another case, *In re Stokes*,[33] the rents and profits of real estate in New Zealand unconverted but held in trust for sale were treated as personalty

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[28] L.R. 1 Ch. 1.

[29] [1894] 2 Q.B. 150; 10 T.L.R. 336.

[30] (1870) L.R. 10 Eq. 178.

[31] [1894] 2 Q.B. 150, 156.

[32] L.R. 10 Eq. 178.

[33] (1890) 62 L.T. 176; 6 T.L.R. 154.

and held to be liable to legacy duty. Mr. Vaughan Hawkins, whose arguments for the Crown in this and other cases seem to have formed no small part of the law on the subject, maintained [34]: "The case of *Forbes* v. *Steven* [35] cannot be distinguished. It has never been doubted, always followed in practice, and it is incontestably right in principle." North J. agreed or succumbed. He noticed the argument that the land in New Zealand was an immovable or real estate: but, he said [36]: "What is this interest? In my opinion it is personalty . . . not an interest in land."

In 1898 came the case of *In re Smyth.*[37] A testator domiciled in the United Kingdom died having created by his will a settlement of land in Jamaica. At a certain stage in the course of the successions under the settlement a trust for sale became effective. One of the remaindermen entitled to a vested interest in reversion in the resulting proceeds died before the trust for sale had become binding or any sale had been made. The learned judge (Romer J.) held, nevertheless, that probate duty was exigible in respect of this legatee's interest, on the explicit ground that the interest was of the nature of personalty, though the land remained unsold at the date of the legatee's death. It was an English asset, an English "equitable chose in action," and it was not to be treated as foreign by reason of the fact that the plantation in question was situate in Jamaica. Having regard to the trust for sale, the Jamaican land was to be considered merely as an investment of the personalty fund.

In the light of these decisions, to which there was no countervailing current of authority, I do not see what Bray J. could have done in *Attorney-General* v. *Johnson* [38] except decide the case as he did. His reasoning is said to have been obscure: but the doctrines that he had to expound and apply do not admit of very simple exposition. It has been objected that the arguments as to succession duty are inextricably mixed with those bearing on estate duty: but section 2 (2) of the Finance Act, 1894, made that confusion inevitable, since it took liability to one as the test of liability to the other. It is a fair theoretical criticism of the learned judge's decision that he did not so much decide that the estate in Assam was liable to duty, though situate abroad, as that the property that passed was not situate abroad at all, being personalty arising under an English settlement. Nevertheless, having regard to the principles laid down in the previous authorities and to the wording of the Finance Act, 1894, s. 2 (2) itself, I think that in this limited field of trusts for sale of foreign land a double-faced argument such as is here involved has to be accepted. I will return to this point before I finish.

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[34] 62 L.T. 176, 178.
[35] L.R. 10 Eq. 179.
[36] 62 L.T. 176, 178–179.
[37] [1898] 1 Ch. 89; 14 T.L.R. 77.
[38] [1907] 2 K.B. 885.

(5) It was clearly appreciated that in determining the range of succession duty, foreign property, real or personal, was being brought within the scope of British taxation and, formally at any rate, subjected to the resulting charge. Nor were these cases in which the maxim "mobilia sequuntur personam" could assist or explain the predations of the Revenue even where only items of personal property in the most straightforward sense were involved. The two leading cases on this point are *In re Cigala's Settlement Trusts* [39] and *Attorney-General* v. *Jewish Colonisation Association*,[40] both concerned with claims to succession duty (and in the second case with a claim to estate duty) when life interests terminated in property situated abroad. In the former the trust fund under an English settlement included French rentes, inscribed in the Grand Livre in Paris, and shares in the Bank of France: in the latter the great part of the securities affected was choses in action situate abroad, as were the documents of title to them. The judgments of the Court of Appeal are, I think, peculiarly relevant to what is now before us, because they were unanimous in holding that the death duty charge was exigible, notwithstanding that the property was physically situated abroad and that the succession itself could only be effective if admitted by foreign law. It was not relevant, said A. L. Smith M.R.,[41] that Austrian law, the law of the settlor's domicile, would govern questions of legitim in the property. ". . . it is quite "immaterial," said Collins L.J.,[42] "where the property is "physically situated." He accepted that "it must depend on "foreign law whether the property, the subject of the trust, "could ever be brought under it": but that only meant that the succession might be defeated. Finally, Stirling L.J. explicitly rejected the argument [43] that an English succession is affected by having to refer to foreign law to ascertain the capacity of the settlor or the validity of his acts.

It is, I think, necessarily involved in the appellant's argument that "the proper law of the disposition" must change according to the question whether or not there is a foreign immovable among the trust investments at the date when any particular passing takes place under the settlement. Thus, if the land in South Africa had been sold and the proceeds invested in anything but other foreign land, the proper law in this case would not be anything but English. On the other hand, if a settlement starts off as English with investments in the United Kingdom and some or all of them are sold and invested in foreign land before a passing takes place, the proper law of the disposition, originally English, then becomes foreign qua that asset. I find it very hard to be content with such a method of construction under which the "proper law" sways to and fro; the more so because proviso (*a*) (i) to the section plainly contemplates that the proper law of a disposition is determined once and for all at one date, the date when it becomes effective.

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[39] (1878) 7 Ch.D. 351.

[40] [1901] 1 K.B. 123; 17 T.L.R. 106, C.A.

[41] [1901] 1 K.B. 123, 133.

[42] Ibid. 137.

[43] Ibid. 141.

My Lords, I have come to the conclusion that section 28 (2) of the Finance Act, 1949, must be interpreted in the light of all this previous authority. Having regard to it I do not believe that the words "proper law regulating the . . . disposition" can be read as meaning no more than that system of law without whose sanction the terms of the disposition would not be effective. So to read it attributes no significance at all to the adjective "proper." It might as well not be there. I hope that I am not being peremptory in saying that: but I do not think that any other of your Lordships has succeeded in finding any significance for it, if that reading were to be accepted. That seems to me an unsatisfactory method of construction, if another and certainly no less plausible meaning is to hand. "Proper law governing the "devolution" can be read as a simple description of the effective law, but in my opinion, in the case of a will or settlement, "the "proper law" means the system of law by which trusts created under it are to be taken as governed, and in an English settlement of the proceeds of sale of foreign land that proper law is English. I do not think, therefore, that in the present case the conditions of exemption have been made out.

I would dismiss the appeal. We have, if I may say so, three excellent judgments before us, from Upjohn J. (as he then was) in the High Court, and from the Master of the Rolls and Harman L.J. in the Court of Appeal. They are all very familiar with this field of death duties, and the judgments on each side show how well balanced the arguments are. I do not believe that either side can present a wholly satisfactory case or one that does not leave certain difficulties unanswered. I can only say that for the reasons which I have set out, I think the views of Upjohn J. and the Master of the Rolls are the more convincing.

There is only one further point to mention. The claim to estate duty has been expressly made in respect of the immovable property consisting of the seven one-eighth undivided shares in Steenbokspan farm. That is the property situate abroad which is treated as passing. Is it consistent with the tenor of the argument which can alone sustain the charge of duty that the claim should be made in respect of the land itself, or does the claim, when analysed, really amount to an assertion that, apart from the passing of the land, there was also a passing of the equitable interest in the fund of personalty created by the will? I have found this a troublesome, because it is rather a metaphysical, question. I think, however, that the Revenue's claim is rightly directed to the immovable itself. It might have been wiser policy to formulate it, as in *Attorney-General* v. *Johnson*,[44] in the shape of a claim upon "so much of the residuary estate as was "attributable to" the land in South Africa, but there is not, I think, any ultimate difference between the two ways of putting it. Estate duty is charged in respect of actual property: and, although the trusts affecting that property, if they turn it into personalty in the eyes of the law and so into an English asset, may afford a test of whether it is chargeable or not, they do not create money or investments where no money or investments yet exist. What exists is the land forming part of the residuary estate and, in my opinion, it is that asset which falls within the charge imposed by section 1 of the Finance Act, 1894.

LORD TUCKER. My Lords, I agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friend on the Woolsack.

LORD DENNING. My Lords, it is clear to my mind that when section 28 (2) speaks of the "devolution" of property, it means a devolution by operation of law, such as heirship or kinship. When it speaks of a "disposition," it means a disposition by instrument, such as a will. And when it speaks of "the dis-"position under or by reason of which" property passes, it means the particular devise or bequest under which it passes.

The disposition with which your Lordships are concerned is a gift in the will of Sir Frederic Philipson-Stow, the first baronet.

[44] [1907] 2 K.B. 885.

He devised his residuary estate to trustees who, under the direction in the will, received the income and paid it to his widow during her life. After she died they paid it to his son, Sir Elliot Philipson-Stow, the second baronet. When Sir Elliot died, the trustees were bound by the will to pay the income to his son, Sir Frederic, the third baronet. It is this disposition—this gift over in the will to the present Sir Frederic—with which this case is concerned.

The Crown claim estate duty on the property which passed on Sir Elliot's death. The trustees have, of course, to pay estate duty on much of it but they claim to be exempt from estate duty on a farm at Steenbokspan in South Africa which they still hold. It is part of the residuary estate which they hold under a trust for sale, but they are at liberty to postpone the sale. They have postponed the sale and still hold the property although 52 years have passed since the testator's death.

It is admitted that all the conditions necessary to give exemption are fulfilled in respect of the South African land except this one on which the whole question arises. What is the proper law regulating the disposition? The Crown say that, in order to ascertain the proper law, you must look at the intention of the testator: just as in the case of a contract you look at the intention of the parties (quoting *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[45]), and likewise in the case of a marriage settlement (quoting the *Marlborough* case[46]): this applies, say the Crown, even though the contract deals with land abroad (quoting *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[47]).

My Lords, I cannot accept the Crown's contention on this point. I do not even accept all that the Crown say about the case of a contract. Only a little while ago this House declared that, in the absence of an express clause, the proper law is to be found by asking with what country has the transaction the closest and most real connection: see *Tomkinson* v. *First Pennsylvania Banking and Trust Co.* (*In re United Railways of Havana and Regla Warehouses Ltd.*[48]). But we are not dealing here with a contract. We are dealing with a will: and, whilst I would agree that the *construction* of a will depends on the intention of the testator, I would say that in no other respect does his intention determine the law applicable to it.

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[45] [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206, P.C.

[46] [1945] Ch. 28, 88.

[47] [1910] 2 Ch. 502, 513; 26 T.L.R. 591, C.A.

[48] [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L.

Let me take first the case where there is a disposition of *movable* property by will. There is no doubt that the proper law regulating the disposition of *movables* is the law of the domicile of the testator at the time of his death. In the leading case on this subject Lord Cranworth used the word "regulate" in this very connection. When a person dies domiciled abroad, he said, "in every case the succession to personal property will be *regulated* not according to the law of this country, but to that of his "domicile": see *Enohin* v. *Wylie*.[49] There is perhaps an exception in regard to the *construction* of his will: for if a question arises as to the interpretation of the will and it should appear that the testator has changed his domicile between making his will and his death, his will may fall to be *construed* according to the law of his domicile at the time he made it: though in all other respects it would be governed by the law of his domicile at the date of his death.

Take next the case where there is a disposition of *immovable* property by will by means of a direct devise and not a trust for sale. There is no doubt that the proper law regulating the disposition is the law of the country where the property is situate and not the law of the testator's domicile: see *Freke* v. *Lord Carbery*,[50] *In re Moses*.[51] There is, perhaps, again an exception in regard to the *construction* of his will: for if a question should arise as to the interpretation of the will, it will normally fall to be *construed* according to the law of his domicile at the time when he made his will. But this interpretation would itself be subject to the overriding requirement that it must in no way conflict with the law of the country in which the property is situate: for if the disposition is not one which is permitted or recognised by the lex situs, it cannot be given effect: see *Earl Nelson* v. *Lord Bridport*,[52] *In re Miller*.[53]

The so-called exceptions to what I have referred—about the *construction* of a will—are not really exceptions at all: for in construing a will, so as to see what a testator meant, every civilised country looks to see what he intended—and for this purpose you may legitimately look at the law he had in mind—but you only do this as a guide to find his meaning. You do not do it so as to find out the law which regulates his dispositions. He has no choice about that. Apart from this one question of construction, the succession to movables is regulated by the law of his domicile: and the succession to immovables is regulated by the lex situs.

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[49] (1862) 10 H.L.C. 1, 19, H.L.

[50] L.R. 16 Eq. 461.

[51] [1908] 2 Ch. 235.

[52] (1846) 8 Beav. 547, 570.

[53] [1914] 1 Ch. 511.

Now does a trust for sale make any difference to this proposition? It was not disputed that a trust for sale does not alter the quality of property. If it is land, then so long as the land has not been sold, the interest of the beneficiary remained immovable property: see in *In re Berchtold.*[54] It follows that when the life tenant dies and the right to the income passes from him to his successor, the disposition under which it passes is regulated by the lex situs just as if it were a direct devise.

I was for some time impressed by the argument that if the law regulating the disposition of immovables by will is always the lex situs why add clause 28 (2) (*c*)? But I do not think it should prevail. The draftsman, I think, was concerned to deal comprehensively with movable and immovable property passing under a will or on intestacy. And it was natural enough to frame the section in the way he has, even though the conditions of exemption involve a good deal of overlapping.

I was also impressed by the argument that in 1949 the decision in *Attorney-General* v. *Johnson*[55] held the field and the legislature cannot have intended to open a new door for exemption. But the decision is admitted by the Crown to have been based on wrong reasons. And I prefer not to suppose that the legislature intended to perpetuate a wrong decision.

I would therefore allow this appeal.

Appeal allowed.

[The House ordered that the respondents do pay to the appellants their costs here and in the Court of Appeal, and that the respondents do pay to the appellants half their costs in the Chancery Division.]

Solicitors: *Norton, Rose, Botterell & Roche; Solicitor of Inland Revenue.*

F. C.

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[54] [1923] 1 Ch. 192.

[55] [1907] 2 K.B. 885.

KANAGASUNDERAM NADESAN . . . APPELLANT;
AND
VAITHILINGAM RAMASAMY . . . . RESPONDENT.

J. C.*
1961
May 8.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Land—Fidei commissum—Gift of undivided share—Subject to fidei commissum—Partition—Fidei commissum thereafter attaching to land allotted in severalty—Partition Ordinance, No. 10 *of* 1863, *s.* 9—*Inapplicable to rights of fidei commissarii.*

By section 9 of the Partition Ordinance, 1863, of Ceylon: "The "decree for partition or sale . . . shall be good and conclusive "against all persons whomsoever, whatever right or title they have "or claim to have in the said property . . ."

The appellant's grandfather in 1928 gave by deed to the appellant's father (the donee), one of four sons of the donor, one-fourth share of certain undivided land subject to a fidei commissum in favour of the donee's descendants. The fidei commissum provided, inter alia, that "if found necessary" the donee "may dispose the "same by way of donation or dowry to his descendants . . ." In purported exercise of that power the donee made an irrevocable donation of the same land to a daughter, one of his ten children living at the date of his death. Pursuant to subsequent dealings with that one-fourth share one V., having apparently become entitled to it, instituted proceedings for partition, the other parties to the suit being the three brothers of the donee, to each of whom an equal undivided one-fourth share of the property had been given. A partition decree having been made and a certain lot of land allotted to V., he purported by deed to sell it to the present respondent. The appellant thereupon claimed against the respondent a declaration of title to an undivided tenth share of the partitioned lot. The respondent alleged, inter alia, that the effect of section 9 of the Partition Ordinance, 1863 (then in force), was to confer on him an absolute and indefeasible title whether or not the fiduciary (donee) or any purchaser from him had been guilty of fraud:—

Held (it having been found that there had been a fraudulent exercise by the donee of the power reserved to him, and that the respondent was not a purchaser for value without notice of the fidei commissum), that section 9 of the Ordinance had no bearing on the rights of fidei commissarii who had no present right or interest in the land which was being partitioned.

Property burdened with a fidei commissum might be partitioned under the Partition Ordinance, but such partition had not the effect of destroying the fidei commissum which thereafter attached to the land allotted in severalty to the fiduciary. The appellant was, accordingly, entitled to the declaration claimed.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD HODSON, LORD GUEST and the RT. HON. L. M. D. DE SILVA.

Dona Maria Abeyesekera Hamini v. *Daniel Tillekeratne* [1897] A.C. 277 applied.

Babey Nona v. *Silva* (1906) 9 N.L.R. 251 and *Gooneratne* v. *Bishop of Colombo* (1931) 32 N.L.R. 337 approved.

Kusmawathi v. *Weerasinghe* (1932) 33 N.L.R. 265 explained.

Adamjee v. *Sadeen* [1957] A.C. 94; [1957] 2 W.L.R. 67, P.C. considered.

Judgment of the Supreme Court of Ceylon reversed.

In his appeal (No. 30 of 1960) from a judgment and decree of the Supreme Court of Ceylon (Basnayake C.J. and K. D. de Silva J.) (November 2, 1956) the appellant sought to have restored a judgment in his favour given by the District Court of Point Pedro (A. W. Nadaraja D.J.) (April 2, 1954).

The following facts are taken from the judgment of the Judicial Committee: The appellant as plaintiff claimed a declaration of title to an undivided tenth share of certain land which had itself been allotted out of a larger extent of land, in the circumstances that will be stated, to the predecessor in title of the respondent. He claimed also ejectment of the respondent and damages.

The appellant's father, Nagamattu Kanagasunderam, was one of four sons of Aramugam Nagamattu who, by deed of March 19, 1928, donated to him subject to a fidei commissum in favour of his descendants one-fourth share of certain land known as Sadaijakadu in the district of Jaffna. The fidei commissum was in these terms: " I declare that the donee should not encumber the " said lands by way of documents such as any transfer, otty, " mortgage, donation and dowry etc. or encumber the same in any " other way or alienate the same but possess the same during his " lifetime and die leaving behind the same to devolve on his " descendants but if found necessary he may dispose the same by " way of donation or dowry to his descendants and will have no " right to make these properties or property or any part of the " properties or property bound for any kind of debts and would " not be liable even for the penalties of courts."

The appellant was one of the ten children of his father living at his death in January, 1948. The father will for brevity's sake be called " the fiduciary."

On September 6, 1934, the fiduciary in purported exercise of the power contained in the recited deed made an irrevocable donation of the same land to his daughter, Vadivelambikai. The donation was expressed to be made in consideration of the natural

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love and affection which he bore to her and for diverse other causes and considerations thereunto moving him. The validity of this gift was of primary importance.

On the same day, September 6, 1934, Vadivelambikai and her husband in consideration of the sum of Rs. 5,000 conveyed the same land to her grandfather Ponniah Mailerumperumah absolutely. It appeared from the note of the attesting notary that Rs. 2,000 only were paid to the vendors in his presence. On the same day Ponniah Mailerumperumah mortgaged the same land to one Parupathipillai for Rs. 2,000. Of this sum Rs. 500 only were given to Vadivelambikai, the remainder being appropriated by the fiduciary.

On November 16, 1936, Ponniah Mailerumperumah sold the same land to the fiduciary. The deed stated the consideration to be Rs. 10,000 paid by the fiduciary to him. The note of the attesting notary stated that out of the consideration Rs. 2,400 was paid in his presence and the balance was acknowledged to have been received. The mortgage for Rs. 2,000 was presumably discharged.

On December 7, 1936, the fiduciary and his wife mortgaged the same land to Ponnampalan Vythilingam to secure Rs. 6,000 and interest thereon, and on the same day Ponniah Mailerumperumah renounced any claim he might have to the property.

On October 11, 1941, the fiduciary and his wife in consideration of the sum of Rs. 5,000 conveyed the same land to the said Vythilingam. He was already a mortgagee for Rs. 6,000 and interest but nothing was said about this in the deed.

Vythilingam being thus apparently entitled to one-fourth undivided share of the lands donated by the deed of March 19, 1928, instituted proceedings for partition in the District Court of Jaffna on June 25, 1942. The other parties to the suit were the three brothers of the fiduciary, to each of whom an equal one-fourth share of the property had been given. In due course a decree was made by that court under which certain lands known as Lot 3 were allotted in severalty to Vythilingam. Lot 3 was the subject of the present dispute. No mention was made in the decree of the fidei commissum created by the deed of 1928.

Vythilingam, having thus obtained Lot 3, purported by deed dated August 23, 1945, to sell it to Ramasamy, the present respondent and defendant in the action. The consideration was expressed to be Rs. 13,500.

The appellant, who had been born in 1926, commenced these proceedings in January, 1952. The Supreme Court of Ceylon set aside the judgment and decree of the District Court in favour of the appellant and dismissed his action.

1961. April 11, 12, 13. *E. F. N. Gratiaen Q.C.* Ceylon and *Walter Jayawardena* for the appellant. The first submission is that by the deed of September 6, 1934, the fiduciary in fact only conveyed to his daughter the fiduciary interest which he had at the time; that is to say, whether or not he had the power to donate the entire property to her, this deed was not null and void but operated only as a conveyance of the fiduciary's limited interest. The crucial issue is whether what the fiduciary did in 1934 was not a fraud of the kind which resulted in the fidei commissum being preserved. Assuming that he had power to donate, he had to do it honestly and for necessity for the benefit of the child in whose favour the gift was made. The evidence establishes that it was not a genuine exercise of the power, but merely part of a device by an impecunious fiduciary to get the property back into his own hands, so that he could claim that he had broken the fidei commissum and was in a position to borrow money on the property. On the authorities the power must be genuinely exercised in good faith and be the discretion of a good man—a combination of the subjective and objective test. A power not so exercised, but to further some private interest, is bad. *Abdul Hameed Sitti Kadija* v. *De Saram* [1] states the general proposition; and see also *Abeyawardene* v. *West.*[2]

It is not conceded that Vythilingam was a bona fide purchaser for value without notice, but that does not matter, because there is a fidei commissum which was not effectively destroyed.

When one examines the deed of 1934 it does not purport to make a gift in the exercise of the power given to the fiduciary by the deed of 1928; it does not purport to state that the necessity had arisen for the exercise of the power; it in fact merely purports to be a conveyance of the land which he considered himself seised and possessed of. The deed is at best equivocal.

The destruction of the fidei commissum does not depend on the knowledge or ignorance of the purchaser of the land. It either survives or fails to survive the attempted exercise of the power. In the present deed of 1928 the power "if necessary" necessarily involves, if exercised, the disinheritance of the other nine children. The expression "good faith and the discretion of

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[1] [1946] A.C. 208, 216.

[2] [1957] A.C. 176, 207; [1957] 2 W.L.R. 281.

"a good man" appears in Voet, Bk. 36, tit. I, s. 54 (in Gane's translation, vol. 5, p. 420). Under what happened here nine-tenths of the children have been disinherited solely for the fiduciary's benefit—that is what it boils down to. On the issue of fraud—whether the deed of September 6, 1934, and all succeeding deeds relied on by the respondent were executed fraudulently and collusively with intent to defraud the appellant and the other beneficiaries under the deed of 1928—there is a strong finding of fact in the appellant's favour on that issue; it was not discussed in the Supreme Court's judgment. That finding of the trial judge should not be altered now. As to fraud on a power in the case of a fidei commissum residui, see *Ferdinandus* v. *Fernando.*[3]

In the Supreme Court's judgment it was said: "It was "contended at the trial that the power of donation given to the "fiduciary was a power to give the property to all the children "and not to one of them, and the learned trial judge upheld that "contention and gave judgment for the plaintiff [present appel"lant]; but in appeal learned counsel for the [present appellant] "abandoned that position and conceded that it was open to the "fiduciary to give the property to one of his children . . ." It is submitted that the appellant should be permitted before this Board to support the finding of the district judge on a pure question of law with regard to the interpretation of the power in the deed of 1928; there was merely an erroneous admission by counsel below on a pure question of law in spite of the trial judge's finding on that question in the appellant's favour: see *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy*[4] and *Lingangowda* v. *Basangowda.*[5]

Dingle Foot Q.C. for the respondent on the concession point. It would be a very unusual departure from the Board's practice to allow the point to be revived here; the appellant ought not to have leave to raise the point again at this stage: Bentwich, Privy Council Practice, 3rd ed., p. 205; *Skinner* v. *Bank of Upper India Ltd.*[6]

[The Board permitted the point to be raised.]

Gratiaen Q.C. If it had been the intention, after a clearly defined fidei commissum had been established, to confer on the fiduciary power to disinherit one or more of the beneficiaries, completely different language could easily have been employed. The only interpretation which is clearly barred is one which suggests that there is the power to enlarge the share which would go to one beneficiary at the expense of the others. It is sufficient to say that whatever be the nature of the power, there was no power conferred on the fiduciary to divest the appellant in advance of any portion which would come to him on the fiduciary's death. There is in Voet, Bk. 36, tit. I, s. 29a (vol. 5, p. 376, of Gane's translation) no language which suggests the power to choose. In the present case clearly there are no express words conferring power of selection, and there is no justification for arguing that there is an implied power. *Estate Wilton* v. *Estate Biddlecombe* [7] is an example of a case where there were clearly rights of selection or disinheritance. There is no power here to do what the fiduciary purported to do; on that interpretation the question of fraud would not arise.

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[3] (1903) 6 N.L.R. 328, 333.
[4] (1899) L.R. 26 I.A. 216, 221.
[5] (1927) L.R. 54 I.A. 122, 125.
[6] (1935) L.R. 62 I.A. 115, 126.

The legal effect of the fiduciary's gift to his daughter, although the deed purported to operate as a transfer of the entire property, in fact only transmitted what was his to give, namely, his fiduciary interest; and when the property ultimately came back to him pursuant to the subsequent transactions, what was restored to him was his fiduciary interest, which alone he conveyed to Vythilingam. On the point of the deed of 1934 operating only as a transfer of his fiduciary interest, see *Rodrigo* v. *Perera* [8] and *Abeyawardene* v. *West*.[9] Whether there is a proper exercise of the power can only be ascertained from the document itself, not from intention.

The effect of the partition decree—whereby Vythilingam was given Lot 3—is regarded in Ceylon as well settled. The effect of the ultimate decree is that the fidei commissarii when the time of vesting comes do not lose their interests but those interests are confined to the specific allotment. Here by operation of law the fidei commissum attached automatically to Lot 3. The authorities on this point are right, and in any case it is far too late to revise them. *Dona Maria Abeyesekera Hamini* v. *Daniel Tillekeratne* [10] states the general principle, and *Babey Nona* v. *Silva* [11] has been treated throughout as having decided the law. Lot 3 went to Vythilingam subject to the fidei commissum. There are certain recent Ceylon cases in which it is suggested that a bona fide purchaser for value from the decree holder would get it free from the fidei commissum. But it is submitted that

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[7] S.A.L.R. 1933 C.P.D. 441.
[8] (1923) 24 N.L.R. 420, 424.
[9] [1957] A.C. 176, 207.
[10] [1897] A.C. 277, 285.
[11] (1906) 9 N.L.R. 251.

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those decisions are wrong, because in them *Kadija's* case [12] and *Abeyawardene* v. *West* [13] were not considered by the Ceylon courts. There is, in any event, a finding in the appellant's favour that Vythilingam was not a bona fide purchaser for value without notice.

Dingle Foot Q.C., *R. K. Handoo* and *Dick Taverne* for the respondent. With regard, first, to the partition decree; if the ground were unencumbered by authority, it would be submitted that the terms of section 9 of the Partition Ordinance could hardly be more clearly expressed; it gives an absolute title to anyone who has obtained a partition decree, and that would be wide enough to cover a claim under a fidei commissum. Of the authorities, *Hamini's* case [14] does not touch or affect the operation of section 9. *Babey Nona's* case [15] is merely authority for the proposition that where there is a fidei commissum the property can still be partitioned under the Partition Ordinance. *Kusmawathi* v. *Weerasinghe* [16] refers to *Babey Nona's* case [17] but the Chief Justice is expressing a view which is not that urged by Mr. Gratiaen. The last occasion on which the Partition Ordinance was considered by the Board was in *Adamjee* v. *Sadeen*,[18] and it is submitted on that authority that the decree holder has an absolute title; what the Board said there was that there must be a most thorough investigation of all titles and all claims.

[*Gratiaen Q.C.* intervening. Under the new Partition Ordinance of 1951 a fidei commissum must be disclosed.]

Tillakaratna v. *De Silva* [19] shows that if there was a fidei commissum it was necessary to refer to it in the partition decree. It is contended that where there is a fidei commissum it was clearly the intention of the legislature that the title acquired in partition proceedings should be good against all the world, leaving the fidei commissarii to a remedy in damages. If that is right it is an end of this appeal.

Turning to the other grounds, and first as to the nature of the power, there are no words of limitation in the deed of 1928 beyond "if found necessary." Assuming that necessity arises in the case of one of several children, Mr. Gratiaen said that the fiduciary could dispose of the whole property and make an advance to all together. That means, of course, that to a considerable extent

[12] [1946] A.C. 208.
[13] [1957] A.C. 176, 207.
[14] [1897] A.C. 277, 284.
[15] 9 N.L.R. 251, 256.
[16] (1932) 33 N.L.R. 265, 271.
[17] 9 N.L.R. 251.
[18] [1957] A.C. 94, 108; [1957] 2 W.L.R. 67.
[19] (1947) 49 N.L.R. 25, 28.

the purpose of the fidei commissum would be defeated, for the fiduciary should be able to enjoy the estate for his lifetime. If Mr. Gratiaen is right it follows that if one of the children gets into difficulties and has a necessity, then the only course open to the fiduciary is to divest himself of his whole interest in the estate. One can only accept Mr. Gratiaen's contention by reading in words which are not there. Too strict an interpretation must not be put on the words "if found necessary." The only obligation which rests on the fiduciary under this deed is to see to it that the property should devolve in one way or another upon his descendants as a class. There is nothing to distinguish between one descendant and another so far as the power of gift is concerned. That is the proper interpretation of the power. The onus, a heavy one, rests on the appellant who makes an allegation that this was a bogus transaction. Where fraud is alleged it must be proved up to the hilt.

It was said in *Vatcher* v. *Paull*[20] that "The term fraud in "connection with frauds on a power does not necessarily denote "any conduct on the part of the appointor amounting to fraud "in the common law meaning of the term or any conduct which "could be properly termed dishonest or immoral. It merely "means that the power has been exercised for a purpose, or "with an intention, beyond the scope of or not justified by the "instrument creating the power." Adopting that test, was this transaction capable of reasonable explanation? It must not be assumed that this was her dowry. There is nothing in the relevant documents taken by themselves which would necessarily arouse suspicion—nothing which would necessarily put the court on inquiry; so they would not be sufficient to avail the appellant in this case. The evidence falls far short of showing that there was any connection between the two transactions—the gift by the father and the taking of it back by him two years later.

There appears to be no authority directly in point on the question whether it was within the power of the fiduciary to give the property to one child to the exclusion of the others. If it was to be in equal shares one would have expected to find it in the instrument itself.

In summary: (1) The respondent is completely protected by the partition decree. The same reasoning that applied in *Adamjee's* case[21] applies where a fidei commissum is involved; and see *Kusmawathi* v. *Weerasinghe*.[22] One cannot get behind the partition decree in any event except by proceedings. (2) The power of gift is a matter of construction, and on the true construction of the deed of 1928 the fiduciary was entitled to give the property to one child by way of donation, and therefore the gift to the daughter was within the power. (3) If anything turns on the issue of fraud, there were no sufficient materials here from which the trial judge was entitled to draw any inference of fraud on the part of the fiduciary or of anyone else.

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[20] [1915] A.C. 372, 378.

[21] [1957] A.C. 94.

Gratiaen Q.C. in reply. Since 1906 it has been clearly understood, whenever the issue directly arose, that where in a partition decree land was allotted either to the fiduciary or to a purchaser from him, the fidei commissum attached by operation of law to the divided allotment irrespective of whether the decree referred to the fidei commissum or not. This question affects a number of existing titles, and a correction of the law now would be of no assistance for the purpose of diverting the law into the correct channel in the future, because of the new Partition Act, No. 16 of 1951, where there is the express provision for dealing with the question of a fidei commissum. [Reference was made to *Marikar* v. *Marikar*,[23] *Abeyesundere* v. *Abeyesundere*,[24] *Dassanaika* v. *Tilleketratne*,[25] *Weeresekera* v. *Carlina*,[26] *Fernando* v. *Shewakram*[27] and *Gooneratne* v. *Bishop of Colombo*.[28]] The only question, if the matter is still at large, would be whether the language of section 9 is strong enough to destroy the effect of the common law that rights which had not yet accrued could not be destroyed by a partition action or in any other way except by the effect of some statute.

No judge has refused to follow *Babey Nona's* case[29] when the question directly arose whether the fidei commissum attached by operation of law to the allotment which was given under a partition decree. Mr. Foot relied on *Kusmawathi* v. *Weerasinghe*,[30] in which the judge claimed that he could distinguish *Babey Nona's* case.[31] This accepted rule, however, whether it be right or wrong—and it is right—should not now be altered on the principle of stare decisis.

The true effect of section 9 of the Partition Ordinance is that no one having a present right of possession as owner whose rights have not been given him in the partition decree can be allowed to come in again and say that he was the true owner at the date of the decree; his right would be in damages. Section 9 wipes out the title of persons who, if they had been given notice, could have resisted the partition on the ground that they were the owners of the entire property or of shares in it. In *Adamjee's* case [32] it was not suggested that there was a duty to consider future unaccrued rights which were not relevant to the problem of the actual partition.

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[22] 33 N.L.R. 265.
[23] (1920) 22 N.L.R. 137.
[24] (1909) 12 N.L.R. 373.
[25] (1917) 4 C.W.Rptr. 334.
[26] (1912) 16 N.L.R. 1.
[27] (1917) 20 N.L.R. 27.
[28] (1931) 32 N.L.R. 337.
[29] 9 N.L.R. 251.
[30] 33 N.L.R. 265.
[31] 9 N.L.R. 251.

The partition decree in favour of Vythilingam, purchaser from the fiduciary, is subject to the fidei commissum. On the facts of this case the respondent clearly had not the protection of a bona fide purchaser for value without notice: *Soysa* v. *Miskin.*[33] A purchaser for value has no place under a fidei commissum: *Kadija's* case.[34] The decree did not extinguish in favour of Vythilingam the appellant's rights.

On the question whether the deed of 1928 did empower the fiduciary to select one or more descendants to the exclusion of the others, here he did not purport to vary the shares but to disinherit nine children altogether. If there is to be a power to vary in that way, it must be given expressly or by necessary implication; clearly it is not expressly given, and it is not to be implied.

Dingle Foot Q.C., dealing with the new authorities. The earlier cases, until one gets to *Marikar* v. *Marikar*,[35] were not section 9 cases at all. In view of the plain words of section 9 one cannot distinguish between a legal and an equitable title. In *Abeyesundere's* case [36] the judge was not addressing his mind in any way to the effect of section 9. *Dassanaika* v. *Tillekeratne* [37] does not really touch the issue in the present case. In *Weeresekera's* case [38] the question of the application of section 9 was raised in the course of the argument, but the judge followed *Babey Nona's* case,[39] in which the section 9 question was never argued. Section 9 was not considered until *Gooneratne's* case,[40] so it is not correct to say that there is a long current of authority on the point in Ceylon.

May 8. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: The questions that arise are (1) whether the fiduciary was empowered by the deed of 1928 to donate the whole of the land subject to the fidei commissum to a single descendant: their Lordships will deal very shortly with this question. (2) Whether upon the assumption that he was so empowered he exercised the power fraudulently, that is, not with an entire and single view to the real purpose and object of the power but for the purpose of carrying into effect a bye or sinister object: see *Portland* (*Duke*) v. *Topham* (*Lady*)[1]; (3) whether, even if the exercise of the power was fraudulent, the respondent could either upon the ground that he was a purchaser for value without notice or by virtue of the Partition Ordinance maintain his title to the land against the appellant as fidei commissarius.

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[32] [1957] A.C. 94.
[33] (1945) 46 N.L.R. 385.
[34] [1946] A.C. 208.
[35] 22 N.L.R. 137, 139.
[36] 12 N.L.R. 373.
[37] 4 C.W.Rptr. 334.
[38] 16 N.L.R. 1.
[39] 9 N.L.R. 251.
[40] 32 N.L.R. 337, 344.

Upon the first question, viz., whether upon the true construction of the relevant clause in the deed the power vested in the fiduciary by the words "but if necessary he may dispose the "same by way of donation or dowry to his descendants" was validly exercised by a donation of the whole of the property to one child and the consequent disinheritance of his other nine children then living, the trial judge upheld the plea of the appellant, but for some reason that was not explained this plea was abandoned before the Supreme Court. Their Lordships thought fit, as the question was purely one of law, to allow it to be raised, but, having done so, do not propose to decide it. It is unnecessary to do so in view of their other conclusions in the case, and they think it proper not to make any observations which might be prejudicial if and when a similar question arises upon other deeds with clauses bearing a marked resemblance to this.

Upon the second question, viz., whether the power was fraudulently exercised, the trial judge, having seen and heard the witnesses, came to a clear conclusion in the appellant's favour. The Supreme Court was of opinion that he was wrong, holding that the evidence fell short of the clear proof that is required to establish a fraudulent exercise of power, especially where the person who has exercised it is dead. Their Lordships have carefully considered the several transactions in which the fiduciary was concerned and the oral evidence and cannot concur in the views of the Supreme Court. There is no reason to suppose that the trial judge was unaware of the jealousy with which evidence directed against a dead man is to be regarded, or of the suspicion that could be justly entertained of the testimony of the appellant's mother. There is, on the other hand, as their Lordships think, with great respect to the Supreme Court, some ground for doubting whether that court directed its mind to the precisely relevant point. For its conclusion upon the evidence was that "the evidence in the case fails to establish that Kanagasunderam "[the fiduciary] sold the land to Vythilingam in order to defraud "his children by Sivapakiam." But the alleged fraud began at an earlier stage, when the fiduciary donated the whole property to his daughter. It may well be that even then the subsequent transaction was contemplated, but the initial fraud lay in the deed of September 6, 1934. As to this deed, their Lordships, regarding the oral and documentary evidence with all proper jealousy and suspicion, entertain no doubt that the fiduciary exercised his power not in order to benefit his daughter Vadivelambikai, one of the fidei commissarii, but with a view to his own advantage. There was some evidence that the daughter's husband was at one time unemployed and in poor circumstances, but it properly did not, in face of the other evidence, satisfy the judge that the daughter and the daughter alone was the beneficiary of the transactions. She and her husband had gone to Malaya and were not called as witnesses. Her mother, the wife of the fiduciary, gave evidence which, if accepted, was conclusive. Their Lordships see no reason why it should not have been accepted. It was not contradicted and had the ring of truth. The trial judge correctly concluded that the power reserved to the fiduciary was fraudulently exercised by him.

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[1] (1864) 11 H.L.C. 32, H.L.

That, however, does not end the matter. It was urged on behalf of the respondent that, whether or not there was fraud in the exercise of the power, he was a purchaser for value without notice of the fraud and his title was accordingly unassailable. If the premise was established, it would be necessary for their Lordships to examine the consequent plea. But again the finding of fact of the trial judge is conclusive. He was amply justified by the evidence in finding that the deed of 1934 and the succeeding deeds relied on by the respondent were "executed fraudulently "and collusively with intent to defraud the plaintiff (appellant) "as a beneficiary" under the deed of 1928, and that the respondent was aware of the fidei commissum and had constructive notice of the fact that the fiduciary was planning a method of defeating it. His own conduct in regard to the lots allotted in the partition to the fiduciary's brothers gave support, if support were needed, to this view.

Their Lordships, having come to the conclusion that the respondent was not a purchaser for value without notice of the property in dispute, have finally to consider whether he was nevertheless protected from any adverse claim by the Partition Decree of June 13, 1944. He alleged that the effect of section 9 of the Partition Ordinance, 1863, which was then in force, was to confer on him an absolute and indefeasible title whether or not the fiduciary or any purchaser from him had been guilty of fraud. Upon this part of the case their Lordships have not the advantage of a judgment by the judges of the Supreme Court.

Section 9 of the Ordinance is in the following terms: "9. The "decree for partition or sale given as hereinbefore provided shall "be good and conclusive against all persons whomsoever, what- "ever right or title they have or claim to have in the said property, "although all persons concerned are not named in any of the "said proceedings, nor the title of the owners, nor of any of them "truly set forth, and shall be good and sufficient evidence of such "partition and sale and of the titles of the parties to such shares "or interests as have been thereby awarded in severalty: Pro- "vided that nothing herein contained shall affect the right of any "party prejudiced by such partition or sale to recover damages "from the parties by whose act, whether of commission or "omission, such damages had accrued."

It must first be said that there is a long current of authority in the courts of Ceylon to the effect that property burdened with a fidei commissum may be partitioned under the Ordinance, and that such partition has not the effect of destroying the fidei commissum which thereafter attaches to the land allotted in severalty to the fiduciary. The substance of these propositions had already been laid down by this Board in *Dona Maria Abeyesekera Hamini* v. *Daniel Tillekeratne*.[2] Lord Watson said[3]: "Not one of these "enactments [one of them being the Ordinance in question] "professes to deal with or alter the law of fidei commissum; and, "in their Lordships' opinion, they cannot be construed as having "that effect."

The first case in the courts of Ceylon to which it is necessary to refer is *Babey Nona* v. *Silva*.[4] There, the precise point being raised, Lascelles A.C.J. said: "In my opinion the balance of "reason and authority is in favour of the view that property "subject to fidei commissum may be the subject of partition, and

[2] [1897] A.C. 277.

[3] Ibid. 285.

[4] (1906) 9 N.L.R. 251, 255.

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"I hold, in the case under consideration, that the property in "dispute, though subject to fidei commissum, was lawfully "partitioned. But the partition decree in no way extinguishes "the reversionary interest of the fidei commissarius. It merely "sets apart a specific portion of the common estate to which the "rights of the fidei commissarius attach in severalty. By no "reasonable construction of the Ordinance can it be held that the "effect of a partition decree is to enlarge the life interest of the "fiduciarius into absolute ownership." The Chief Justice then quoted the passage already cited from the judgment delivered by Lord Watson. In *Weeresekera* v. *Carlina*[5] the same Chief Justice assisted by De Sampayo (then A.J.) reaffirmed what had been said in *Babey Nona* v. *Silva*,[6] saying that he saw no reason to differ from it. In *Dassanaika* v. *Tillekeratne*[7] the matter was treated as settled law by Wood Renton C.J. In *Marikar* v. *Marikar*[8] the only question was whether the rule well established in regard to fidei commissa prevailed also in regard to trusts, but there are in the judgment of Bertram C.J. some pertinent observations about the interests which were dealt with in partition proceedings. In *Gooneratne* v. *Bishop of Colombo*[9] (a useful case in which numerous previous authorities were examined) Lyall Grant J. said: "The net result of the cases seems to be that no "partition can affect the rights of a subsequent fidei commis- "sarius except to the extent of attaching his rights to a divided "portion of the land instead of to an undivided share and also "perhaps to the extent of substituting money for land, the latter "only in exceptional circumstances and under safeguards." It was urged by counsel for the respondent that this chain of authority was broken by *Kusmawathi* v. *Weerasinghe*.[10] But this is not so. Macdonell C.J., who decided that case, was careful to cast no doubt on *Babey Nona*[11] and the succeeding cases but (rightly or wrongly) distinguished the case before him, saying[12]: "The donor of the land charged by her with a fidei commissum "under which she, the donor, was not a fiduciarius, thereafter "enlarged by virtue of a partition decree the rights, dominial or "usufructuary, remaining to her after her gift, into the full and "conclusive ownership that a partition decree title gives, which "ownership she, not being a fiduciarius, could transmit unbur- "dened by the fidei commissum to her successors in title." No doubt is cast on the title of a fidei commissarius as against his fiduciary or a person claiming through him. As has been already said, it is unnecessary to consider whether in the law of Ceylon the equitable doctrine of purchase for value without notice has any place. Observations will be found in favour of the view that it has, but the contrary view has also been entertained, see, e.g., *Tillakaratna* v. *De Silva.*[13] The only question which their Lordships are now considering is the effect of a partition decree under the Ordinance of 1863 which makes no mention of a fidei commissum. Upon that question no doubt has been expressed.

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[5] (1912) 16 N.L.R. 1.
[6] 9 N.L.R. 251.
[7] (1917) 4 C.W.Rptr. 334.
[8] (1920) 22 N.L.R. 137.
[9] (1931) 32 N.L.R. 337, 344.
[10] (1932) 33 N.L.R. 265.
[11] 9 N.L.R. 251.
[12] 33 N.L.R. 274.

It remains, so far as authority is concerned, to mention the case recently heard by this Board upon which reliance was placed by the respondent, *Adamjee* v. *Sadeen.*[14] That case proved upon examination to have no bearing upon a case in which a fidei commissarius claimed against his fiduciarius or his successors in title. The long and careful judgment delivered by Lord Cohen does not mention, much less purport to overrule, the long line of authority to which reference has been made. It asserts in a different context the conclusive character of a partition decree and emphasises that section 9 of the Ordinance may in some circumstances even bar the title of a person whose interest has been concealed by the fraudulent collusion of the parties to a partition suit.

Their Lordships have referred to the line of authority by which for 50 years the courts of Ceylon have held themselves bound, and they would be reluctant to disturb it even if they came to a different conclusion upon section 9 of the Ordinance. But that is far from being the case. It appears to them that this section has no bearing upon the rights of fidei commissarii who have no present right or interest in the land which is being partitioned. They are not owners or co-owners to whom section 1 can apply: they may not even be in existence at the date of the partition suit. It is difficult to see what part they can play in such a suit. It might have been prudent to provide that in a partition decree, by which land was allotted in severalty to one who appeared to be a fiduciarius, some mention should be made of his capacity. But this might well have created grave embarrassment. The absence of such a provision cannot, as it appears to their Lordships, bring them within the scope of section 9. It is true enough that the words " against all persons whomsoever "

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[13] (1947) 49 N.L.R. 25.

[14] [1957] A.C. 94; [1957] 2 W.L.R. 67, P.C.

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etc. are wide and general. But it is not a new doctrine that wide and general words may be limited by the field in which they are found.

Their Lordships accordingly reject this submission of the respondent both on reason and authority.

The appellant does not seek to disturb that part of the order of the trial judge which provided for payment by him to the respondent of Rs. 1,500 for improvements and for jus retentionis until the same be paid.

For the reasons herein stated their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside and the decree and order of the trial judge restored. The respondent must pay the appellant's costs here and below.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

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AHMED REFAI BIN ADHAM SALIH AND
OTHERS . . . . APPELLANTS;
AND
VALLIYAMMAI ATCHI AND ANOTHER . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Administration of Estates—Right to follow assets of estate—Right of unsatisfied creditor — Equitable right — Defeated by transfer by devisee in consideration of marriage.

Ceylon—Administration of estates—Secretary of District Court appointed administrator—Corporation sole—Code of Civil Procedure (Legislative Enactments of Ceylon, 1938 *Rev., c.* 86), *s.* 520.

Corporation—Corporation sole—Administration of estates—Administrator de bonis non—Secretary of court—Whether corporation sole —Ceylon.

Judicial Precedent—Decision long undisturbed—Administration—Officer of court appointed as administrator—Effect—Decision of 12 *years' standing* (post, p. 792).

A testator, who died in 1931, specifically devised the land the subject-matter of the present action to his son, who was also

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* *Present*: LORD RADCLIFFE, LORD DENNING, LORD HODSON, LORD GUEST and the RT. HON. L. M. D. DE SILVA.

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appointed executor of his will. The son, in the course of the administration, had mortgaged four properties of the testator (the subject-matter of this action not being one) in favour of a creditor, whose executrix was the first respondent, to secure a loan. The testator's son died in 1940, before completing the administration, having previously obtained the release of two of the four mortgaged properties and having also, in 1938, conveyed the disputed land to himself—executor to devisee—and thereupon transferred it by way of gift to his son. In 1943 the first respondent obtained the appointment under section 520 of the Civil Procedure Code of the secretary of the District Court, Colombo, as administrator de bonis non of the estate of the testator, and letters of administration were issued to him. On his retirement from office without completing administration his successor was appointed administrator and, in turn, on his retirement, his successor was, in July, 1949, directed to be substituted, but no letters of administration were issued to the last.

In November, 1949, the first respondent sought to enforce the outstanding mortgage, naming the "Secretary of the District Court, "Colombo," as defendant. On proof of the mortgage debt, the secretary administrator not having appeared, a decree was made in 1951 that the secretary should pay to the first respondent the outstanding debt with interest. Execution was then levied on property in the hands of the administrator to satisfy the decree debt, and it resulted in the seizure of the disputed land which was then in possession of the appellants, having been transferred to them by their mother who had received it as a provision made on her marriage by her brother, the son of the testator's son. The appellants having obtained a court order for release of the property seized, the first respondent began the present proceedings which resulted in an order that she was entitled to execute the decree of 1951 against the appellants' property:—

Held, (1) that the Civil Procedure Code created the holder of the office of secretary of the District Court a corporation sole for the discharge of his functions qua administrator, and therefore notwithstanding the changes in the holder of the office there was a proper defendant before the court in the mortgage proceedings and the last holder of the office did not require a grant of letters of administration for himself (post, pp. 791, 792).

Samarasekera v. *Secretary, District Court* (1949) 51 N.L.R. 90 approved.

Desirability of remedying the difficulties attending the reconciliation of the requirements of the Civil Procedure Code with the responsibilities of the secretary of the court as administrator commented on.

(2) That the right of an unsatisfied creditor to follow assets of the estate into the hands of devisees or legatees and those claiming through them for the purpose of obtaining payment was fundamentally an equitable right which might be defeated by, inter alia, a transfer from the devisee to someone who took in consideration of marriage. Accordingly, since the appellants derived title to the

disputed property through their mother and she took it from her brother in consideration of marriage, it was not liable to be seized to satisfy the first respondent's decree (post, pp. 793, 794).

Dilkes v. *Broadmead* (1860) 2 Giff. 113; *Spackman* v. *Timbrell* (1837) 8 Sim. 253; *Fernando* v. *Fernando* (1902) 2 Browne 277; *Staples* v. *De Saram* (1867) Ramanathan (1863–68) 265 and *Gavin* v. *Hadden* (1871) 8 Moo.P.C.N.S. 90 considered.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 3 of 1960) from a judgment and decree of the Supreme Court of Ceylon (Basnayake C.J. and Pulle J.) (December 4, 1957) reversing a judgment and decree of the District Court of Colombo (G. M. de Silva D.J.) (July 5, 1954).

The following facts are taken from the judgment of the Judicial Committee: The testator whose will and estate are involved was one Hadjie Ibrahim Bin Ahamed who died on May 9, 1931, having specifically devised the land which is the subject-matter of the present action to his son Ahmed Bin Ibrahim. The latter was also appointed executor of the will and in due course took out probate in the District Court of Colombo.

At the date of the testator's death eight properties belonging to him were charged to a creditor as security for sums owing to him. In 1935 the executor obtained the court's sanction to his selling four of these properties and borrowing on the security of the other four. With the moneys so realised, the existing creditor was paid off and a new mortgage was created upon the four retained properties. This was a mortgage for the sum of Rs. 30,000 in favour of the lender, Km. N. Sp. Natchiappa Chettiar, whose executrix was the first respondent, Valliyammai Atchi. The land now in dispute (hereinafter referred to as "the disputed "land") was not one of these four properties.

Ahmed Bin Ibrahim died on November 5, 1940, without having fully administered his father's estate. Before his death he had, however, done two things that were material to this case. He obtained a release from the mortgage of two of the four properties in consideration of Rs. 5,000 which he paid to the mortgagee in reduction of the mortgage debt out of the assets of the estate; and on December 13, 1938, at a time when, as found by the District Judge in his judgment in this action, the administration was nearly at an end and when he was making similar assents in favour of other specific devisees, he conveyed the disputed land to himself, executor to devisee, and on the same day transferred it by way of gift to his son Mohamed Ghouse bin Ahmed. Prima facie, therefore, it had ceased to be assets of the estate by the year 1938.

On November 27, 1943, the first respondent, acting as executrix of the unpaid mortgage creditor, moved the District Court of Colombo for the appointment of the secretary of the court as administrator de bonis non of the testator, and on May 26, 1944, an order was made appointing Mr. Culanthaivalu, the then secretary, official administrator of the estate and declaring him entitled to letters of administration accordingly. These letters were issued to him on October 12, 1944. For the moment it was sufficient to notice that by the year 1948 Mr. Culanthaivalu had retired from the post of secretary without completing administration and a Mr. Peiris, the new secretary, was appointed administrator in his place, and that when Mr. Peiris in his turn retired he was succeeded as secretary by a Mr. Palliyaguru. On July 7, 1949, an order was made in the administration proceedings relating to the testator's estate by which Mr. Palliyaguru was directed to be substituted for Mr. Peiris, but no letters of administration were issued to Mr. Palliyaguru.

It was not until matters had reached this state that the present action was begun. On November 21, 1949, the first respondent filed her plaint, naming the "Secretary of the District "Court, Colombo," as the defendant, praying enforcement of the mortgage bond by payment of the sum of Rs. 45,431 and further sums of interest and, failing due payment, sale of the mortgaged properties under order of the court. Mr. Palliyaguru appeared to but did not defend the action: on the other hand, two persons, Ahmed Bin Hassen and Mohammed Bin Hassen, who claimed to be specific devisees under the testator's will of the two mortgaged properties, intervened asking to be added as parties and allowed to defend. The upshot of this was that the first respondent came to terms with them and on October 24, 1951, an agreement was recorded in the proceedings under which the first respondent agreed to release the properties from the mortgage, not to ask for any hypothecary decree in respect of them and in no event to go against those properties for execution of the decree she was proposing to obtain. In exchange the interveners undertook what prima facie seemed to be the smaller sacrifice of withdrawing any objection to decree being entered against the administrator, on the first respondent satisfying the court as to the amount due on the mortgage.

No explanation was ever given in the course of these proceedings as to why the first respondent entered into such an unusual transaction, which denuded the estate she represented of the security which it had held for 16 years, or why the second respondent, as administrator, expressed no views about a transaction to which he could hardly have been indifferent. According to the evidence given at the trial, each of the two properties was worth about Rs. 50,000, so the holder of the mortgage bond had been amply secured at the date of the release.

However that might be, the action went ahead on that basis, the first respondent filed an affidavit proving her debt as claimed, the second respondent did not appear, and on December 7, 1951, the District Court made an order sanctioning the agreed release of the two properties as well as the earlier release of the two other properties originally subject to the mortgage and decreed that the second respondent should pay to the first the sum of Rs. 45,431, together with interest on Rs. 23,522/97 at the rate of 8 per centum per annum from November 22, 1949, to the date of the order and thereafter on the aggregate amount of the decree at 5 per centum per annum until payment in full.

The next thing that happened was the issue of a writ of execution addressed to the fiscal of the Western Province directing him to levy upon the "houses, lands, goods, debts and credits" of the administrator for satisfaction of the decree debt. It was not now necessary to inquire whether this could in any event extend to assets that had long passed out of the estate. It did at any rate result in the seizure of the disputed land and this brought the present appellants into the affair, for the first and second appellants were then in possession of it by virtue of a transfer made to them by their mother, Zubaida, who herself had received it in 1941 as a provision made on her marriage by her brother Mohamed Ghouse. The third appellant appeared as their guardian ad litem. They applied to the court to have the property released from seizure and their claim was upheld. Thereupon the first respondent started the present proceedings praying that the disputed property should be declared liable to be sold in execution of the money decree which had been made against the estate on December 7, 1951. The action was dismissed by the District Court (G. M. de Silva D.J.) on July 5, 1954, the judge holding that "the plaintiff, having released the "mortgage property, cannot now seek to sell the land seized "which has vested in the third and fourth defendants." This judgment was reversed on appeal by the Supreme Court (Basnayake C.J. and Pulle J.) on December 4, 1957, the judges holding that nothing had occurred to prevent the first respondent from executing her decree against the appellants' property.

1961. March 22, 23, 27, 28. *Walter Jayawardena* and *Dick Taverne* for the appellants. The first submission is that the money decree obtained by first respondent on December 7, 1951, in her action to enforce the mortgage bond is bad because there was no proper defendant in the action, since the secretary, Mr. Palliyaguru, had not received letters of administration and did not therefore represent the estate. Mr. Palliyaguru was merely "substituted" in place of the secretary who had retired; that is not sufficient; the District Judge had to appoint him. [Sections 520, 521, 532–534, 538 and 540 of the Ceylon Code of Civil Procedure were referred to.] The appointment of a secretary does involve a limitation on the period for which the appointment is to be made (s. 540); so the appointment has to be made each time the secretary vacates office. Basnayake C.J. in *Ladamuttu Pillai* v. *Attorney-General* [1] took the same view as was taken in the present case in which *Samarasekera* v. *Secretary, District Court* [2] was relied on, where it was said that the secretary possesses "all such attributes of a corporation sole as are necessary "for the proper discharge of his functions qua administrator." *Ladamuttu Pillai's* case,[3] however, was upset on appeal.[4] The secretary is not a corporation sole in the true sense of the term. There is no section in the Civil Procedure Code which expressly or by necessary implication creates him a corporation. The person who takes the appointment as administrator by the bond binds himself, his heirs and executors, and not his successors. Two cases with regard to the position of secretaries which were not considered in the court below and which have a bearing on the matter now for decision are *Lewis* v. *Ukkua Dureya* [5] and *Moldrich* v. *Cornelis*.[6] Even if the secretary is regarded as having a succession for the purposes of enforcement, he cannot be regarded as a corporation sole continuing for the purpose of entering into an obligation under a bond. The implication in *Moldrich* v. *Cornelis* [6] is entirely in these appellants' favour. The secretary's personal estate would be liable for default—he holds the appointment qua secretary. One may have a corporation for a particular

[1] (1957) 59 N.L.R. 313.

[2] (1949) 51 N.L.R. 90, 93.

[3] 59 N.L.R. 313.

[4] [1960] A.C. 854; [1960] 3 W.L.R. 626.

[5] (1908) 11 N.L.R. 33.

[6] (1910) 14 N.L.R. 97, 100.

limited purpose: *Gilleghan* v. *Minister of Health*.[7] So here, the secretary could be a corporation sole for a particular purpose of enforcement. There are certain forms of incorporation in England and in Ceylon, and here they have not been used. The secretary not being a corporation sole, there was therefore no proper defendant in the action against whom a money decree could be passed.

The second and main point in the case is whether a person like the first respondent here can follow the property into the hands of the devisee and the persons to whom it has passed from him. This raises a question of Roman-Dutch law with regard to the rights of legatees, and also raises questions of English law because it is essentially a question of administration. Here the testator's son gifted the devised land to his own son, who passed on the title to his sister on her marriage, and from her it went to her daughters, the appellants. English law on this matter appears to be introduced into Ceylon, and it is conceded that if there is a judgment against an estate one may follow the assets constituting part of the estate which have gone out of the estate in the sense that they have become vested in legatees—that one may take those assets to satisfy the debt—provided that there is no equity which prevents that being done. As to the introduction of English law in Ceylon, see *Staples* v. *De Saram* [8]; see also *Gavin* v. *Hadden*,[9] which is also of direct relevance to the present case on the merits. The rights of legatees, however, are distinct from the law of administration, and there is no reason why the rights of legatees should not be recognised by Roman-Dutch law; *Silva* v. *Silva* [10] shows that the rights of the heirs are to be determined by Roman-Dutch law.

The next question is whether this equitable right, such as it is, to go against the property in the hands of the appellants can be enforced in an ordinary action and not in a section 247 action. [*Sir Frank Soskice Q.C.* (for the first respondent) intervened to object that this point was not argued in either court below and that the formal reasons of the appellants were not consistent with it.] [Reference was made to Williams on Executors and Administrators, 14th ed. (1960), ss. 1169, 1194, to *Ministry of Health* v. *Simpson*,[11] and to sections 244, 245 and 247 of the Civil

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[7] [1932] 1 Ch. 86, 94; 47 T.L.R. 439.

[8] Ramanathan (1863–68) 265.

[9] (1871) 8 Moo.P.C.N.S. 90, 122.

[10] (1907) 10 N.L.R. 234, 239, 241–242.

[11] [1951] A.C. 251, 265; 66 T.L.R. (Pt. 2) 1015, H.L.

Procedure Code.] The only case in which property not the property of the judgment debtor has been made the subject-matter of a section 247 action is *Ladamuttu Pillai's* case.[12] The question was decided by a majority in favour of the judgment creditor. The title of the appellants here is defeasible, but until defeated it is in them. The equitable remedy is not available in this action, and the appeal should be allowed.

Sir Frank Soskice Q.C. and *Mervyn Heald* for the first respondent. First, on the question whether the action was properly brought against the secretary of the court—whether he was an administrator or not—it is submitted that the procedure was in fact properly carried out and there was an appointment of Mr. Palliyaguru even if it cannot be submitted that the appointment under section 520 is of a legal persona. In the alternative, the sections beginning from section 518, particularly section 520, do provide for the appointment of a legal persona who is an occupant from time to time of the office of secretary of the court. If that is right, the result is that Mr. Palliyaguru was the administrator. Reliance is placed on *Samarasekera* v. *Secretary, District Court*[13]; there is no provision for the termination of the appointment of any individual. The effect of section 520 of the Code is that it is the secretary of the court for the time being, notwithstanding changes, who is the person who admittedly becomes the administrator. Form 90 in the First Schedule authorises the making of a bond in favour of the secretary of the court for the time being, and that involves that section 520 is making the secretary for that purpose a continuing legal persona. [*Moldrich* v. *Cornelis*[14] was referred to.] The secretary is to be looked at as a continuing artificial person for the purposes of the administration as a whole. Section 520 means that each secretary steps into the shoes of his predecessor. It is not conceded that each occupant of the office has to execute a fresh bond—the bond binds the successors. [Reference was made to *Gavin* v. *Hadden*.[15]] In the argument in *Land Commissioner* v. *Pillai*[16] the need for property to be vested was given as a test of a corporation sole. That test is satisfied here—the secretary is an artificial person for a special purpose and the property is vested in him for that purpose. The appointment does continue from secretary to secretary.

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[12] 59 N.L.R. 313, 322.

[13] 51 N.L.R. 90.

[14] 14 N.L.R. 97, 98.

[15] 8 Moo.P.C.N.S. 90, 117.

[16] [1960] A.C. 854, 868.

With regard to the equity point, it was conceded that, notwithstanding the conveyance to himself by the executor and the subsequent transfers, the creditor has a right to follow the property subject to any equity intervening. There is no foundation whatever for the contention that either of the appellants was entitled to succeed in equity. In the first place, there is no equity against the first respondent created simply by the statement of the facts—merely to release a charge and to ask for a judgment is not something which is necessarily inequitable. The first respondent has not by anything which she has done created an equity against herself. Mere delay is not enough; there must be something which goes beyond it and amounts to laches or acquiescence and that sort of thing. The only thing that is said against this respondent in the judgment of the District Judge is that she released properties on which she had a charge and therefore there is an equity against her. The fact of having a charge and releasing it does not raise an equity against her which prevents her from using a personal covenant and going against the property in the hands of the legatee: *Harrison* v. *Kirk* [17]—it is sought to tie up what was there said with the law of Ceylon by reference to *Gavin's* case [18]; it is agreed that that does not go to following it into the hands of legatees.

The Ceylon law on this matter is in effect the same as English law. How equity has been developed appears from *Dilkes* v. *Broadmead*,[19] *Ridgway* v. *Newstead*,[20] *Blake* v. *Gale* [21] and *In re Eustace*, *Lee* v. *McMillan*.[22] Devisees take the property subject to the creditor's right to the charge on it; unless he debars himself by equity the court will exercise its discretion in his favour, and the legatees take subject to the right of the creditor. Here when the first respondent released the mortgaged property it was still property in the estate, and she directed her attention to other properties in the estate. Nothing in the nature of laches can be pointed to—from beginning to end there is no conduct which can be said to have created an equity against her. [Reference was made to Williams on Executors and Administrators, 14th ed., p. 860, para. 1344.] *Dilkes* v. *Broadmead* [23] would appear to be against this respondent, but the circumstances of the two cases can be distinguished; that case is authority for no more than that in the case of property being settled upon marriage if it goes direct from the testator to the person whom he marries, then it is exempt from the creditors; the decision does not go beyond that, and it should not be extended beyond what in terms it lays down. [Reference was also made to *Spackman* v. *Timbrell.*[24]]

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[17] [1904] A.C. 1, 7, H.L.

[18] 8 Moo.P.C.N.S. 90, 118.

[19] (1860) 2 Giff. 113.

[20] (1860) 2 Giff. 492.

[21] (1886) 32 Ch.D. 571, 578, C.A.

[22] [1912] 1 Ch. 561, 564, 565.

[23] 2 Giff. 113.

Jayawardena in reply. There is nothing in section 520 of the Code to show that the legislature intended that the secretary should be a continuing legal persona; he was to be responsible individually; section 538 does not compel one to hold that the secretary is made a legal persona. The appointment as administrator ceases when the secretary ceases to be an officer. [Reference was made to the argument in *Land Commissioner* v. *Pillai*[25] and to *Appuhamy* v. *Edwin.*[26]]

On the question of equity, the order of the District Court is supported by the English rules of equity applicable in Ceylon: *Blake* v. *Gale*[27]; *In re Eustace*[28]; *Ridgway* v. *Newstead*[29]; *Harrison* v. *Kirk.*[30]

May 8. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from a judgment and decree of the Supreme Court of Ceylon involves two points of law. One is a question of procedure relating to the status of a secretary of a District Court when he is appointed administrator cum testamento annexo under section 520 of the Civil Procedure Code. The other is a question of substantive law as to the equitable defences available to persons claiming through a testamentary devisee when their land is sought to be taken in execution by an unsatisfied creditor of the estate. The circumstances in which these two question arose must first be briefly related. [His Lordship stated the facts set out above and continued:] In the course of the argument before the Board the point was made by the appellants' counsel that these proceedings, which were said to be proceedings under section 247 of the Civil Procedure Code, were not within the range of action covered by that section, having regard to the fact that the property had already passed out of the estate and that if the action was to be treated as a mere pendant to the execution proceedings the appellants found themselves involved in an action in which a monetary decree had already passed, in their absence, against the estate, although they themselves would have desired to challenge the making of the decree itself. This point does not seem to have been raised in the courts in Ceylon and it is not noticed in any of the judgments given there. As the question it raises is essentially one as to the correct procedure under the local rules and their Lordships have no assistance on the point from the judges familiar with the practice, they do not propose to deal with it in this appeal. They will assume, without deciding, that the first respondent's action is not defective on that account.

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[24] (1837) 8 Sim. 253.
[25] [1960] A.C. 854, 868.
[26] (1951) 53 N.L.R. 515.
[27] 32 Ch.D. 571.
[28] [1912] 1 Ch. 561.
[29] 2 Giff. 492.
[30] [1904] A.C. 1, 7.

But was there ever a real defendant in the action against whom there could pass a monetary decree capable of binding the testator's estate? This is the first main point made by the appellants and it is by no means easy to say what is the correct answer to that question. The decree was obtained in proceedings against a defendant styled "The Secretary of the District Court "of Colombo, as administrator de bonis non of the estate and "effects of Hadjie Ibrahim Bin Ahmed deceased." Now the appellants say that Mr. Palliyaguru was not and could not be that defendant since, although for the time being the secretary of the District Court, he had not received letters of administration to the estate and could not therefore represent it: that under section 520 letters of administration could only issue to a secretary of the District Court as an individual person, and that there was no corporation sole constituted by the office which could be sued under the corporate name as distinct from the individual holders from time to time: and that, consequently, no person representing the estate had ever been made defendant in the action or had been effectively cited to appear in it.

It is necessary first to inquire what is the scheme established by the Civil Procedure Code under its chapter on testamentary actions in order to see how much support it would give to the appellants' argument that the letters can only issue to a secretary in his individual capacity. Section 520 itself says no more than that, when no fit and proper person otherwise appears, the court shall appoint the secretary of the court to be administrator cum testamento annexo. There is nothing said explicitly about successors to the office or the creation of a corporation sole. Section 538 prescribes certain general duties to be performed by (inter alios) all persons appointed administrator, without exception. They must take an oath in the form set out in the First Schedule, file an inventory and valuation of the estate, and enter into a bond with sureties, securing the due administration of the estate, which bond is to be in accordance with Form 90 in the Schedule. By virtue of section 521 the court, when it appoints its secretary as administrator, is precluded from dispensing with the giving of security, as under section 541 it has a limited power to do in other cases.

When reference is made to the forms prescribed in the Schedule it is seen that while Form 87 (Letters of Administration) and Form 88 (Oath) are neutral and would be as consonant with the appointment of a corporation sole as that of an individual, Form 90 (Security Bond) is irreconcilable with a bond entered into by a corporation, since it is expressed to bind the administrator and the sureties in the specified sums, "for which payment "we and each of us bind ourselves, our heirs, executors and "administrators." Any conclusive argument that is sought to be extracted from the form of the security bond, however, must take account of the fact that it is not merely irreconcilable with the conception of an administrator being a corporation sole: it is also irreconcilable with the idea of the secretary being administrator at all, since the prescribed form requires the bond to be entered into with "the Secretary of the District Court of —— "(or . . . the Secretary of the District Court for the time being)," and one can hardly suppose that the secretary, whether individual or corporate, was envisaged as offering security by himself to himself. This is only one of several indications that neither the scheme laid down by the relevant sections of the Code nor the prescribed forms have been framed to fit the special situation of a secretary of the court acting as administrator.

If at this stage one follows up the suggestion that the only admissible administrator is a secretary in his individual capacity, the practical consequences become so unworkable that it is virtually impossible to accept it. The first secretary to take the appointment must necessarily remain administrator until his death or the final winding up of the estate, since the Code provides no means by which the court can relieve him, once appointed, and transfer his duties to a new secretary. The only lawful power to recall or revoke a grant (section 536) is not applicable to such a case. Yet it is inevitable that secretaries will retire or be transferred to another district while administrations are still pending, and it is inconceivable that they are intended to remain charged with these duties, undertaken for the original court, after they have ceased to have any official contact with the office or the district.

It was argued for the appellants that the difficulty of this position could be met if section 540, which is styled "Power of "administrator when not limited," were to be read as impliedly sanctioning the appointment of individual secretaries for no longer period than their tenure of office as secretary of the court that appointed them. It was suggested that the opening words "If no limitation is expressed in the order making the grant . . ." could warrant the view that the mere naming of the secretary of the District Court in the grant amounted to a limitation in time for this purpose. But this argument can provide no solution and would in any case create more difficulties than it could solve. First, it is plain that section 540 does not carry the implication suggested but is the obverse of the immediately preceding section 539, styled "Limited probate and administration," a section which does enable the court in certain circumstances, though not circumstances that obtain here, to make limited grants in express terms. Section 540 merely says that, except and so far as there are such express limitations, an executor's or administrator's powers are to endure for his life or until final administration and to extend to the whole of the assets. Secondly, even if an administrator, though appointed individually, could drop out of his appointment upon leaving his post as secretary to the court, provisions, which are lacking, would be needed for determining the liability of his sureties and himself on his bond, which is unlimited, and for requiring him to bring in and pass the accounts of his administration up to the date of his retirement.

For these reasons their Lordships think that it is in effect impossible to treat a grant to the secretary of a District Court as if it were a grant to him in his individual capacity. Not much help is to be had from reference to the actual course that administration has taken in this case since no theory that is internally consistent seems to prevail. The first person to receive letters of administration was Mr. Culanthaivalu. They were issued to him in his own name but "as Secretary of the District "Court." He took the oath of office, and entered into a bond acknowledging that he was bound to himself, "Secretary of the "District Court of Colombo or to the Secretary of that court "for the time being," in the sum of Rs. 500, for which payment he bound himself and his heirs, executors and administrators. When he retired from the secretaryship, fresh letters were issued to his successor, Mr. Peiris, on the basis that there was an unadministered estate for him to succeed to as administrator de bonis non: yet there is not to be found in the Code of Civil

Procedure power for the court either to discharge an existing administrator or to appoint an administrator de bonis non except upon the death (not retirement) of a sole surviving administrator (section 549). Rightly or wrongly, Mr. Peiris then took a new oath and entered into a new bond, made on this occasion in favour of "N. Sinnetamby, District Judge of Colombo or ". . . the District Judge of Colombo for the time being," but again binding the giver of the bond, his heirs, executors and administrators.

When Mr. Peiris retired in his turn, no new letters were issued to Mr. Palliyaguru, nor did he take an oath or give a bond. The only official action which recognised him as administrator of the estate was an order made on July 7, 1949, in the testamentary proceedings directing him to be substituted for Mr. Peiris.

There is not much that can be said about the course of practice, which very likely follows the practice accepted from time to time, except that it is impossible to treat it as altogether consistent either with the idea that the secretary, when appointed by the court under section 520, is appointed in his individual capacity or with the idea that what is appointed is a corporation sole represented by the holder for the time being of the secretary's office. For, if the former, there was no way of getting rid of Mr. Culanthaivalu, the first holder, and no vacancy to which his successors could be appointed: and if the latter, there was no vacancy at any time and nothing to which either Mr. Peiris or Mr. Palliyaguru required appointment.

The change in procedure on the last occasion was no doubt due to a decision of the Supreme Court given in the same year, 1949, in the case of *Samarasekera* v. *Secretary of the District Court.*[1] In that case the court (Basnayake and Gratiaen JJ.) held that section 520 contemplated the appointment of the secretary of the court as such and not the individual who held the office of the secretary at the time of the appointment. Letters of administration in such cases should, in their view, be addressed to the secretary of the court and not to the current holder by name, and a change of the individuals holding the office would not affect the appointment once made. The sum of their judgment was expressed in their holding that the Civil Procedure Code intended the secretary of the court to possess[2] "all such "attributes of a corporation sole as are necessary for the proper "discharge of his functions qua administrator."

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[1] (1949) 51 N.L.R. 90.

[2] Ibid. 93.

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Their Lordships accept this as a correct proposition. Despite the difficulties created by the wording of certain sections and of the prescribed forms, they think that, having regard to the functions to be performed by the secretary of the District Court and the evident intention that his office should carry a continuing responsibility for the property to be administered, it must have been intended that the Code should create the holder of the office a corporation sole for this purpose. Even if their Lordships did not think that this was the preferable conclusion, they would find themselves very reluctant indeed to overrule a decision of this kind which has now stood for 12 years and upon the strength of which many judgments and orders must have been made in the course of testamentary proceedings.

For these reasons the appellants' first argument fails. There was a proper defendant before the court in the mortgage proceedings and Mr. Palliyaguru did not require a grant of letters of administration for himself.

It must, however, be pointed out that the judgment of the Supreme Court in *Samarasekera's* case[3] has not disposed of several difficulties which still attend the reconciliation of the requirements of the Civil Procedure Code with the responsibilities of the secretary of the court as administrator. If it is a corporation sole which is appointed in the first instance, what is the correct form of security to be offered by that corporation? The provision of proper security is of the first importance when the assets of an estate are entrusted to the hands of a stranger. The Supreme Court themselves said in their judgment in that case that Form No. 90 was inappropriate to a secretary administrator: but neither there nor in their judgment in the present case, where they seem to have followed the same principle, did they indicate what should be done to ensure that proper security is at all times available. Should the secretary in office when the appointment is made give a bond for the office binding himself and his successors, and, if so, out of what funds, public or private, should the penalty be exacted if there should be devastavit? And, again, is there to be indemnity at the public expense if the corporation sole commits devastavit? It does not seem satisfactory that the estate should be secured by the mere personal bond of the secretary in his individual capacity. And what should be the form of oath appropriate to the corporation sole, and should a new oath be required from each new holder? Their

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[3] 51 N.L.R. 90.

Lordships must earnestly commend these questions to the attention of the authorities in Ceylon, for the present position calls for immediate review and it looks as if it may be necessary to produce new statutory forms and even, possibly, new statutory provisions if a complete scheme is to be provided.

Turning now to the appellants' second ground of appeal, their Lordships are of opinion that the decision of the Supreme Court ought not to stand. It is quite true that as a general rule a secured creditor of an estate is entitled to decline to rely on his security and to claim payment out of the estate as a whole; though it must be remembered that if he does so his action releases the secured property into the general pool of assets and the creditor does not make a side deal, as was done here, with the specific devisees of the land subject to the mortgage with the intention of exempting their property from any contribution at all towards the satisfaction of his debt. It is quite true, too, that an unsatisfied creditor is entitled to follow assets of the estate into the hands of devisees or legatees and those claiming through them for the purpose of obtaining payment: but this right of following is fundamentally an equitable right. As such it is liable to be lost by laches and acquiescence on the part of the creditor or by other conduct which raises an equity against him (see *Ridgway* v *Newstead* [4]), or it may be defeated by a sale by the devisee to a purchaser for value without notice or by a transfer from the devisee to someone who takes in consideration of marriage (see *Dilkes* v. *Broadmead*,[5] *Spackman* v. *Timbrell* [6]). In such cases the marriage consideration is as effective a bar as a purchase for value without notice, and this should be so, since the property is transferred as provision for an alteration of status which is in its nature irrevocable. From this aspect the decision in the case of *Theodoris Fernando* v. *W. L. Roslin Fernando*,[7] the correctness of which was doubted by the Supreme Court, must be regarded as unexceptionable. Nor is the creditor affected to his prejudice by these rules; for, while he cannot follow the property against the purchaser, he can follow the purchase price in the hands of the devisee and, if there has been a transfer in consideration of marriage, he can claim as assets from the transferor the value equivalent to that which has been transferred.

These general principles of equity are in their Lordships' opinion fully applicable to the administration of a deceased's

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[4] (1860) 2 Giff. 492.

[5] (1860) 2 Giff. 113

[6] (1837) 8 Sim. 253.

[7] (1902) 2 Browne 277.

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estate in Ceylon (see *Staples* v. *De Saram*,[8] *Gavin* v. *Hadden*[9]). If they are applied to the circumstances of the present case, it must result that the disputed land is not liable to be seized to satisfy the first respondent's decree. The first and second appellants derive title to it through their mother and she took it from her brother in consideration of marriage, "a dowry or marriage "gift absolute and irrevocable," as it is described in his deed of December 21, 1941. The transfer on marriage blocks the first respondent's claim. Even if this was not enough in itself, the defence is strongly reinforced by the other circumstances of the case. The mortgagee stood by while administration was proceeding during all the years until 1949, ostensibly in possession of an ample security and without making any call for payment off of the mortgage moneys. This alone would not be prejudicial; but if, when at length proceedings are taken, the mortgagee deliberately denudes herself of her security, apparently with the intention of favouring the devisees of the land subject to the mortgage at the expense of other devisees, she has only herself to blame if she finds that her rights against other devised property are not so far-reaching as she may have wished to suppose. It is not that in the absence of evidence the court will impute to the first respondent bad faith in the making of the arrangement that she made in the course of the mortgage action; but it is that, if such an arrangement is made, without explanation, at the time and in the circumstances that prevailed here, the creditor's equity to follow assets after they have passed from the hands of the executor may find itself destroyed by the mere situation that the creditor's own choice has brought about.

For the reasons that have been set out their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the judgment and decree of the District Court of Colombo dated July 5, 1954, dismissing the first respondent's action with costs should be restored, and that the judgment and decree of the Supreme Court dated December 4, 1957, should be reversed, and that in lieu thereof the first respondent should be ordered to pay the appellants' costs of the hearing before that court. The first respondent must also pay the appellants' costs of this appeal.

Solicitors: *Charles Russell & Co.; Lee & Pembertons.*

C. C.

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[8] Ramanathan (1863-68) 265.

[9] (1871) 8 Moo.P.C.N.S. 90.

VICTORINE ROBERTS AND ANOTHER . . APPELLANTS; J. C.*

AND 1961

LETTER "T" ESTATES LTD. AND OTHERS RESPONDENTS. *June* 8.

ON APPEAL FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES.

Company — Shares — Sale — Private company — Articles restricting transfer of shares to members—To be offered to members by "any "person (not a member [or close relative] of a member) becoming "entitled to shares" on death of a member—Executor a "person "becoming entitled to shares"—Executor himself a member—Exempted from obligation to offer deceased's shares to members—Procedure to be followed.

West Indies—British Guiana—Company—Private—Restriction of sale of shares to members—Position and duty of executor member.

A testatrix, who died holding shares in a private company incorporated under the laws of British Guiana, by her will gave to each of the two appellants a specific legacy of 121 shares in the company. The executor of her will was registered as a member as nominee of the testatrix in respect of 10 of those shares. Article 25 of the company's articles of association provided that the executors or other legal representatives of a deceased member should be the only persons recognised by the company as having any title to the shares of such member, and by article 15: "Any person (not a "member or the son, daughter [or specified close relative] of a mem"ber) becoming entitled to shares in consequence of the death of "any member, shall, within three months . . . offer the shares to "members . . ." at the fair value. On a summons taken out by the executor for directions whether he should transfer the 242 shares to the two legatees or to three member shareholders who wished to purchase them:—

Held, (1) that the words in article 15 "any person . . . becoming "entitled to shares in consequence of the death of any member" designated not the two legatees (who only became entitled to the beneficial interest) but the executor, who became entitled to the legal interest, and must be recognised by the company as being entitled on behalf of the estate even though his name had not been entered on the register in respect of the shares of the testatrix.

Llewellyn v. *Kasintoe Rubber Estates Ltd.* [1914] 2 Ch. 670; 30 T.L.R. 683, C.A. considered.

(2) That the words in parenthesis in article 15 "any person (not "a member, etc.)" must mean "not himself being a member, etc.," and since the executor fell within the words "any person" and was himself a registered member (in respect of the 10 shares as nominee) he was within the exception contained in the parenthesis and was

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* *Present*: LORD TUCKER, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

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not bound under article 15 to offer the 242 shares to members. The fact that he was only nominee of the 10 shares did not affect the matter. Article 15 was, accordingly, inapplicable.

(3) That the executor's safer course would be to give notice to the company under article 9 that he desired to transfer the shares and then make the company (under that article) " his agent for the " sale of the shares to any member or to any person selected by " the directors . . . at the fair value." He was not bound to transfer the shares to the appellants or to the three members who wished to purchase them, and he could choose the time he thought best to obtain the " fair value " and was not bound by the three months in article 15.

Judgment of the Federal Supreme Court of the West Indies set aside.

APPEAL (No. 43 of 1958) from a judgment of the Federal Supreme Court of the West Indies (July 4, 1958) allowing an appeal from a judgment of the Supreme Court of British Guiana (August 8, 1957).

The following facts are taken from the judgment of the Judicial Committee: This case concerned the difficulties which had arisen in administering the estate of Miss Sophia Musterd, and particularly what was to be done about the controlling interest which she held in a private company incorporated under the laws of British Guiana called " Letter ' T ' Estates Limited " (hereinafter called " the company "). The judges in the West Indies gave directions with which the legatees under her will were dissatisfied and they appealed to Her Majesty in Council.

The company owned plantations in British Guiana. The shares were held as follows:

Sophia Musterd – – – – – –	222 shares
Stanley Heald – – – – – –	10 shares
J. C. Falconer – – – – – –	10 shares
Jessica Watt – – – – – –	80 shares
Ella Jeannie Mearns – – – – –	81 shares
Greta Enid Mearns – – – – –	70 shares
Greta Enid Mearns and M. M. Smith jointly –	10 shares
	483 shares

Heald and Falconer were only nominees of their 10 shares each for Sophia Musterd. So she owned beneficially 242 out of 483 shares. On October 19, 1956, Sophia Musterd died leaving a will in which she appointed Stanley Heald to be the executor of her will and, after several other specific legacies, gave these two specific legacies to her maid and her chauffeur (hereinafter called "the two legatees"):

"I bequeath to Victorine Roberts, my maid for long and "faithful years of constant service, 121 of my shares in 'Letter "'"T" Estates Limited,' also my new side-board, the wardrobe "with the mirror, and all of my china wares, dinner set, glasses "and silver.

"I bequeath to Oscar Edmond James, my chauffeur, for the "invaluable help he gave to me on the estate, the other 121 of "my shares in 'Letter "T" Estates Limited' also my writing "desk and typewriter."

On November 28, 1956, a firm of chartered accountants valued the shares as at October 19, 1956, when Miss Musterd died, at $410 a share. On January 9, 1957, this valuation was filed with the estate duty papers for purposes of probate.

On January 25, 1957, probate was granted to the executor, Heald, and the estate was sworn at nearly $300,000. It was ample to provide for all the debts and to enable the specific legacies to be paid in full. The executor was not in a position, however, to transfer the shares to the legatees because the articles of association of the company contained restrictions on transfer and gave rights of pre-emption to existing members. Hence the difficulties that had arisen.

Under the articles of association of the company Heald, the executor, was the only person entitled to the shares which stood in the name of Miss Musterd. Article 25 said that "The heirs, "executors or administrators or other the legal representatives "of a deceased member . . . shall be the only persons recognised "by the company as having any title to the shares registered in "the name of such member."

Heald thought that under the articles he was bound to offer the shares to the other shareholders at the fair value. Article 15 said that "Any person (not a member or the son, daughter, "grandson, granddaughter, or other issue, brother, sister, husband "or wife, nephew or niece, of a member) becoming entitled to "shares in consequence of the death of any member, shall within "three months after his so becoming entitled, offer the shares to "members or, in default of members, to persons selected by the "directors . . . and the purchaser of such shares shall be entitled, "without making any payment therefor, except the fair value and "costs of transfer, to all the shares held by such deceased "person."

Thinking himself bound by article 15, Heald on February 7, 1957, wrote this letter to the secretary of the company offering the shares:

"I hereby give you notice that I desire, pursuant to "article 25 to transfer the shares in Letter 'T' Estates Limited "left by Miss Sophia Musterd deceased in her will, and to comply "with article 15 of the articles of association of the company.

"Will you please let me know as soon as possible if the "members, or, in default of members, the persons selected by "the directors, are willing to purchase the shares.

"The fair value of the 242 shares, as you know, has been "fixed at $410 each share and I shall require payment of the sum "of $99,220.00 before transferring the shares to whoever may "purchase same.

"Yours faithfully,
"Estate Sophia Musterd, deceased.
"S. Heald, Executor."

On February 22, 1957, the secretary of the company replied to the executor and said that three of the shareholders, Jessica Watt, E. J. Mearns and G. E. Mearns (hereinafter called "the three shareholders") would take up the shares. He said:

"I have just been notified by Messrs. Cameron and Shepherd "that their clients, as listed hereunder, have accepted the offers "made to them and will take the number of shares set against "their individual names:

"Mrs. Watt will take – – – – – 101 shares
"Mrs. E. J. Mearns will take – – – 81 shares
"Mrs. G. E. Mearns will take – – – 60 shares

242 shares

"Messrs. Cameron and Shepherd also state that their other "clients, Mrs. G. Mearns and Mr. M. Smith, are not in a "position to take up their proportion of the shares offered.

"I shall be glad, therefore, if you as executor of the estate "of Sophia Musterd, deceased, and her nominees will execute "transfers of the above shares in favour of the above-named "persons and forward them to Cameron and Shepherd for "completion. On receipt of these transfers they will forward a "cheque for $99,220 in payment."

On March 5, 1957, the three shareholders deposited the sum of $99,220 with the company: but instead of complying with their request for a transfer to them, the executor decided to safeguard himself by applying to the court for directions, as he was entitled to do under section 45 of the Supreme Court Ordinance.

On March 11, 1957, the executor, Heald, took out a summons asking the court to give directions whether he should transfer the 242 shares to the three shareholders or to the two legatees or "make and give such directions as the court may deem fit." He served this summons on the company and the two legatees but not on the three shareholders. On August 8, 1957, the Supreme Court of British Guiana (Miller J.) ordered the executor to execute transfers of the 242 shares to the two legatees. The company appealed and an order was made giving leave to the three shareholders to join in the appeal. On July 4, 1958, the Federal Supreme Court of the West Indies (Hallinan C.J., Rennie J., with Archer J. dissenting in part) reversed the decision of Miller J. and ordered the two legatees to comply with article 15 of the company's articles and to make the offer required by it. This meant, in effect, that the two legatees had to offer the 242 shares to the shareholders. There was a difference between the judges as to the time when the fair value of the shares should be ascertained. Hallinan C.J. and Rennie J. thought that it should be the highest value during the three months after Miss Musterd's death, i.e., between October 19, 1956, and January 19, 1957; Archer J. thought it should be their value on February 7, 1957.

The two legatees now appealed to Her Majesty in Council.

1961. April 18, 19. *E. F. N. Gratiaen Q.C.* (Ceylon) and *Neil Elles* for the appellants. Article 15 did not compel the executor to make an offer within a fixed period of time. He, as the person legally entitled to the shares—the appellants being beneficially entitled to them—was under a duty as executor to select in regard to their interests a proper time for making the offer. The Federal Supreme Court said that the appellants were the people who had to offer the shares. [Reference was made to the Companies Ordinance of British Guiana, c. 328 (vol. VI of the Laws of British Guiana, 1953), ss. 15 (1), 27 and 29, and to the relevant articles of association of the company.] Under the Ordinance the articles undoubtedly bind the executor whether he is registered as a member or not in respect of the particular shares left by the deceased person. Being specific legatees, the appellants, although they had the beneficial interest in the shares and it is the duty of the executor in relation to those shares to protect their interests, are not members of the company and are not bound by the articles of association. They would at best have the hope of claiming a transfer if, and after, an appropriate offer made by the executor has not been accepted. Under article 9 he has the option of transferring them even though not registered as a member.

The only question is whether article 15 obliged the company and the executor, whether he desired to do so or not, to act under that article within three months from the date of entitlement. There was no obligation here to act under article 15 because, although the executor was a person entitled to the shares, he was in fact a member of the company. The obligation to make the offer within three months applies only to a person who is not a member or close relative of a member.

The practical problem is whether the appellants are compelled to accept a sum of money representing fair value and interest. The only person who can make a valid offer is the person who is legally entitled to the shares, and he, under article 25, is the executor. Article 15 cannot impose any obligation on a person who is merely beneficially entitled. It would be completely rewriting article 15 to uphold the meaning suggested by the company: *Grundt* v. *Great Boulder Proprietary Mines Ltd.*[1] As to "Any person . . . becoming entitled to shares in consequence of "the death of any member," it was rightly assumed in *In re T. H. Saunders & Co. Ltd.*[2] that the executors alone were the persons entitled to the shares. Once that is conceded, then, for the purpose of deciding whether article 15 imposes any obligation or not, it has to be determined whether the executor has the personal qualification of being a member or not, and here he was a member. He should now exercise the option under article 26 of proceeding to transfer in accordance with the regulations, and make a voluntary offer under article 9.

The judgments of both Miller J. and of the Federal Supreme Court should be set aside. No direction should be made that the executor should transfer the shares to the three respondent shareholders. Article 15 has no application so as to bind the appellants or the executor to comply with its terms in relation to the shares. Except as provided by article 16, article 9 applies in any case in which any person, including a member, proposes to transfer any shares to anyone. No contract was entered into between the executor and the three respondent shareholders to sell any shares.

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[1] [1948] Ch. 145, 158–160; [1948] 1 All E.R. 21, C.A.

[2] [1908] 1 Ch. 415, 422; 24 T.L.R. 263.

P. S. A. Rossdale for the respondent company. The company's interests in this litigation are of a quasi-fiduciary nature; they are (1) to see that the conditions of its articles are duly observed, and (2) to make submissions as to the true construction of the articles. The issues in *Lyle & Scott Ltd.* v. *Scott's Trustees* [3] were very similar to those here. The company say, first, that they are content if the Board thinks it proper to direct a transfer under articles 8 and 9. [Reference was made to Buckley on the Companies Acts, 13th ed., p. 176.] Secondly, if the Board direct article 15 to operate, then the company say that it must be operated according to its tenor. The same initial phrase, "Any person . . . becoming entitled to shares in consequence of the death of any member," occurs in the English Table A, art. 30 (Buckley, p. 818), and has been considered in *Llewellyn* v. *Kasintoe Rubber Estates Ltd.*[4] Something must be read into article 15, such as "any person (not being a person holding in trust for a member, or the son, etc., of a member)" to give it efficacy. There appears to be no authority on the construction of an article drawn as this is. The general principle is to construe articles of association ut res magis valeat: see *Holmes* v. *Keyes* [5]; the same principle was applied by Vaisey J. in very different circumstances in *Rayfield* v. *Hands.*[6] The *Lyle & Scott* case [7] is authority that the company is entitled to enforce the various provisions of the articles.

The company submits that no order should be made on this appeal which would restrict the exercise by the directors of the company of their power of refusing to register the transfer of any shares conferred by article 17 of its articles of association, and submits to act in all respects as the Board may direct.

Ralph Instone for the three respondent shareholders. There is nothing on the true construction of these articles which affects the transfer of shares from one member to other members. The executor was not in fact bound by article 15, which is irrelevant to this case. An effective and binding contract subsists between the executor and these respondents for the sale of the testatrix's shares at $410 a share; it is not at variance with the company's articles. Mr. Gratiaen's argument on article 15 is adopted. Articles 7, 25 and 26 are relied on. Article 15 should not be construed in a way which frustrates article 7. The construction of article 15 contended for is supported by *Llewellyn's* case [8]—the locus classicus on this matter. It is quite clear that Astbury J. in that case in talking about "any person, etc.," is referring to the executor and nobody else.

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[3] [1959] A.C. 763, 787; [1959] 3 W.L.R. 133; [1959] 2 All E.R. 661, H.L.

[4] [1914] 2 Ch. 670, 672, 682–683; 30 T.L.R. 683, C.A.

[5] [1959] Ch. 199, 215; [1958] 2 W.L.R. 772; [1958] 2 All E.R. 129, C.A.

[6] [1960] Ch. 1, 4; [1958] 2 W.L.R. 851; [1958] 2 All E.R. 194.

[7] [1959] A.C. 763.

The only right of transfer conferred on an executor is conferred by article 26. Once article 15 is out of the way the position is that of somebody who is (a) a member, and (b) by virtue of article 26 is the right member to transfer the shares. There is no restriction on the transfer of the shares under article 17. As to the joint effect of articles 8 and 9, see *Delavenne* v. *Broadhurst.*[9] So here, article 9 is mere machinery. This is a case where the executor has absolutely unfettered rights under the articles to transfer the shares to existing members.

Undoubtedly the executor thought that he was bound by article 15; but he desired to transfer, and there was a contract by correspondence, and these respondents are ready and willing to give effect to their contract. The executor ought to be directed to transfer the 242 shares to these shareholders respectively in the proportions specified in the letter of February 22, 1957, against payment of the price. It is not appropriate in these proceedings for the Board to go further and direct him to account to the beneficiaries for the price. If there is no contract, these respondents have no case. The only question raised in these proceedings is whether the legatees or the shareholders are the persons to whom the shares ought to be transferred; that question arises in the course of the administration of the estate of the testatrix and the costs of determining the question ought to be borne by the estate or alternatively by the legatees.

Peter Curry for the respondent executor. The executor submits to be bound by such order as the Board may make. His position is that if the Board decide that article 15 does not apply because the executor is a member, then he was wrong in his interpretation in attempting to transfer pursuant to that article. It would be unfortunate if the Board were to decide, without the full evidence, that there was here an offer and acceptance; there is no contract because, first, the executor was under a mistake, and so were the company and the shareholders, and, secondly, because there is no sufficient evidence of it.

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[8] [1914] 2 Ch. 670, 674, 679.

[9] [1931] 1 Ch. 234, 239.

There should be a declaration that article 15 does not apply, and that no binding contract has been entered into by the executor with the three respondent shareholders. That will be a very satisfactory conclusion, because at that stage the executor can take such advice and instructions as he requires and can apply to the court, if necessary, with all the relevant facts as to whether or not he should apply to be registered himself or should transfer the shares at a fair value. It would be an offer by him under article 9. The order asked for can be made on the summons as framed and would involve that the decisions of the two courts below which, it is submitted, are on a wrong basis of law, should be set aside. The executor's application was perfectly proper and, indeed, the only course he could adopt, and the parties to it were proper parties in a complex matter: *In re Buckton.*[10] The costs should be borne by the estate as a whole, but it would be argued that since the subject-matter of the application was the shares, the costs should be borne out of them and not by beneficiaries having no concern therewith.

Gratiaen Q.C. in reply. Article 15 has no application. Secondly, no direction should be given for the transfer to the legatees. As to the suggested transfer to the three shareholders on the footing that there was a binding contract for an agreed price completely outside the articles of association, a direction on that new basis should be refused because this relief was asked for for the first time before the Board, and in accordance with established practice the Board should not now entertain it. But in any case no direction should be given on the footing of a voluntary contract, for there is no evidence that anyone contemplated such a position.

Article 9 applies to any proposed transfer by any member or executor to any person. If the executor decides that it is in the interests of all concerned to transfer the shares, the Board might be disposed to give a direction that he should resort to article 9. *Delavenne* v. *Broadhurst,*[11] on which Mr. Instone relied, is very different from this case. The costs should come out of the general estate.

June 8. The judgment of their Lordships was given by LORD DENNING, who stated the facts set out above and continued:

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[10] [1907] 2 Ch. 406, 414; 23 T.L.R. 692.

[11] [1931] 1 Ch. 234.

Their Lordships have had the benefit of a much fuller argument than was put before the courts in the West Indies and in the result no one of the counsel sought to support either the order made by the Supreme Court of British Guiana or the order of the Federal Supreme Court of the West Indies.

At the hearing before their Lordships the principal issue was between the two legatees and the three shareholders. The three shareholders said that the executor was under a binding contract, evinced by the letters of February 7 and 22, 1951, to transfer the 242 shares to them at the price of 410 dollars per share. The two legatees said that the executor was under no such obligation. The executor, they said, was never under an obligation under article 15 to offer the shares to the members within three months after becoming entitled to them. He was at liberty to transfer the shares at a later date: and, as the shares had risen in value, he ought to sell them at a much higher value than 410 dollars a share and pay over the proceeds to the two legatees.

In order to determine this issue and give appropriate directions to the executor, their Lordships think it necessary first to construe article 15. The first question is, who is the person designated by the substantive words in article 15 " any person . . . becoming " entitled to shares in consequence of the death of any " member " ? The majority of the Federal Supreme Court (Hallinan C.J. and Rennie J.) thought that the words mean a person becoming entitled to the beneficial interest in the deceased's shares. That is, in this case, the two legatees. Their Lordships do not share this view. It seems to them that the words designate, in this case, the executor (who becomes entitled to the legal interest) and not the two legatees (who only become entitled to the beneficial interest). The executor is the only person recognised by the company as having any title to the shares which were registered in the name of Miss Musterd, see article 25. He must be recognised by the company as being entitled on behalf of the estate, even though his name has not been entered on the register, see *Llewellyn* v. *Kasintoe Rubber Estates*.[1] The company are not bound by, and may not recognise, any equitable, contingent, future or partial interest, see article 7. This view was accepted by all the counsel who appeared before their Lordships: and it means that the words " any person " designate the executor.

The words in parenthesis in article 15 "(not a member or the

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[1] [1914] 2 Ch. 670; 30 T.L.R. 683, C.A.

"son, daughter [et ceteros] of a member)" are troublesome. The intention of the parenthesis was probably to ensure that a deceased member could leave his share by will to another member or to a close relative and, in that event, the shares would not have to be sold. But if that were the intention, their Lordships find that the draftsman has not succeeded in carrying it out. Once it is held, as their Lordships think it must be, that "any "person" designates the executor, then the words in parenthesis must mean "not himself being a member or the son, daughter, "etc. of a member." This view was accepted by counsel for the two legatees and for the three shareholders, and for the executor, but not by counsel for the company. He invited their Lordships to insert several words into the parenthesis so as to read "not "*being a person who holds on trust for* a member or the son, "daughter et ceteros of a member." Their Lordships see no sufficient reason for introducing these words. It would be difficult to do so consistently with the established principle that a company takes no notice of trusts of its shares, which is embodied in section 27 of the Companies Ordinance and article 7. Their Lordships think, therefore, that on the true construction of the parenthesis, it means that when the executor is himself already a member of the company, or the son, daughter, etc., of a member, he is not bound to offer the shares. This gives, it must be acknowledged, a capricious result, but on the wording it is the only result possible.

Once this literal meaning is given to article 15, it means that the executor, Heald, was not bound under article 15 to offer the 242 shares to members: for he was already a member. He was therefore within the exception contained in the parenthesis. True it is that he was only nominee of these 10 shares for Miss Musterd, but this does not affect the matter. The company takes no notice of the fact that he was only a nominee. Suffice that he was registered as a member in respect of 10 shares.

Their Lordships take the view, therefore, that article 15 did not apply in this case. The executor was not bound by it as he thought he was. The three shareholders, by their counsel, admitted that the executor was under a misapprehension, but they contended nevertheless that the letters of February 7 and 22 evinced a binding contract. The executor was, they say, able to transfer to members without restriction: because articles 8 and 9 only restrict transfers to non-members. Those articles, they say, do not restrict transfers to members any more than similar articles did in *Delavenne* v. *Broadhurst* [2]; and the directors have no right under article 17 to refuse to register a transfer to a transferee who is already a member.

Their Lordships are not satisfied that the letters of February 7 and 22, 1957, do evince a binding contract. The correspondence before them is incomplete. The letters which the company wrote to the shareholders and their replies were not put in evidence in the courts of the West Indies. In the absence of those letters it would not be possible to affirm that there was a binding contract, apart altogether from the fact that the executor was under a misapprehension.

What, then, is the position? The executor is, of course, bound to protect the interest of the two legatees who are entitled to the beneficial interest in the shares: and he should consult them. He may apply to be registered as a member in respect of the 222 shares. But the directors are not bound to give their consent to this, see article 26. And they may well refuse. Alternatively he, in his capacity as executor, may transfer the shares without becoming registered himself, see section 29 of the Companies Ordinance: but in that case he must comply with the provisions of the articles. It was suggested that he might be able, without consulting the company, to transfer to a member at the best price he can obtain, see *Delavenne* v. *Broadhurst* [2]: but, in view of the opening words of article 9, their Lordships feel some doubt about this. Their Lordships think that his safer course would be to act under article 9 itself. He should give notice to the company that he desires to transfer the shares, and then make the company his agent for sale "to any "member or to any person selected by the directors . . . at the "fair value." But he can choose the time he thinks best for this, so as to obtain the "fair value" at the most appropriate time. He is not bound by the three months in article 15.

What, then, are the directions which should be given to the executor? Seeing that he is not bound to act under article 15 and has never been bound so to act, the directions must be so designed as to make it clear that he is under no such obligation as was held by the Federal Supreme Court and to give freedom to act under the other articles as he may be advised. Seeing also that it has not been proved that the executor made any enforceable contract to sell to the three shareholders, he should not be directed to transfer to them.

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[2] [1931] 1 Ch. 234.

J. C.
1961
Roberts v. Letter "T" Estates Ltd.

In the opinion of their Lordships the appeal should be allowed; the judgment of the Federal Supreme Court of the West Indies dated July 4, 1958, and of Miller J. dated August 8, 1957, should be set aside: and the second respondent Stanley Heald, executor of the estate of Sophia Musterd deceased, should be directed to take such further steps as he may think fit in the administration of such estate on the footing that he is not bound to transfer or procure the transfer of the 242 shares in the respondent company either to the appellants or to the third, fourth and fifth respondents. The costs of all parties before their Lordships and in the courts below should be taxed and paid out of the general estate of Sophia Musterd deceased.

Solicitors: *Garber, Vowles & Co.; Cartwright, Cunningham; Wray, Smith & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1960
Dec. 5, 6, 7, 8, 12, 13.
1961
Feb. 7.

RIVERSTONE MEAT CO. PTY. LTD. . . Appellants;

AND

LANCASHIRE SHIPPING CO. LTD. . . Respondents.

Shipping—Bill of lading—Seaworthiness—Hague Rules—Damage to cargo—Defect in storm valves—Negligence of independent contractor's fitter—Lack of due diligence—(Australian) Sea Carriage of Goods Act, 1924 (*No.* 22 *of* 1924), *ss.* 4, 5, *Sch.—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1, *art. IV, r.* 1.

Negligence—Safe system of work—Plant and equipment—Latent defect—Principle governing employer's liability.

Vicarious Liability—Delegate or independent contractor—Specialised work—Principal's liability for want of due care.

Judicial Precedent—Foreign decision—Commercial law—Desirability for uniformity—Decisions on meaning of Hague Rules.

Judicial Precedent—Decision long undisturbed—Subsequent legislation—Construction of statute—Words of foreign statute used—Hague Rules.

Statute — Construction — International convention — Statute based on —Previous foreign decisions on meaning of words used.

Ships' Names—Muncaster Castle.

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* *Present*: Viscount Simonds, Lord Merriman, Lord Radcliffe, Lord Keith of Avonholm and Lord Hodson.

By article IV, rule 1, of the Hague Rules (given legislative force by section 1 of and the Schedule to the Carriage of Goods by Sea Act, 1924, and section 4 of and the Schedule to the Sea Carriage of Goods Act, 1924, of Australia): "Neither the carrier nor the "ship shall be liable for loss or damage arising or resulting from "unseaworthiness unless caused by want of due diligence on the "part of the carrier to make the ship seaworthy . . . and to make "the holds . . . and all other parts of the ship in which goods are "carried fit and safe for their reception, carriage and preservation ". . . Whenever loss or damage has resulted from unseaworthiness, "the burden of proving the exercise of due diligence shall be on the "carrier or other person claiming exemption under this section."

Several cases of tinned food were shipped on the respondents' vessel at Sydney for carriage to London under bills of lading subject to the Sea Carriage of Goods Act, 1924, of Australia, the appellants being parties to the bill. When the goods were discharged most of the cases were found damaged by seawater which had entered the hold through defective inspection covers to storm valves. Immediately before her outward voyage to Australia the ship was passed through No. 2 special survey and her annual load-line survey. For this purpose the marine superintendent employed by the respondents' agents instructed a reputable firm of ship repairers to open up all the storm valves and inspection covers. After the Lloyd's surveyor's inspection a fitter employed by the repairers closed each inspection cover and secured it with nuts. Once the nuts had been hardened up, no visual inspection could detect any unevenness in the position of the cover. No seawater entered the hold during the outward voyage. The presence of the water found in the hold on the unloading was due to the negligence of the fitter, who failed to secure the nuts sufficiently, with the result that they were loosened by the working of the ship in rough weather. There was no negligence on the part of anyone but the fitter:—

Held, that the respondents, the carriers, had not discharged the burden of proving that they had exercised due diligence to make the ship seaworthy, since a shipowner is not safeguarded by the fact that the negligence in repairing the ship is that of an independent contractor, and the obligation imposed on the shipowner in the work of repair is one of due diligence by whomsoever it may be done, even when the work delegated to the independent contractor calls for technical or special knowledge or experience, and the negligence was not apparent to the shipowner.

When the shipowner puts his ship into the hands of third parties for repair, the same considerations do not apply as in the case where a ship is built for him or newly comes into his hands by purchase (post, pp. 841–842, 867, 870).

Dicta of Lord Wright in *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456, 462; 43 T.L.R. 675, and in *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628, H.L. explained.

Davie v. *New Merton Board Mills Ltd.* [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L. distinguished.

Decision of the Court of Appeal [1960] 1 Q.B. 536; [1960] 2 W.L.R. 86; [1960] 1 All E.R. 193, C.A. reversed.

APPEAL from the Court of Appeal (Morris, Ormerod and Willmer L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 26, 1959, in favour of the respondents, Lancashire Shipping Co. Ltd., the defendants in the action, affirming an order of McNair J. dated July 31, 1958, in favour of the respondents. The trial of the action before McNair J. lasted seven days and the hearing of the appeal eleven days.

The short issue which arose on this appeal was whether, on the facts found by the trial judge, which were unchallenged in the Court of Appeal, the respondents exercised due diligence to make seaworthy their vessel the m.v. *Muncaster Castle* before the cargo of the appellants, Riverstone Meat Co. Pty. Ltd., the plaintiffs in the action, was loaded therein at Sydney in May, 1953, in accordance with their obligation to that effect contained in article III, rule 1, of the rules, commonly known as the Hague Rules, scheduled to the Australian Sea Carriage of Goods Act, 1924.

The facts, stated by Viscount Simonds, were as follows: On May 7, 1953, 150 cases of canned ox tongue, the property of the appellants, Riverstone Meat Co. Pty. Ltd., were shipped in good order and condition on board the *Muncaster Castle* at Sydney under a bill of lading of that date for carriage to London. It was provided by the bill of lading that it should have effect subject to the rules (commonly known as the Hague Rules) which are contained in the Schedule to the Australian Sea Carriage of Goods Act, 1924, and that the carriers, the respondents, should be entitled to all the privileges, rights and immunities contained in that Act and in the Schedule thereto.

On July 16, 1953, four days after the beginning of the discharge in London, seawater was discovered in the hold in which the goods were stowed and 113 of the appellants' cases were found to be damaged thereby. It was admitted that in a certain respect the ship was unseaworthy at the beginning of the voyage. It was upon the particular facts of the case that McNair J. and the Court of Appeal relied and that the respondents relied in supporting their decision upon this appeal. The statement of the facts in the respondents' formal case was as follows:

"(i) The *Muncaster Castle* was built in the United States "during the 1939–1945 war and was acquired by the respondents "in 1949. She remained in the respondents' service until 1955. "Throughout this period she was well maintained and classed "with the British Corporation (which was united with Lloyd's "Register in 1949) in the highest class for vessels not built under "the supervision of this Classification Society.

"(ii) In February, 1953, immediately before her outward "voyage to Australia where she loaded the goods in question in "this action, she passed her No. 2 special survey by Lloyd's "Register surveyors and was reported to be 'so far as seen in "'good condition and eligible to remain as at present classed in "'the Register Book.' On the same occasion she was passed "through her annual load line survey pursuant to the Load Line "Rules, 1941, made under the Merchant Shipping (Safety and "Load Line Conventions) Act, 1932, and a report to this effect "was issued dated February 3, 1953.

"(iii) The normal practice for classed ships (see rules 60 and "64 of the 'Instructions to Surveyors' issued by the Ministry of "Transport and Civil Aviation in connection with load line "surveys) is to carry out the load line survey while the ship is "in a drydock and at the same time as a periodical classification "survey.

"(iv) For the purposes of the above special survey and annual "load line survey the vessel was placed in the hands of Alexander "Stephen & Sons Ltd. of Glasgow, who are a ship-repairing "concern of the highest repute.

"(v) Under the Load Line Rules, 1941, provision is made for "the examination at the annual survey of the discharges leading "through the ship's side from spaces below the freeboard deck. "In practice, Lloyd's surveyors (acting as assigning authority on "behalf of the Ministry of Transport) are satisfied if 25 per cent. "of the sea outlets are opened up for inspection, but it was the "respondents' practice to insist that they should all be opened "up. In the case of the load line survey in the drydock in the "yard of Alexander Stephen & Son in February, 1953, 31 storm "valves in the vessel were accordingly opened up for inspection, "including the two storm valves in question in No. 5 hold. "This was done upon the instructions of one Atkinson, an "experienced and competent marine superintendent employed by "Moller Line U.K. Ltd., the managers of the vessel, who "attended the Glasgow surveys on behalf of the respondents. "The opening up of the storm valves necessarily involved opening "up the inspection covers.

" (vi) After the storm valves had been inspected by the surveyor to Lloyd's Register it was the duty of a fitter employed by Alexander Stephen to replace and close the inspection covers. This is done by placing the inspection cover over the studs in the top of the inspection chamber, placing the nuts in position and tightening up the nuts. The nuts should be tightened gradually at opposite angles so as to ensure that the pressure all round is even. If the nuts are tightened up in the wrong order, i.e., by tightening up all the nuts on one side before those on the other side, the pressure will be uneven and it will be impossible to make a secure joint, and this will also be so if the nuts are not fully tightened. Once the nuts have been tightened up, no visual inspection or tapping with a spanner will reveal improper or insufficient tightening up.

" (vii) According to ordinary and prudent practice the task of tightening up the nuts on the inspection cover is left to a fitter and is well within the competence of a skilled fitter and is not supervised by Lloyd's surveyors or by the owners' superintendent.

" (viii) The vessel carried cargo on the outward voyage to Australia in No. 5 hold, but none of it was damaged by seawater. After the discharge at Sydney of the outward cargo stowed in the after half of No. 5 hold the hold was inspected by the vessel's chief officer. There was no sign of leakage of seawater. The appellants' cargo was then loaded in the after part of No. 5 lower hold. The vessel then proceeded to Brisbane where the outward cargo in the forward part of the said hold was discharged, as a result of which the places where the storm valves were situated became visible. The chief officer again inspected the said hold and there were no signs of seawater staining or rust. No seawater in fact entered No. 5 hold either through the storm valves or at all on the outward voyage to Australia.

" (ix) On the voyage from Australia to the United Kingdom there was some heavy weather which caused the vessel to roll and pitch, which was sufficient to loosen the nuts of the inspection covers in No. 5 hold if they had been improperly tightened up in Glasgow and there had been some loosening in the working of the ship on the outward voyage.

" (x) The cause of the admission of seawater into No. 5 hold and of the damage to the cargo in question was that a fitter employed by Alexander Stephen in Glasgow 'negligently failed 'to secure the nuts on the inspection cover evenly or sufficiently,

" ' with the result that the working of the ship on the outward " ' voyage was sufficient to produce the condition, by the time " ' the plaintiffs' cargo was loaded at Sydney, that the nuts had " ' been loosened to such an extent that with the vessel rolling " ' and waves striking the sides of the ship, seawater was forced " ' through the interstices below the inspection covers.'

" (xi) There was no negligence on the part of anyone (other " than the fitter) in failing to discover that the nuts had not been " evenly or sufficiently tightened, in particular, the failure to " discover this was not due to any negligence on the part of " Lloyd's surveyor, the superintendent acting on behalf of the " respondents, or any of the ship's officers."

Upon these facts the appellants brought an action in the Queen's Bench Division against the respondents claiming that they were liable for the damage to their goods. The respondents pleaded that they were protected from liability by the Act and rules already referred to, and their plea was upheld by the trial judge and by the Court of Appeal. They relied specifically on section 5 of the Act and article III, rule 1, and article IV, rule 1, of the rules, which were as follows:

Section 5. " There shall not be implied in any contract for the " carriage of goods by sea to which this Act applies any absolute " undertaking by the carrier of the goods to provide a seaworthy " ship."

Article III, rule 1. " The carrier shall be bound before and at " the beginning of the voyage to exercise due diligence to: " (*a*) make the ship seaworthy . . . (*c*) make the holds, . . . " and all other parts . . . in which goods are carried fit and safe " for their reception, carriage and preservation."

Article IV, rule 1. " Neither the carrier nor the ship shall " be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of " the carrier to make the ship seaworthy . . . and to make the " holds . . . and all other parts of the ship in which goods are " carried, fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article " III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall " be on the carrier or other person claiming exemption under " this section."

Ashton Roskill Q.C. and *J. F. Willmer* for the appellant company. The respondents did not exercise due diligence to make the ship seaworthy before the start of the voyage as required by rule 1 of article III of the rules in the Schedule to the Australian Act. A specific mandatory obligation is imposed on the carrier by the Hague Rules. He can get others to perform it, but their performance or non-performance is that of the carrier. If those whom the carrier gets to perform his obligation do not perform it, the carrier is liable. The reason is not that he is answerable for the neglect of those persons but that he, the carrier, has not performed his obligation. Strictly this is not a case of vicarious responsibility, but a case of the carrier failing to discharge his statutory or contractual duty.

It is submitted: (1) The work incidental to the periodic examinations of the ship must be carried out if she is to be efficiently maintained. (2) Without that work due diligence to make the ship seaworthy will not have been exercised. (3) If a shipowner contracts with others for that work to be done, he delegates to them his obligation of exercising due diligence to make the ship seaworthy. (4) It is irrelevant that these "others" can be labelled "independent contractors." They are the shipowner's agents for the performance of the shipowner's obligations. (5) A fortiori is this so where, as here, the work was within the capacity of the shipowner's servants. (6) The conclusion is that, if the work is carelessly done, the shipowner is liable, not because he is liable for the carelessness of the person who did the work but because he himself has not performed his obligation.

On these submissions the issue before the House is narrow. In the passages relating to delegation *Davie* v. *New Merton Board Mills Ltd.*[1] supports the basic principle invoked, though on the facts, which were entirely different from those of the present case, the decision was against the plaintiff. That decision is distinguishable, though the Court of Appeal here was led astray by the belief that it afforded a helpful analogy.

The object and scheme of the Hague Rules and their interpretation lie at the root of the present problem. They are the product of the international conference on maritime law at Brussels in 1922. The object of the conference and of the rules which emerged from it was the unification of the rights of holders of bills of lading against carriers: see the successive editions of Scrutton on Charterparties from the 12th edition in 1925 (p. 486) until the 16th edition in 1955 (p. 453). The scheme was that various States should apply the rules by municipal legislation: see pp. 562–566 in the 16th edition. The terms of the municipal legislation vary to some extent, but the Hague Rules are in effect in the same form wherever they are applied. In the 16th edition is found the legislation of different countries—Canada, pp. 555–556, New Zealand, pp. 556–558, United States of America, pp. 546 et seq. Substantially similar language is to be found in the earlier statutory enactments of the particular countries: see pp. 453–454. The predecessors of the Hague Rules were the American Harter Act, 1893, and the Water Carriage of Goods Act, 1910, of Canada. As to section 3 of the former Act, see Carver's Carriage of Goods by Sea, 10th ed., pp. 107 and 170. See also section 6 of the Act of 1910. Under both those Acts the obligation on the shipowners is to exercise due diligence to make the ship seaworthy by themselves or others, but they are not liable for loss or damage resulting from negligence in the management of the ship.

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[1] [1959] A.C. 604, 620, 621, 625; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L.

As to the construction of the Hague Rules, see what Atkin L.J. said in *Hourani* v. *Harrison*[2]; also, *Gosse Millerd Ltd.* v. *Canadian Government Merchant Marine Ltd.*[3]; *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[4] and *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[5] In dealing with the Hague Rules one must avoid introducing by analogy questions which arise in a wholly different context. Article III, rule 1, imposes a mandatory obligation of an overriding character. It contains no qualifying provision and its language contrasts with that of article III, rule 2. In the Court of Appeal[6] in this case Morris L.J. regarded article III, rule 1, as mandatory. Section 2 of the Carriage of Goods by Sea Act, 1924, enacting the Hague Rules, provides that in any contract for the carriage of goods by sea there shall not be implied an absolute undertaking to provide a seaworthy ship. There is no such provision in the Carriage of Goods by Sea Act, 1936, of the United States. But there are no grounds for the view that the meaning of the Hague Rules varies according to whether the enacting statute does or does not contain such a provision.

It has long been authoritatively recognised that the additional protection to be derived by a carrier from the Hague Rules would be likely to be confined to cases in which the defect causing unseaworthiness was so latent that due diligence could not have discovered it: see Scrutton on Charterparties, 12th ed., pp. 107 and 499; 13th ed., pp. 108 and 513, and what was said in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[7] by MacKinnon L.J., which reflects the right approach and sums up the appellants' contentions. The decision of the Court of Appeal was affirmed in the House of Lords.[8] See also *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[9] *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[10] is not to be distinguished, as it was in the Court of Appeal, by saying that it was just a case where the shipowners' servant was negligent. It indicates that the obligation to exercise due diligence can be performed by a third party, but that, if it is not so performed, the shipowner is liable. The shipowner's agent is the person engaged to do the work (not "employed" because that word connotes the relationship of master and servant). That decision has never been dissented from or qualified.

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[2] (1927) 137 L.T. 549, 556; 43 T.L.R. 633, C.A.

[3] [1929] A.C. 223, 230; 45 T.L.R. 63, H.L.

[4] [1932] A.C. 328, 350; 48 T.L.R. 127, H.L.

[5] [1959] A.C. 589, 603; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740, P.C.

[6] [1960] 1 Q.B. 536, 564; [1960] 2 W.L.R. 86; [1960] 1 All E.R. 193.

Carver's Carriage of Goods by Sea, 10th ed., pp. 181–183, sets out several United States cases. Reliance is placed on *The Colima*[11]; *The Mary L. Peters*[12]; *The Flamborough*[13]; *The Alvena*[14]; *The Irrawaddy*[15]; *Nord-Deutscher Lloyd* v. *President Insurance Co. of North America*[16] and *Bethlehem Shipbuilding Corporation Ltd.* v. *Joseph Gutradt & Co.*[17]

Article III, rule 1, of the Hague Rules helps the shipowner but little: see Scrutton on Charterparties, 12th ed., p. 499, n. (*z*) and pp. 106–107.

In the present case Willmer L.J. was wrong in saying that any consideration of the present question must start with *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*[18] It must start with the Harter Act and the English and American decisions. The respondents have tried to read far more into the *Angliss* case[18] than it contains. The decision must be considered in the light of its facts, in particular the negligence of the shipbuilders' workmen, since it is extremely doubtful whether the building of a ship is within the obligations of article III, rule 1, which presupposes the existence of a ship. The decision could be reconciled with the other authorities on the view that the shipowners did not there delegate the performance of any obligation. But it goes far beyond that to say that, when a ship is handed over to repairers for day to day maintenance, the shipowner is thereby absolved from the obligation of due diligence. As to this case, see Scrutton on Charterparties, 16th ed., p. 473, and 15th ed., p. 457.

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[7] (1939) 55 T.L.R. 766, 767; [1939] 2 All E.R. 855, C.A.

[8] [1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405, H.L.

[9] [1934] A.C. 538, 540, 544, 550; 51 T.L.R. 5, P.C.

[10] [1895] 2 Q.B. 408, 416; 11 T.L.R. 501, C.A.

[11] (1897) 82 Fed.Rep. 665, 677–679.

[12] (1895) 68 Fed.Rep. 919.

[13] (1895) 69 Fed.Rep. 420.

[14] (1896) 74 Fed.Rep. 252; aff. (1897) 79 Fed.Rep. 973.

[15] (1897) 171 U.S. 187, 192.

[16] (1901) 110 Fed.Rep. 420, 425.

[17] (1926) 10 Fed. (2d) 769.

[18] [1927] 2 K.B. 456; 43 T.L.R. 675.

For the background of this case, see *London Rangoon Trading Co. Ltd.* v. *Ellerman Lines Ltd.*[19]; *Ellerman Lines Ltd.* v. *Smith's Dock Co.*[20]; *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[21]; *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[22]; *Wilsons & Clyde Coal Co. Ltd.* v. *English*[23]; *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[24]; *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[25]; *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*[26]; *C. H. Smith & Sons Fellmongery Pty. Ltd.* v. *Peninsular and Oriental Steam Navigation Co. Ltd.*[27]; *S. M. Bulley & Son* v. *British and African Steam Navigation Co. Ltd.*[28]; *The Australian Star*[29]; *Waddle* v. *Wallsend Shipping Co. Ltd.*[30]; *Minister of Materials* v. *Wold Shipping Co. Ltd.*[31]; *The Abbazia*[32] and *International Packers (London) Ltd.* v. *Ocean Steamship Co. Ltd.*,[33] where the law is stated with complete accuracy.

It is not necessary to contend that the *Angliss* case[34] was wrongly decided. Article III, rule 2, is directed to the obligations of a shipowner who has a ship in his possession. The words are not apt to cover the construction of a seaworthy ship. An existing ship is in the possession of the shipowner and may become unseaworthy; so the owner is under the obligation to exercise due diligence to make her seaworthy. *The Assunzione*,[35] a case which had already been before the Court of Appeal,[36] but not on any point material to the present matter, is not an authority for the view that merely following common prudent practice amounts to the exercise of due diligence. If it purported to lay that down, it would be wrong. It is to be noted that a bill of lading is not itself a contract of carriage but evidence of a contract of carriage. *The Waterville Victory*[37] was a case turning on the shortcomings of shipbuilders and adds nothing to the *Angliss* case.[38] *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[39] has been accepted as correct time and time again. *Davie's* case[40] is very far from the present one.

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[19] (1923) 14 Ll.L.Rep. 497, 508; 39 T.L.R. 284.

[20] (1924) 18 Ll.L.Rep. 172.

[21] [1934] A.C. 538.

[22] (1938) 58 Ll.L.Rep. 33, P.C.

[23] [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628, H.L.

[24] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658, H.L.

[25] 55 T.L.R. 766, 767; [1940] A.C. 997, 1001.

[26] [1952] 1 D.L.R. 850, 854.

[27] (1938) 60 Ll.L.Rep. 419.

[28] (1925) 22 Ll.L.Rep. 162, 164.

[29] (1940) 67 Ll.L.Rep. 110.

[30] [1952] 2 Lloyd's Rep. 105, 128–129.

[31] [1952] 1 Lloyd's Rep. 485, 501–502.

[32] (1904) 127 Fed.Rep. 495.

[33] [1955] 2 Lloyd's Rep. 218, 235–236.

[34] [1927] 2 K.B. 456.

Both rules 1 and 2 of article III impose a mandatory duty, but the duty imposed by rule 1 is an overriding duty not subject to anything, whereas the duty imposed by rule 2 is not overriding. Compare this article with the United States Carriage of Goods by Sea Act, 1936. Although rule 2 imposes a less strict duty than rule 1, there is authority to the effect that a shipowner remains liable for non-performance of his duty under rule 2, although that non-performance is by an independent contractor: see *Heyn* v. *Ocean Steamship Co. Ltd.*[41] and *Hourani* v. *Harrison*,[42] *per* Bankes and Atkin L.JJ.

In summary, the obligation imposed on a carrier by rule 1 is mandatory and overriding. The expression "shall be bound" indicates that it is mandatory. That it is overriding appears from the fact that the obligation is not (as in the case of the obligation under rule 2) made subject to the provisions of article IV. Morris L.J. in the Court of Appeal[43] appeared to accept this view as correct.

The obligation under rule 1 is not limited to or performed by the personal diligence of the carrier. Many judicial statements support this conclusion, which is reinforced by what Morris L.J. said[43] and by the language of the Hague Rules, particularly article IV, rule 2 (q). Performance of the carrier's obligation to exercise due diligence to make the ship seaworthy must, in the nature of things, be delegated in order to be performed. If,

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[35] [1956] 2 Lloyd's Rep. 468, 486.

[36] [1954] P. 150; [1954] 2 W.L.R. 234; [1954] 1 All E.R. 278, C.A.

[37] [1931] A.M.C. 320.

[38] [1927] 2 K.B. 456.

[39] [1895] 2 Q.B. 408; 11 T.L.R. 501, C.A.

[40] [1958] 1 Q.B. 210, 237; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67, C.A.; [1959] A.C. 604, 621, 624, 629, 642, 646–647, 652.

[41] (1927) 137 L.T. 158, 161; 43 T.L.R. 358.

[42] 137 L.T. 549, 556, 557.

[43] [1960] 1 Q.B. 536, 564.

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where performance is delegated, the person to whom it was delegated fails to perform the duty, the carrier is liable. This is not because the carrier is liable for the delegate's negligence, but because non-performance by the delegate is non-performance by the carrier.

The judgments in the Court of Appeal[44] correctly recognise that it is irrelevant in this connection whether the delegate is the servant of the carrier or an independent contractor. The task of ship maintenance may involve technical matters of widely varying character. The carrier is "almost certainly not an "expert naval architect, engineer or surveyor": *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[45] One or more such persons may have to be engaged if the ship is to be made seaworthy. It is authoritatively well recognised that the carrier's obligation to exercise due diligence to make the ship seaworthy is not performed merely by the appointment of a competent surveyor. The carrier will be liable if the expert appointed fails to exercise due diligence, and liability will, in such circumstances, attach to the carrier, whether the expert be his servant or an independent contractor. In the *Robin Hood Mills* case[46] it was said that a carrier is liable for a compass adjuster's failure to exercise due diligence. A compass adjuster is an independent contractor: see *per* Willmer L.J. in the Court of Appeal.[47] There is no logical distinction between an independent contractor of such a character and ship repairers engaged to perform the necessary periodical work of maintenance or repair.

The proper approach in this connection is that which the courts here and in the United States have adopted for many years. There are many expressions of judicial opinion to this effect and none to the contrary. See what was said in the Court of Appeal in this case.[48]

The expression "exercise due diligence to make the ship "seaworthy" was not new when incorporated into the Hague Rules. It was in the Harter Act and had been considered in the courts here and in the United States. It is reasonable to assume that was why the same expression was used in the Hague Rules.

The Harter Act differed from subsequent Acts incorporating the Hague Rules in that it did not relieve the carrier from the obligation of the implied absolute warranty of seaworthiness, and that the exercise by the carrier of due diligence to make the ship seaworthy was a condition precedent to his claiming the protection of the Act. But decisions before the Hague Rules involving consideration of the words " shall exercise due diligence to make " the vessel seaworthy " afford useful guidance in the present case, and the exclusion of the implied absolute warranty of seaworthiness in, for example, the Sea Carriage of Goods Act, 1924, of Australia and the British Act of 1924, provides no ground for giving these words a meaning different from that which was attributed to them in decisions under the Harter Act. Although in *Dobell's* case [49] the language used may have gone further than was strictly necessary for the decision, it shows that the court had no doubt that the material due diligence must be exercised by the carrier himself or by those whom he employed to see to the seaworthiness of his ship, and that it was not intended to restrict the ambit of " agents " to those who were only the carrier's servants.

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[44] [1960] 1 Q.B. 536, 557, 564, 579, 582, 583.

[45] [1938] A.C. 57, 61.

[46] 58 Ll.L.Rep. 33, 40.

[47] [1960] 1 Q.B. 536, 580.

[48] Ibid. 563–564, 577–580.

In the Court of Appeal [50] Ormerod and Willmer L.JJ. seem to have thought that the construction of the obligation imposed by rule 1 contended for by the appellants was wrong because, if it was correct, shipowners would have gained little by the adoption of the Hague Rules. That approach is fallacious. The chief purpose of the Rules was not to confer benefits on shipowners but to standardise the rights of bill of lading holders against shipowners. This was recognised in successive editions of Scrutton on Charterparties.

The Court of Appeal accepted [51] correctly that it was established that a carrier does not perform his obligation merely by choosing competent servants or agents and that he may delegate performance of that obligation to persons other than his own servants, but the court was wrong in holding that such performance was not delegated to the repairers in this case.

The work negligently performed by the repairers' servant was closing down the inspection covers after the storm valves had been inspected. The storm valves had to be periodically opened up for inspection as part of the work necessary for maintaining the ship in seaworthy condition. The work was within the competence of the ship's engineers who, indeed, themselves renewed the rubber jointing and replaced the covers after the defect had been discovered. It was work which the respondents' superintendent expressly instructed the repairers' foreman to have done and which could have been done either by the respondents'

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[49] [1895] 2 Q.B. 408.

[50] [1960] 1 Q.B. 536, 570–571, 582.

[51] Ibid. 564, 582.

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own servants or by independent contractors, as the respondents in fact chose to have it done. In the circumstances the respondents were, through the repairers, seeking to perform their obligation of exercising due diligence to make the ship seaworthy and, since the repairers and their fitter were negligent in carrying out the work, the respondents' obligation was not performed.

Further, the work was not supervised, although it was known that no visual inspection would reveal whether or not the covers had been properly replaced so as to be water-tight. In these circumstances, the respondents' superintendent was not their delegate or, at any rate, their sole delegate for exercising due diligence to see that the ship was in this respect seaworthy. He was not concerned to see that this work was properly done. Its performance was left by the respondents entirely to the repairers and their fitter. If, in these circumstances, the respondents delegated to the repairers and their fitter the performance in this respect of their obligation to exercise due diligence to make the ship seaworthy, the respondents are liable because the repairers, to whom the performance was delegated, failed to perform the duty. If the respondents did not so delegate the performance, they are liable because they did not themselves perform it.

In the Court of Appeal Willmer L.J.[52] distinguished between "employing someone else to carry on one's own business and "engaging someone else to perform something which is his "business." He regarded this case as falling within the latter category. But the suggested distinction is unsound as affording the proper test whether or not a person delegates performance of his obligation. In any event, the suggested test is inappropriate where, as here, the work to be done can properly be regarded as within the business both of the persons engaged to do the work (the repairers) and the persons engaging them (the respondents).

In so far as it is necessary to suggest a distinction, the true distinction is between negligence in the performance of the work which the person is engaged to do and negligence which is merely collateral thereto. In the former case such negligence will attract liability on the part of the person engaging. In the latter case it will not. Here the negligence was in the performance of the work which the repairers were engaged to do and McNair J.[53] was wrong in regarding the fitter's negligence as "casual negligence."

The judgments of McNair J.[54] and the Court of Appeal[55] reflect the view that the decision in the *Angliss* case[56] was in effect decisive in favour of the respondents. That is wrong and involves reading far more into the *Angliss* case[57] than is there present or is legitimate. That case concerned negligent workmanship on the part of the shipbuilders' workmen which was not later discoverable by reasonable inspection.

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[52] [1960] 1 Q.B. 536, 583.

[53] [1959] 1 Q.B. 74, 94; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.

[54] [1959] 1 Q.B. 74, 89–91.

[55] [1960] 1 Q.B. 536, 554–556, 569–573, 576, 578, 583–587.

The obligation to exercise due diligence to make the ship seaworthy is, as was recognised in the *Angliss* case,[58] placed on the shipowner in his capacity as carrier. The obligation includes that of maintaining his ship. If he fails to perform this obligation, whether by himself or by those to whom he entrusts performance, he fails to exercise due diligence to make his ship seaworthy. By contrast, shipbuilding, negligence in which raised the material issues in the *Angliss* case,[59] is not within the capacity of a carrier.

Accordingly, where, as the result of negligence on the part of shipbuilders, unseaworthiness results and causes damage, the carrier discharges the burden of proof imposed by article IV, rule 1, by establishing that he engaged builders of repute and took such other necessary precautions as were indicated in the *Angliss* case.[60] In such event there is no delegation by the carrier of the performance of his obligation to exercise due diligence to make the ship seaworthy and the carrier can discharge the burden of proof imposed by article IV, rule 1, in the way indicated in that case. The obligation imposed by article III, rule 1, which is that of exercising due diligence to make the ship seaworthy, not that of exercising due diligence to make a seaworthy ship, has not in such a case been broken. The character of the obligation imposed by article III, rule 1, is material to the question whether or not the burden of proof enjoined by article IV, rule 1, has been discharged. The decision in the *Angliss* case[61] is not decisive of the issues arising in the present case.

The *Angliss* case[61] is linked by analogy with *Davie's* case,[62] which was discussed at length in the present case in the Court of Appeal.[63] In *Davie's* case[63a] the House of Lords considered that the decision in the *Angliss* case[64] that shipowners were not responsible for the negligent workmanship of the employees of shipbuilders afforded a helpful parallel. But no such parallel exists between the present case and *Davie's* case.[65] To affirm the existence of the legal principle that an employer or shipowner, as the case may be, cannot escape liability by appointing an agent to perform his obligations on his behalf, but nevertheless to conclude (as the Court of Appeal did) that the facts of the present case did not fix the respondents with liability, is inconsequent and substantially deprives the principle affirmed of practical validity.

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[56] [1927] 2 K.B. 456.
[57] Ibid.
[58] Ibid. 461.
[59] [1927] 2 K.B. 456.
[60] Ibid. 462.
[61] [1927] 2 K.B. 456.
[62] [1959] A.C. 604.
[63] [1960] 1 Q.B. 536, 553, 557–562, 573–575, 585–587.
[63a] [1959] A.C. 604.
[64] [1927] 2 K.B. 456.

The Court of Appeal[66] was influenced by the consideration that if independent contractors engaged to do work on a ship were the delegates of the carrier for the performance of his obligation to exercise due diligence to make the ship seaworthy, it would follow that sub-contractors engaged by those contractors or persons from whom those contractors bought spare parts would also be delegates. This suggested "unlimited retrogression" would, it was felt, convert the carrier's obligation into an obligation to make the ship as seaworthy as due diligence can make it. But neither this consideration nor its suggested consequence necessarily follows from the contentions advanced on behalf of the appellants.

There is a clear distinction between those who are in contractual relationship with the carrier and those who are not. The obligation to make the ship seaworthy is on the carrier. He either performs this obligation himself or appoints another to perform it for him. Such a person, whether or not an independent contractor, can properly be called a delegate. It is only to the contractor and his servants that performance of the obligation is delegated, and due diligence of the contractor is, in the circumstances, the due diligence of the carrier. If the contractor is entitled, for the purpose of carrying out the work which he has been engaged to perform, to buy material from a third party or to sub-contract the performance of part of his obligation, the seller or sub-contractor, as the case may be, is in no contractual relation with the carrier, has not been appointed by him and is not his delegate. Thus there is no "unlimited retrogression" and the only persons with whom the court need be concerned are those appointed by the carrier to perform his obligation on his behalf. So regarded, the obligation on the carrier remains an obligation to exercise due diligence (by himself, his servants or agents) to make the ship seaworthy, and does not become an obligation to make the ship as seaworthy as the exercise of due diligence can make it.

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[65] [1959] A.C. 604.

[66] [1960] 1 Q.B. 536, 565, 570–571, 582–583.

Several decisions were cited to the Court of Appeal on behalf of the respondents drawn by suggested analogy from other fields of the law, including master and servant, invitor and invitee and the duty owed by the owner of a motor-car to other road users. Further, a suggested rule was propounded on behalf of the respondents that where the law imposes an obligation to exercise reasonable care the court will pay regard to whether what has to be done is something which normally forms a part of the obligor's own ordinary trade or business. It was argued that if what had to be done normally formed part of the obligor's own business and it was done negligently, the obligor would be liable, even though the negligence might have been that of an independent contractor; but if what had to be done did not normally form part of the obligor's own business and was something calling for specialised knowledge or experience, the obligor discharged his duty by appointing a properly skilled person to do it and was not liable for any negligence of that person, unless it was apparent to the obligor himself. This suggested rule found favour with Willmer L.J.,[67] who considered that this case fell within the latter category and that accordingly an additional reason was afforded for dismissing the appeal. In this he was wrong.

Practical considerations lend powerful support to the appellants' argument. A shipowner who was held liable to a cargo-owner in cases such as the present would have a remedy over against the negligent repairer. The initial wrongdoer would thus be fixed with the ultimate responsibility. On the other hand, if the cargo-owner could not recover against the shipowner, he would be without a remedy unless he could successfully sue the repairer, which has not yet been decided. Even if in this country the cargo-owner could establish a cause of action against a negligent repairer, he might be without a remedy against him in the courts of other countries. In any event, the cargo-owner might first have successfully to sue the shipowner in order to obtain the necessary evidential material to enable him to proceed against the repairer, since the cargo-owner could, ordinarily, know nothing of the ship's previous history. Moreover, a cargo-owner, who had no cause of action against the ship for loss of or damage to cargo, would have no right of arrest and so would lose the security which is obtainable by proceedings in rem.

The duty imposed by article III, rule 1, is not strictly analogous to the common law duty to exercise due care vis-à-vis one's neighbour in law to guard against the reasonable or foreseeable consequences of one's acts. Here there is a specific duty in relation to a specific subject-matter. The shipowner remains responsible notwithstanding that he gets someone else to perform the duty for him.

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[67] [1960] 1 Q.B. 536, 587–588.

As to collateral negligence, see *Hole* v. *Sittingbourne and Sheerness Railway Co.*[68]

It does not follow from *Davie's* case[69] that the *Angliss* case[70] was rightly decided.

A. A. Mocatta Q.C. and *Michael Kerr* for the respondent company. The approach of Morris L.J.[71] to the question was correct. Under the *Angliss* case[72] the principles applicable which emerge from its reasoning are as follows: (1) The duty imposed on the carrier is merely to exercise due diligence to make the ship seaworthy—no more and no less. (2) In considering whether or not that duty has been performed the court must look at all the circumstances of the case, since primarily the issue is one of fact. (3) Where what has to be done does not ordinarily form part of his trade or business in his capacity as a carrier, in contrast, for example, with loading, storing, carrying and discharging goods, the carrier performs his duty if he engages and properly instructs a competent expert to carry out the necessary work and, where appropriate, provides proper supervision by persons representing him, who act without negligence. In cases coming within the third principle the carrier does not delegate his duty; he performs it. And, per contra, were he to undertake the work himself in a field where he was not an expert, he would be failing in his duty.

The obligation does not amount to a warranty that the ship will have been made as seaworthy as the exercise of due diligence could make her. It is merely that the carrier shall exercise due diligence, that is, use reasonable care to make the ship seaworthy. The obligation under article III, rule 2, is on the shipowner in his capacity as a carrier and so is different from his obligation under rule 1. The obligation under rule 1 (which makes no mention of servants or agents) is not, as the appellants say, an obligation to produce a seaworthy ship, save in so far as she may have a latent defect undiscoverable by anyone. The obligation expressed here is to take reasonable care to make the ship seaworthy; it is not to make the ship seaworthy. The respondents plead that they, their servants and agents exercised due diligence to make the ship seaworthy in the relevant respects as required by article III, rule 1. They have followed the recognised practice as to survey laid down in the Ministry of Transport Merchant Shipping Survey of Load Line Ships for Load Line Certificates and Loading of Ships Instructions to Surveyors, when the scuppers and valves were opened up, inspected, closed and subjected to a hose test and found to be in good order. At Sydney the hold was inspected by the chief officer and found to be in good order before the cargo was loaded.

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[68] (1861) 6 H. & N. 488, 500.

[69] [1959] A.C. 604.

[70] [1927] 2 K.B. 456.

[71] [1960] 1 Q.B. 536, 563–564.

[72] [1927] 2 K.B. 456.

The case cannot be dealt with by saying that a competent member of the ship's staff could easily have tightened the covers. It is right for a shipowner to entrust all the work to a competent shipyard, subject to the provision of proper supervision. But in specialised work within the competence of the repairers rather than the shipowners and their servants, the work and everything incidental to it should be left to the repairers. It is only an exceptional shipowner who has his own dry dock and does his own repair work; that does not fall within his work as a carrier. The respondents, on the facts, performed their duty; they did everything that a prudent shipowner should have done to take due care to see that this ship was made seaworthy and omitted nothing, and they are not liable vicariously for the negligence of the fitter employed by the repairers as independent contractors. It would be unreasonable and utterly artificial to isolate work which was clearly incidental to the specialised operation of repairing a ship simply on the ground that it was in itself the sort of work which required no specialised or technical knowledge or experience.

The Australian Act was brought in by the contract, and this bill of lading must be construed in accordance with English law. As to the principle of seeking uniformity of decision among the courts of maritime nations, it is not possible in an action under the Hague Rules to investigate how French, German or United States courts would have interpreted the rule in question: see the *Stag Line* case.[73] It is not easy to approach the Act in the present case on the basis of uniformity, and it is hard to know what are "broad principles of general acceptation." There is no reason to give more weight to United States cases than to others, since one cannot hope to ascertain how the law of those foreign countries has developed. In *Gosse Millerd Ltd.* v.

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[73] [1932] A.C. 328, 342–343, 350.

Canadian Government Merchant Marine Ltd.[74] reference is made to the Harter Act, but that Act is different in material respects from the present Act. There is no absolute warranty of seaworthiness under the English Act, contrary to the Harter Act position: see Scrutton on Charterparties, 12th ed., p. 519, n. (*m*), and *McFadden* v. *Blue Star Line*.[75] The United States authorities hold that the carrier must see that due diligence is exercised. But under the Australian and English Acts, which are identical, one cannot apply the United States cases. The absolute warranty of seaworthiness was not removed by the Harter Act, but has been abolished here. In *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker* (*A*/*B*) [76] there is a warning against relying too much on United States cases.

The Hague Rules expressly mention agents and servants in some places and not in others. Fuller words were used by the draftsman when he intended a fuller meaning. Shipowners cannot be expected to have knowledge of ship repairing and shipbuilding. That is something which they cannot do for themselves. Article VI of the Hague Rules is relied on. The old absolute warranty of seaworthiness is quite inapplicable to the complex mechanism of a modern ship.

As to the authorities, it is right to start with *Angliss*,[77] the first case decided after the new Act which bears on this problem. It is parallel to the present case where there was bad workmanship by a fitter and no fault in anyone failing to detect it. It is part of the qualification of the master of a ship to be a competent stevedore: see *Anglo-African Co. Ltd.* v. *Lamzed*,[78] because, it is submitted, that concerns the care of cargo, which falls within a master's province. In the same way it might be said that the replacing of the storm covers was within the competence of one of the ship's engineers, but the answer to that contention is provided by Willmer L.J. in the court below.[79] Suppose a carrier had his ship repaired at a proper yard, giving no instructions as to the storm covers, and the yard properly decided that they needed replacing and had new covers fitted, then, on the appellants' argument, the owner would be liable for any defect if the yard did the work, but he would not be liable if sub-contractors did it. There might be a case where extensive repairs were done to a ship, some by the yard's own men and some by sub-contractors' men; then if both sets of men were negligent, but the negligence was not detectable by the shipowner's surveyor acting diligently, the owner, on the appellants' argument, would be responsible for the negligence of the yard's men but not for that of the sub-contractors' men.

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[74] [1929] A.C. 223, 230.

[75] [1905] 1 K.B. 697; 21 T.L.R. 345.

[76] [1949] A.C. 196, 230–231; 65 T.L.R. 217; [1949] 1 All E.R. 1, H.L.

[77] [1927] 2 K.B. 456.

[78] (1866) L.R. 1 C.P. 226.

[79] [1960] 1 Q.B. 536, 590.

What was said in the *Angliss* case [80] is of great help in providing a reasonable principle for dealing with cases like this. It covers the present case. The duty on the carrier is "to see, as "far as reasonably possible," that the repairs make good the defects. In respect of his protection by the employment of a reputable specialist, there is no distinction in principle between bad workmanship on the part of the original builder's men and bad workmanship on the part of the repairers' men at a later period of the ship's history.

In each case one must look at the facts and see whether on them the carrier has exercised due diligence. In the *Angliss* case [81] the increased complexity of modern ships was noted. As time has gone on since the Act of 1924 the cases have shown that the estimate in the earlier editions of Scrutton on Charterparties was not accurate and that the protection given to carriers was wider than was thought. It dealt with more than latent defects. The decisions since the *Angliss* case [82] have uniformly mentioned it with approval: see the *C. H. Smith & Sons Fellmongery* case [83] and *Cranfield Brothers Ltd.* v. *Tatem Steam Navigation Co. Ltd.*,[84] in which the *The Dimitrios Rallios* [85] was referred to. Great reliance is placed on the *Cranfield* case.[86] Hilbery J. was right in saying there that it is harder to establish a latent defect than to establish the exercise of due diligence. *The Australia Star* [87] was a case in which *Angliss* [88] was cited and applied with approval, as it was also in *The Assunzione*.[89] *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[90] was dealing with a section of the Canadian Act different from the relevant enactment in the present case; it is no help in the decision here. In it no opinion is expressed as to the correctness of *Angliss*.[91] *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[92]

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[80] [1927] 2 K.B. 456, 462.
[81] Ibid. 461.
[82] [1927] 2 K.B. 456.
[83] 60 Ll.L.Rep. 419.
[84] (1939) 64 Ll.L.Rep. 264.
[85] (1922) 128 L.T. 491, C.A.
[86] 64 Ll.L.Rep. 264.
[87] (1940) 67 Ll.L.Rep. 110.
[88] [1927] 2 K.B. 456.
[89] [1956] 2 Lloyd's Rep. 468, 486–487.
[90] [1934] A.C. 538, 542–543.
[91] [1927] 2 K.B. 456.
[92] 58 Ll.L.Rep. 33, 40.

was a decision in a limitation action and not one for breach of a contract of affreightment. What was there said was directed to the old Canadian Act. There was no criticism of *Angliss*[93] in *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[94] The references to the latter case in *Davie's* case[95] show that it had no adverse effect on *Angliss.*[96] Under the Hague Rules there is no difference between the case of a man who has a ship built for him and that of a man who has a ship repaired for him. The *Angliss* case[96] was not affected by *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[97] *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[98] contains a dictum which is helpful to the appellants but it adds nothing by way of reasoning to the passage from Scrutton's book there quoted. In the House of Lords in that case see what Lord Wright said,[99] making no reference to the *Angliss* case.[100] As to the obligation to use due diligence to make the ship seaworthy, compare p. 109 of the current edition of Scrutton on Charterparties with p. 110 of the 14th edition. In *Waddle* v. *Wallsend Shipping Co. Ltd.*[101] Devlin J. accepted the reasoning of Wright J. in the *Angliss* case.[102] In the *International Packers* case[103] see what McNair J. said which shows the nature of the negligence in that case. What he said as to the shipowner not being able to escape liability by employing a competent independent contractor,[104] he amended in the present case[105] to "competent independent surveyor," though it may be that the difference does not affect the present case. In the *Hourani* case[106] Atkin L.J. said no more than that it was satisfactory that the courts of England and the United States had come to the same conclusion on the point in question. But the principle of uniformity should not be pursued too far. If French or Italian decisions were cited as being contrary to the United States decisions, one would be reduced to the necessity of picking and choosing between them. *Heyn* v. *Ocean Steamship Co. Ltd.*[107] was also relied on by the appellants, but it is merely an illustration of the cases on the other side of the line. Reliance is placed on what Wright J. said in the *Angliss* case [108] as to the carrier's liability for the acts of servants of sub-contractors. See also what Willmer L.J. said in the Court of Appeal in the present case.[109] Admittedly what Lord Wright said cannot be treated as a decision, but it has been cited in shipbuilding cases and applied ever since, for example, in *The Australia Star.*[110] Innumerable disputes have been settled on the basis of its correctness: see what McNair J. said on that in the present case.[111] There is no valid distinction between negligence of shipyard men in building a ship and in repairing her or putting her through her survey in the suggestion that there is delegation of a duty in the one case and performance of a duty in the other.

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[93] [1927] 2 K.B. 456.

[94] [1938] A.C. 57.

[95] [1959] A.C. 604, 619, 621, 622, 623, 630 et seq., 646, 651.

[96] [1927] 2 K.B. 456.

[97] [1939] A.C. 397.

[98] 55 T.L.R. 766, 767.

[99] [1940] A.C. 997, 1001.

[100] [1927] 2 K.B. 456.

[101] [1952] 2 Lloyd's Rep. 105.

[102] [1927] 2 K.B. 456.

[103] [1955] 2 Lloyd's Rep. 218, 237-238.

[104] Ibid. 236.

[105] [1959] 1 Q.B. 74, 94; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.

[106] 137 L.T. 549.

[107] 137 L.T. 158.

As to the weight that should be given to long-standing authorities, see *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[112]

In *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[113] there are dicta favourable to the appellants, but they are no more than dicta and should not militate against the respondents' contentions. That case was cited in *Angliss.*[114]

The Harter Act cases in the United States must be read with considerable caution because the common law warranty remained unimpaired: see *McFadden* v. *Blue Star Line.*[115] *The Colima* [116] was a very special case. The facts show that, by reason of its construction, the ship required more than usual care in the distribution of its cargo and that it was top-heavy because there was too much deck cargo. The *Nord-Deutscher* case [117] goes further than any English case has ever gone. The *Bethlehem* case [118] takes the matter no further, because there was clearly negligence not only on the part of the shipbuilding yard but also on the part of the ship's officer. The fact that the owners of damaged cargo, if they fail against the shipowners, may or may not have a case against the repairers takes the case no further and that consideration does not affect the law. *American Linseed Co.* v. *Norfolk and North American Steam Shipping Co.*[119] is relied on. *The Waterville Victory* [120] suggests that in a shipbuilding case a shipowner will escape liability if he has gone to a proper yard and the defect was not apparent when the ship was delivered. In

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[108] [1927] 2 K.B. 456.

[109] [1960] 1 Q.B. 536, 584.

[110] 67 Ll.L.Rep. 110.

[111] [1959] 1 Q.B. 74, 91.

[112] [1931] A.C. 726, 732–733, 749; 47 T.L.R. 542, H.L.

[113] [1895] 2 Q.B. 408.

[114] [1927] 2 K.B. 456.

[115] [1905] 1 K.B. 697, 706.

[116] 82 Fed.Rep. 665, 669, 670, 673, 678.

[117] 110 Fed.Rep. 420.

[118] 10 Fed. (2d) 769.

[119] (1929) 32 Fed. (2d) 281.

[120] [1951] A.M.C. 320.

Canadian Transport Co. Ltd. v. *Hunt Leuchers & Hepburn Ltd.*[121] there was no evidence of proper supervision and there was patent negligence on the part of those instructed to survey the ship, and therefore the decision in that case was inevitable. The *Angliss* case[122] was cited.[123] From the findings in the *Australian Newsprint* case[124] it appears that the respondents' argument in the present case would not have been available there. One reason for requiring a supervisor is to enable the shipowner to give proper instructions and also to give the repairers information as to the work done in the past. The appellants relied on certain passages in *Davie's* case.[125] Though that was a case of master and servant the duty to take reasonable care applicable there is the same as the duty applicable here. There was no more an absolute warranty there than there is here. The passages relating to delegation relied on by the appellants do not refer to cases where there is a contract with a third party. Reference was there made[126] to *Smith* v. *Charles Baker & Sons*,[127] which defines the duty to take care applicable in that case and in this. In considering the passages relied on by the appellants, one should look at the other side of the medal, what Lord Simonds said later on.[128]

When a shipowner has properly employed an independent contractor, especially in connection with a matter requiring special or technical knowledge or experience, he will not be held liable to a person injured by the negligence of the independent contractor or his servants so long as that negligence was not apparent to him: see *Searle* v. *Laverick*.[129] The dividing line depends on the nature of the work to be done. See also *Green* v. *Fibreglass Ltd.*,[130] which is indistinguishable from *Haseldine* v. *C. A. Daw & Son Ltd.*,[131] and *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*[132] If these cases are right, the duty to take reasonable care can be discharged by going to a proper expert. A case on the other side of the line is *Woodward* v. *Mayor of Hastings*.[133]

No authority expressly covers the present point, but in almost all the cases of failure to exercise due diligence to make a ship seaworthy the failure turned out to be that of the owner, his servant or representative, and not an independent contractor, so the question of a strict application of the rule relied on by the appellants against the owner did not arise.

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[121] [1947] 2 D.L.R. 647.

[122] [1927] 2 K.B. 456.

[123] [1947] 2 D.L.R. 647, 657.

[124] [1952] 1 D.L.R. 850, 852–853, 855.

[125] [1959] A.C. 604.

[126] Ibid. 612, 620, 628.

[127] [1891] A.C. 325; 7 T.L.R. 679.

[128] [1959] A.C. 625.

[129] (1874) L.R. 9 Q.B. 122.

[130] [1958] 2 Q.B. 245, 249; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521.

[131] [1941] 2 K.B. 343, 353, 356, 374–375; 58 T.L.R. 1; [1941] 3 All E.R. 156, C.A.

[132] [1923] 1 K.B. 539, 553–554, 556; 39 T.L.R. 207.

[133] [1945] K.B. 174, 180; 61 T.L.R. 94; [1945] 2 All E.R. 565.

The respondents are not responsible here because they have employed competent experts in the repair and survey of the ship, a specialised task proper to be given to a reputable yard, subject to supervision. Once the ship was so sent to repair, the whole work must be done and the master and crew cannot reserve for themselves the sort of work which they could easily do.

In all cases there must be an analysis to see whether the defendants acted as a prudent person should act in the circumstances. If that principle were wrong the courts would not know where to draw the line. That is the test suggested in Salmond on Torts, 12th ed., pp. 147–153, in the section on the "Liability "for Independent Contractors." What Morris L.J. said [134] in the Court of Appeal in the present case was right. Lloyd's Register recognises that a shipowner acts properly in going to thoroughly competent people to do specialised work. If work is of such a nature that a prudent shipowner would not undertake it himself, it is specialised so as to justify that course. In each case one must consider the nature of the work on the facts. Willmer L.J. approved the shipowners' submission in the Court of Appeal.[135] The nature of the obligation is the same as that in *Davie's* case,[136] though the subject-matter is different. The cases are clearly parallel, and in both one should apply the same principle, so as to render the solution of the problem consistent. There should be the same test to find whether the duty has been performed or delegated. The shipowners here are no more sheltering behind the skill of the fitter here than the master in *Davie's* case [136] was sheltering behind the skill of the maker of the drift. See what was said in the Court of Appeal in the present case.[137]

The decision of the Court of Appeal should be affirmed unless some satisfactory basis can be found for distinguishing the *Angliss* case.[138] There is no such ground. There is no special magic in a shipbuilding case. The distinction suggested between building and repair is completely unreal, since there may be cases of conversion or very extensive repairs. Further, it is expected that a contractor should sub-contract. The reasoning in the *Angliss* case [138] provides satisfactory tests to distinguish between performance and delegation and is consistent with all the common law cases. The House of Lords should be reluctant to accept the appellants' "latent defect" argument. The expression is not used in the Hague Rules in connection with seaworthiness. It is only used in article IV, rule 2, not in article III, rule 1. It does not appear in the Harter Act. The appellants' contention would place a difficult burden on shipowners to establish that a defect was latent. That view has not been adopted by judges of first instance since the Act of 1924 was passed. *Davie's* case [139] strongly supports the respondents. For the reasons given in the Court of Appeal this appeal should be dismissed.

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[134] [1960] 1 Q.B. 536, 552.

[135] Ibid. 589.

[136] [1959] A.C. 604.

[137] [1960] 1 Q.B. 536, 565, 570, 581.

[138] [1927] 2 K.B. 456.

Michael Kerr following. The importance and authority of the *Angliss* case [140] is basic. It could have been decided on the basis that "due diligence" meant due diligence in relation to the result to be achieved, so that there was an absolute liability on the shipowner, subject to the existence of a latent defect. But that was not the ratio decidendi. Or the ratio might have rested on an obligation to use due diligence, save in the case of a ship in the hands of shipbuilders, on the ground that a ship while it is being built is not yet a ship; but that is illogical because a ship is a ship before the owner takes delivery; it is the owner's ship before it is handed over. Such a point was not in Wright J.'s mind in that case. The ratio on which the case was determined is that it is a question of fact in each case whether due diligence has been exercised. There is absolute liability of a carrier for the negligence of his servants. In determining the question of liability for negligence by persons other than servants one must ask what the carriers as prudent shipowners should have done. Was the matter, in relation to which the defect arose, within the carrier's province as a carrier or was it not? The real importance of the *Angliss* case [140] is that it was decided on this last point. It has never been criticised in any case and no one has suggested that it was wrong. Suppose that while a ship is at a foreign port a breakdown requires repairs to be done and they are done on the advice of the best person available, such as the local Lloyd's surveyor, but are inadequate, how would the appellants' argument apply?

On the appellants' argument the words "on the part of the "carrier" would have no force in article IV, rule 1, but some effect must be given to them.

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[138] [1927] 2 K.B. 456.

[139] [1959] A.C. 604.

[140] [1927] 2 K.B. 456.

As to *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[141] in that case it was a question of fact whether a shipowner, acting prudently, would call in an expert compass adjuster and whether the owners or their servants could not afterwards have discovered the defect. In the case of radar, an owner, employing a wireless operator, could not say that he could not have discovered a defect in the apparatus.

Ashton Roskill Q.C. in reply. The respondents rely on the fact that a hose test was carried out, but its object was not to test the inspection covers but to ensure that the scuppers were free. It could not have revealed the looseness of the covers. Similarly, the inspection of the hold at Sydney was not directed to the condition of the inspection covers.

As to the desirability of uniformity of decision under the Hague Rules, it is true that the Australian Act was part of the contract between the parties, but the Rules will not have a different construction according to whether they are brought in by contract or by statute. Lord Macmillan in the *Stag Line* case [142] stressed the desirability of uniformity of decision. In the *Maxime Footwear* case [143] his words were repeated. What Lord Macmillan said was not detracted from by what Lord Atkin said in the same case.[144] See also the *Hourani* case.[145] It is not possible to say that the United States cases relied on by the appellants were decided on their particular facts; there is a long line all one way. Many English judges have emphasised the desirability of uniformity in this class of case. As to the warranty of seaworthiness, see also *B. J. Ball* (*New Zealand*) *Ltd.* v. *Federal Steam Navigation Co. Ltd.*[146]

The respondents' approach ignores the authorities both before and after the *Angliss* case,[147], including *Dobell's* case [148] and what Lord Wright said in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[149] See also the *Smith, Hogg* case.[150]

The intention of the Hague Rules is to standardise the rights and obligations of shipowners and holders of bills of lading. Their language does not help the respondents.

Although article III, rule 1, does not mention servants or agents, the obligation remains the shipowner's obligation. Nothing in the Hague Rules justifies the limitation suggested by the respondents in the case where the shipowner goes to a properly qualified expert. The obligation is imposed on the carrier. It can be performed by him or by anyone whom he gets to perform it. He may have acted with perfect propriety, going to the best experts available, and yet be held not to have exercised due diligence. That is a recognised approach, for example, in cases of invitor and invitee. In negligence cases what is basic is the failure of the common law duty to guard against the reasonably foreseeable consequences of one's acts. It is fundamental in carriage of goods by sea that at the root of the carrier's obligations is the obligation to provide a proper ship. That cannot just be shaken off by suggesting that it is a shipowner's personal obligation and no more. *Heyn's* case [151] and the *Hourani* case [152] are against the respondents here. The *Anglo-African* case [153] does not support their main argument.

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[141] 58 Ll.L.Rep. 33.

[142] [1932] A.C. 328, 350.

[143] [1959] A.C. 589, 603.

[144] [1932] A.C. 328, 342–343.

[145] 137 L.T. 549.

[146] [1950] N.Z.L.R. 954, 965.

[147] [1927] 2 K.B. 456.

[148] [1895] 2 Q.B. 408.

[149] [1934] A.C. 538, 547.

[150] 55 T.L.R. 766, 767.

Lord Wright in the *Angliss* case [154] did not mean to cover ship repairers when he spoke of shipbuilders. Until Scrutton on Charterparties, 16th ed., p. 473, n. (*m*), he was never regarded as having there laid down any principle which covered ship repairers. The suggestion was first adumbrated in the 15th edition, p. 457, n. (*h*). In the 13th edition (1931) and the 14th edition (1939) there is no such suggestion. See also *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[155] the *Smith, Hogg* case [156] and *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[157] Carver's Carriage of Goods by Sea, 10th ed., p. 182, does not reflect the views expressed in the last edition of Scrutton. See also what was said about the *Angliss* case [158] in *Davie's* case.[159] McNair J.'s observation [160] that "innumerable disputes "between shippers" (sic, presumably a misprint for shipowners) "have been settled on the basis of" the *Angliss* decision is without significance in the absence of enlightenment about the disputes to which the judge was referring.

The respondents' argument is against the weight of authority. They rely on *Cranfield's* case,[161] which was decided on July 3 and 4, 1939. It does not appear that what MacKinnon L.J. said in the *Smith, Hogg* case,[162] decided on May 12 of that year, was cited to Hilbery J. That case is at variance with other authorities. In it no definition of "latent defect" was advanced. The respondents also rely on the case of *C. H. Smith & Sons Fellmongery*,[163] but no question of law arose there because the judge found that the work was properly done. *The Assunzione*[164] carries the matter no further. In *Waddle's* case,[165] the *Wold Steamship* case[166] and the *International Packers* case[167] the obligation under article III, rule 2, is equated with that under article III, rule 1. *The Waterville Victory*,[168] which was a case of negligence in a shipbuilder's yard, shows the recognition in the United States of the true approach to the *Angliss* case.[169] *Searle* v. *Laverick*,[170] relied on by the respondents, rather supports the appellants. It is a case dealing with the ordinary obligations of a bailee: see the judgment of Blackburn J.[171] As to *Green* v. *Fibreglass Ltd.*,[172] see *Mersey Docks and Harbour Board Trustees* v. *Gibbs*[173] and *Wilkinson* v. *Rea Ltd.*[174]

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[151] 137 L.T. 156.
[152] 137 L.T. 549.
[153] L.R. 1 C.P. 266.
[154] [1927] 2 K.B. 456.
[155] [1934] A.C. 538, 547.
[156] [1940] A.C. 997, 1001.
[157] 58 Ll.L.Rep. 33, 40.
[158] [1927] 2 K.B. 456.
[159] [1959] A.C. 604, 623, 634, 651.
[160] [1959] 1 Q.B. 74, 91.
[161] 64 Ll.L.Rep. 264.
[162] 55 T.L.R. 766, 767.

If analogies are to be sought, they are more helpfully found in the region of statutory duty than in that of pure tort: see *Grote* v. *Chester and Holyhead Railway Co.*[175] and *Francis* v. *Cockrell.*[176] See also *Cassidy* v. *Ministry of Health.*[177] For the respondents reliance was placed on Salmond on Torts, 12th ed., p. 150. But compare this with the 6th edition, the last one published by the author, pp. 119 and 123. See also Winfield on Tort, 6th ed., p. 128.

There is no principle that a shipowner can escape his liability by delegating performance. There was never any difficulty until in Scrutton on Charterparties, 15th ed., *Angliss*[178] was regarded as covering ship repairing.

A. A. Mocatta Q.C. As to the case of *B. J. Ball (New Zealand) Ltd.*,[179] cited in reply, that case adds nothing to the English cases; there was no negligence other than that of members of the crew.

As to the common law cases newly cited in reply, for a true analogy one must find cases, like *Davie's* case,[180] where the duty is stated in the same terms as in the present case. That is not so in the case of *Francis* v. *Cockrell.*[181] That case and *Grote's* case[182] were dealt with by Morris L.J. in the Court of Appeal in the present case[183] and treated as irrelevant. *Wilkinson's* case[184] was explained in *Green's* case.[185] *Cassidy's* case[186] is dealt with in Salmond on Torts, 12th ed., p. 108. The dicta of Blackburn J. in the *Mersey Docks* case[187] are in a very different context.

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[163] 60 Ll.L.Rep. 419.

[164] [1956] 2 Lloyd's Rep. 468.

[165] [1952] 2 Lloyd's Rep. 105.

[166] [1952] 1 Lloyd's Rep. 485, 501–502.

[167] [1955] 2 Lloyd's Rep. 218, 236.

[168] [1951] A.M.C. 320.

[169] [1927] 2 K.B. 456.

[170] L.R. 9 Q.B. 122.

[171] Ibid. 124, 126, 127, 130–131.

[172] [1958] 2 Q.B. 245.

[173] (1864) L.R. 1 H.L. 93, 114.

[174] [1941] 1 K.B. 688; [1941] 2 All E.R. 50, C.A.

[175] (1848) 2 Ex. 251, 254.

[176] (1870) L.R. 5 Q.B. 501, D.C.

[177] [1951] 2 K.B. 343, 363; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574, C.A.

[178] [1927] 2 K.B. 456.

[179] [1956] N.Z.L.R. 954.

[180] [1959] A.C. 604.

Their Lordships took time for consideration.

VISCOUNT SIMONDS stated the facts and continued: My Lords, the question, then, is whether the respondents discharged this burden, and it is conceded that they did unless they are to be held responsible for the negligence of the fitter employed by Alexander Stephen & Sons Ltd. This is the single issue in the case. It was decided in favour of the respondents by McNair J. and the Court of Appeal. Its solution depends on the meaning of the words occurring in article III, rule 1, and repeated in article IV, rule 1, "due diligence to make the ship seaworthy." To ascertain their meaning it is, in my opinion, necessary to pay particular regard to their history, origin and context, and, as I think the courts below have not paid sufficient regard to this aspect of the case, I must deal with it at some length. The Hague Rules, as is well known, were the result of the Conferences on Maritime Law held at Brussels in 1922 and 1923. Their aim was broadly to standardise within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken by the latter. To guide them the framers of the rules had amongst other precedents the American Harter Act of 1893, the Australian Sea Carriage of Goods Act, 1904, the Canadian Water Carriage of Goods Act, 1910, and, though they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provisions being embodied in bills of lading. In all these Acts the relevant words, "exercise due "diligence to make the ship seaworthy," are to be found. It was in these circumstances that these words were adopted in the Hague Rules.

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[181] L.R. 5 Q.B. 501.
[182] 2 Ex. 251.
[183] [1960] 2 Q.B. 536, 566.
[184] [1941] 1 K.B. 688.
[185] [1958] 2 Q.B. 245.
[186] [1951] 2 K.B. 343.
[187] L.R. 1 H.L. 93, 114.

H. L. (E.)

1961

RIVERSTONE MEAT CO. PTY. LTD.
v.
LANCASHIRE SHIPPING CO. LTD.

Viscount Simonds.

My Lords, the question how far their meaning should be governed by previous decisions in the courts of America or this country has been more than once discussed in this House. Notwithstanding some apparent qualification of the proposition which is to be found in the speeches of Lords Atkin and Macmillan in *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*,[1] I think I am at liberty to adopt emphatically what was said by Lords Sumner and Hailsham in *Gosse Millerd Ltd.* v. *Canadian Government Merchant Marine Ltd.*[2] The former of them said[3]: " By forbearing to define ' management of the ship ' . . . the legislature " has, in my opinion, shown a clear intention to continue and " enforce the old clause as it was previously understood and " regularly construed by the courts ": the latter said[4]: " I am " unable to find any reason for supposing that the words as used " by the legislature in the Act of 1924 have any different meaning " to that which has been judicially assigned to them when used " in contracts for the carriage of goods by sea before that date; " and I think that the decisions which have already been given " are sufficient to determine the meaning to be put upon them " in the statute now under discussion." Mutatis mutandis these statements apply to the words we have to construe, and that is why I think, with great respect to the Court of Appeal and to Willmer L.J. in particular, that it is a wrong approach to our problem to say[5] that " any examination of the [Hague Rules] " must . . . begin with *Angliss'* case."[6] To that case I must refer in detail later. I would only now observe that, whatever it decided, it is only a link—an important one, no doubt—in the chain of authority which starts at an earlier date.

First I would refer to *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*,[7] a case often referred to in the courts of this country and of the United States and never, so far as I am aware, dissented from. In that case the ship was unseaworthy owing to the negligence of the ship's carpenter. Into the bill of lading the words of the Harter Act were introduced, " which," said Lord Esher M.R.,[8] " I decline to construe as an Act, but which we must " construe simply as words occurring in this bill of lading." Then

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[1] [1932] A.C. 328; 48 T.L.R. 127, H.L.

[2] [1929] A.C. 223; 45 T.L.R. 63, H.L.

[3] [1929] A.C. 223, 237.

[4] Ibid. 230.

[5] [1960] 1 Q.B. 536, 583; [1960] 2 W.L.R. 86; [1960] 1 All E.R. 193, C.A.

[6] [1927] 2 K.B. 456; 43 T.L.R. 675.

[7] [1895] 2 Q.B. 408; 11 T.L.R. 501, C.A.

[8] [1895] 2 Q.B. 408, 413.

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he proceeds: "In section 3 of the Act so incorporated the exception which is to relieve the shipowner is made to depend on the condition that the owner of the ship . . . shall exercise due diligence to make the vessel in all respects seaworthy. If he does not do that the exceptions in his favour do not take effect. It is contended that the meaning of the clause is that if the owner personally did all that he could do to make the ship seaworthy when she left America, then, although she was not seaworthy, by the fault of some agent or servant, the owner is not liable." And the learned Master of the Rolls, after rejecting this contention, went on: "It is obvious to my mind . . . that the words of section 3 which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that it is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port." So also Kay L.J.[9]: "It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent." I have cited from these judgments at some length because they determine decisively the meaning attached by the courts of this country to the relevant words. It is true that the negligence was that of a servant of the shipowner, but the reasoning and the language of the judgments embrace any agent employed by him. These are wide words.

I turn now to a case decided two years later in the District Court, S.D. New York, *The Colima*,[10] and I quote at some length from the judgment of Judge Brown. In that case the vessel was unseaworthy owing to negligent loading by the stevedores which was done under the supervision and direction of the master and first officer of the ship. The learned judge said[11]: "This section [that is, section 3 of the Harter Act] has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The Act requires in other words, due diligence in the work itself," and after referring to American cases which amply bear out his reference, *The Mary*

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[9] [1895] 2 Q.B. 408, 416.

[10] (1897) 82 Fed.Rep. 665.

[11] Ibid. 678.

L. Peters,[12] *The Flamborough*,[13] *The Alvena*,[14] and the case of *The Rossmore*,[15] which I have already cited, he continues[16]: "On any other construction, owners would escape all responsi-"bility for the seaworthiness of their ships by merely employing "agents of good repute, whether any diligence and care to make "their vessels seaworthy were in fact exercised or not. On "reason and sound policy no such intent in the statute can be "supposed. The context and the pre-existing law indicate that "the intent of the Act is to relieve the shipowner from his pre-"vious warranty of absolute seaworthiness in fact, and to substi-"tute for that warranty a warranty only of diligence, to make "the ship seaworthy. This difference is of great importance, as it "avoids responsibility for latent and undiscoverable defects. But "the warranty of diligence remains: and this requires the applica-"tion of the usual rule, that the acts and negligences of the agent "are deemed those of the principal." He had already made it clear[16] that "agents" means to him persons whom the shipowner "may employ, or to whom he may have committed the "work of fitting the vessel for sea." My Lords, I have without reluctance ventured on this long quotation because I can find no words more apt to express my own view as to the meaning of words taken from the Harter Act and embodied in the Hague Rules. To one thing in particular I call attention. The Harter Act did not in terms, as did the Australian Act by its fifth section, relieve the shipowners of the absolute warranty of the seaworthiness of the ship on sailing. But, in my opinion, this cannot affect the meaning of the relevant words. Here I may quote words of MacKinnon L.J. in *Smith, Hogg & Co. Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.*[17]: "The limitation and "qualification of the implied warranty of seaworthiness by cutting "down the duty of the shipowner to the obligation to use 'due "'diligence . . . to make the ship seaworthy' is a limitation or "qualification more apparent than real, because the exercise of "due diligence involves not merely that the shipowner personally "shall exercise due diligence, but that all his servants and agents "shall exercise due diligence. That is pointed out in a note in "Scrutton on Charterparties (14th ed., p. 110) which says that "this variation will not be 'of much practical value in face of the "'dilemma that must constantly arise on the facts. In most cases

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[12] (1895) 68 Fed.Rep. 919.

[13] (1895) 69 Fed.Rep. 470.

[14] (1896) 74 Fed.Rep. 252; affirmed (1897) 79 Fed.Rep. 973.

[15] [1895] 2 Q.B. 408.

[16] 82 Fed.Rep. 665, 678.

[17] (1939) 55 T.L.R. 766, 767; [1939] 2 All E.R. 855, C.A.

" 'if the vessel is unseaworthy due diligence cannot have been used " 'by the owner, his servants, or agents; if due diligence has been " 'used the vessel in fact will be seaworthy. The circumstances " 'in which the dilemma does not arise (e.g., a defect causing " 'unseaworthiness, but of so latent a nature that due diligence " 'could not have discovered it) are not likely to occur often.' " In the same case on appeal to this House, Lord Wright said [18]: "The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of "due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does "not protect the shipowner. In effect such an exception can "only excuse against latent defects. The overloading was the "result of overt acts." See also *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[19] *per* Lord Wright. I have found no sufficient reason for the omission or alteration of the passage in Scrutton on Charterparties, which was approved by MacKinnon L.J., in later editions of that work.

My Lords, I have gone too far ahead in order to deal with a particular point. But before I come to the *Angliss* case,[20] upon which the respondents rely, I would observe that the law as expounded in *The Colima* [21] has been consistently followed from that day, more than 60 years ago, to this in the United States, and I would remind your Lordships of what Atkin L.J. said in *Hourani* v. *Harrison* [22]: "Those are words which were found, "and no doubt are still found, in old bill of lading and charterparty exceptions, and they are words that are found in legislation which preceded this Act and upon which this Act was "founded, and especially, it is to be noted, are to be found in "the Harter Act, which was the forerunner of all Acts of this "kind, in relation to the carriage of goods by sea. I think it is "very important in commercial interests that there should be "uniformity of construction adopted by the courts in dealing with "words in statutes dealing with the same subject-matter, and it "is a matter of great satisfaction to me to find that the decisions "of these courts seem to correspond with the decisions given by "the courts of the highest authority in the United States." It "would, in my opinion, be a grave departure from the prevailing harmony if, upon, as I think, a false view of the decision in *Angliss*,[23] currency is given to the interpretation of the rules which commended itself to the Court of Appeal in the present case.

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[18] [1940] A.C. 997, 1001; 56 T.L.R. 893; [1940] 3 All E.R. 405, H.L.

[19] [1934] A.C. 538, 547; 51 T.L.R. 5, P.C.

[20] [1927] 2 K.B. 456.

[21] 82 Fed.Rep. 665.

[22] (1927) 137 L.T. 549, 556; 43 T.L.R. 633, C.A.

I come, then, to *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[23] which is said to be the first case in which the Hague Rules were discussed in an English court since the passing of the Australian Sea Carriage of Goods Act, 1924, which, as I should have mentioned, is in the same terms as the English Carriage of Goods by Sea Act of the same year. It is important to note what was the point of decision. It was whether, when the carrier has contracted for the building of a ship, he is liable for lack of due diligence on the part of the shipbuilders or their workmen if he has engaged builders of repute and has adopted all reasonable precautions, such as requiring the builders to satisfy one of the recognised classification societies and engaged skilled naval architects who advise him and skilled inspectors who supervise the work with due diligence. The learned judge, Wright J., as he then was, held that in such circumstances the carrier was not liable. I see no reason to question the correctness of this decision, and need say no more about it, for it does not in the present appeal fall to be reviewed. Of greater significance is that, except in a single passage where the learned judge was dealing with the employment of an inspector to supervise the work, no mention is made of the employment of agents to repair a ship. That passage is as follows [24]: "Again, the need of repairing a ship may "cast on the carrier a special duty to see, as far as reasonably "possible, by special advisers for whom he is personally respon-"sible, that the repairs adequately make good the defects."

It is not possible to extract from this somewhat speculative dictum that the learned judge thought that the carrier would not in any case, with or without inspection, be liable for negligence on the part of those to whom (in the words of Brown J. in *The Colima* [25]) "he committed the work of fitting the vessel for sea." It was not a matter for his decision and he did not, in my opinion, purport to decide it. But it is upon this authority that the whole fabric of the respondents' case appears to rest. It is a reasonable construction of the words, which once again I quote, "to exercise due diligence to make the ship seaworthy" to say that in the case of a ship built for the carrier, or newly come into his hands by purchase, the carrier fulfils his obligation if he takes the precautions which the learned judge suggests. Until the ship is his he can have no further responsibility. I am aware of no case either in the United States under the Harter Act or this country when its words fell to be construed in which the contrary has been suggested. But it is far otherwise where the shipowner puts his ship in the hands of third parties for repair. To such a case the words that I have cited from *The Rossmore*[26] and *The Colima*[27] are precisely applicable. An attempt was made to draw a distinction between negligence shown by the shipowner's servants, his agents and independent contractors. But this could but fail. For no sensible reason could be found for such a distinction. To take a relevant example: repair work might equally be entrusted by a shipowner to his own servants or to an independent contractor. To fasten him with liability for negligence in the one case but not in the other would wholly defeat the purpose of the Act. The holder of the bill of lading is only secure if (to use once more the words of Brown J.) due diligence is shown in the work. That the shipowner is not safeguarded by the fact that the negligence is that of an independent contractor is endorsed by *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[28] where Lord Roche (in delivering the judgment of the Judicial Committee of the Privy Council, consisting of Lord Atkin, Lord Thankerton and himself) held that a carrier was liable for the failure of a compass adjuster to exercise due diligence. As the Court of Appeal recognised in its judgment in the case under appeal, a compass adjuster can fairly be regarded as belonging to the category of independent contractor.

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[23] [1927] 2 K.B. 456.

[24] Ibid. 462.

[25] 82 Fed.Rep. 665, 678.

I will not multiply examples, but will cite one more case which introduced yet another category of persons for whose negligence the shipowner must be held liable. In *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*,[29] the same words occurring in the Canadian Water Carriage of Goods Act, 1910, had to be construed, and Lord Wright said: "The obligation to make a "ship seaworthy is personal to the owners, whether or not they "entrust the performance of that obligation to experts, servants, "or agents." It would be strange if the shipowner were liable for the negligence of an expert who is called in just because work is beyond the competence of the owner, but was not liable for that of the independent contractor. It may, indeed, be asked whether the expert is not typically an independent contractor.

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[26] [1895] 2 Q.B. 408.

[27] 82 Fed.Rep. 665.

[28] (1938) 58 Ll.L.Rep. 33, P.C.

[29] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 648, H.L.

Two Canadian cases may also be mentioned in the interest of uniformity. In *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*[30] it was said by Coady J. in the Supreme Court of British Columbia: " It seems to me that the due diligence " imposed by the statute and as interpreted by the authorities is " not made out by evidence that this duty someone else was " engaged to perform on the behalf of the defendants—someone on " whom the defendants relied and in whom the defendants had " confidence. The duty of the defendants was to exercise due " diligence and this applies to their servants and agents and that " duty is absolute, except as to latent defects not discernible " by the exercise of due diligence." The learned judge supports this proposition by reference to numerous authorities, many of which I have cited. The other case is *Canadian Transport Co. Ltd.* v. *Hunt, Leuchars & Hepburn Ltd., The City of Alberni,*[31] which contrasts the liability of the shipowner under the Water Carriage of Goods Act and his right to limit his liability under the Canada Shipping Act, 1934.

The plea that the shipowner is not liable for the negligence of an independent contractor failing as a general proposition, as it was bound to fail, it was then urged that it was a question of fact in each case, and that upon the facts of the present case the respondents were not liable for the negligence of the fitter employed by the ship repairers. It was for this reason that I stated the facts fully at the beginning of this opinion. Having done so, I must say at once that I find it impossible to distinguish between one independent contractor and another, or between one kind of repair and another. I have no love for the argumentative question " Where is the line to be drawn? " but it would be an impossible task for the court to examine the facts of each case and determine whether the negligence of the independent contractor should be imputed to the shipowner. I do not know what criterion or criteria should be used, nor were any suggested. Take the case of repair. Is there to be one result if the necessary repair is slight, another if it is extensive? Is it relevant that the shipowner might have done the work by his own servants but preferred to have it done by a reputable shipyard? These and many other questions that will occur to your Lordships show that no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done.

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[30] [1952] 1 D.L.R. 850, 854.

[31] [1947] 2 D.L.R. 647.

In the course of the argument some reliance was placed on the fact that the work of repair, or some of it, was inspected by a competent and experienced surveyor. In fact, the negligent work of the fitter was not supervised or inspected by anyone. But this was excused on the ground that it was work that was in practice left to the fitter—a distinction which, in my opinion, illustrates how impossible it is to draw the necessary line. But, supposing that the surveyor had inspected all that he should have inspected, what follows? If there has been no negligent work, there is nothing for him to discover. If there has been and he does not discover it, what does it avail the shipowner that a negligent inspection follows negligent workmanship? I find nothing to help the shipowner in this plea.

I come now, my Lords, to a matter which I should dispose of very shortly but for the weight attached to it in the Court of Appeal. I refer to the reference to the English Carriage of Goods by Sea Act, 1924, by Lord Wright in his speech in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[32] and the comments made upon that reference by some of the noble Lords who took part in *Davie* v. *New Merton Board Mills Ltd.*[33] In the earlier of these cases the first point decided was (I quote from the headnote to the report) that " the provision of a safe system of working in a mine " is an obligation of the owner, who, if he appoints an agent to " perform it, remains vicariously responsible for the agent's " negligence." Lord Wright concurred in this decision and in the course of his speech [34] referred to the Carriage of Goods by Sea Act as an example of the creation of an absolute obligation which is not discharged by the shipowner taking reasonable care to appoint a competent expert. It was, as I have said before and as Lord Wright himself described it, an " analogy or instance." The obligation imposed by the Act is not, as he said it was, to " exercise due diligence . . . to *provide* a seaworthy ship " but " *to make the ship seaworthy.*" His own earlier decision in *Angliss* [35] had been that a shipowner, who had a ship built for him and could presumably be said to " provide " the ship, was not, due precautions being taken, liable for the negligence of the shipbuilders' workmen. It was natural that his observations in the *Wilsons* case[36] should be pressed upon the House in *Davie's* case,[37] and should be the subject of comment in the speeches of their Lordships, but in neither case was the construction of the Hague Rules in any degree relevant to the decision, and I must say, with great respect to the Court of Appeal, that they appear to have attached undue weight to what was said in them.

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[32] [1938] A.C. 57, 80–81; 53 T.L.R. 944; [1937] 3 All E.R. 628, H.L.

[33] [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L.

[34] [1938] A.C. 57, 80.

[35] [1927] 2 K.B. 456.

My Lords, I ought not altogether to neglect the argument that was urged with a wealth of illustration to the effect that where a defendant has properly employed an independent contractor, particularly in relation to a matter which calls for technical or special knowledge or experience, he is not liable if the plaintiff has been injured by the negligence of the independent contractor or his servants, provided such negligence was not apparent to him. Such cases as *Searle* v. *Laverick*,[38] *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*,[39] *Haseldine* v. *C. A. Daw & Son Ltd.*[40] and *Green* v. *Fibreglass Ltd.*,[41] were cited to support the proposition. No one, I think, doubts that in some circumstances a defendant can escape liability for the negligence of an independent contractor; nor could he doubt that in other circumstances he cannot so escape, for he would be faced by such authority as *Grote* v. *Chester & Holyhead Railway Co.*,[42] *Wilkinson* v. *Rea Ltd.*[43] and *Francis* v. *Cockrell.*[44] I do not think it necessary to try to reconcile all the cases on this subject. It is surely sufficient to say that in the context of the Hague Rules it is patent that the obligation of the shipowner is in the latter category. As I have already pointed out, it was ultimately on the facts of the particular case that the respondents were compelled to rely; for the authority was overwhelming that the broad proposition, that the shipowner was protected by the employment of a competent independent contractor, could not stand. With this aspect of the case I have already dealt, and I will say no more about it.

Your Lordships were pressed with the argument that McNair J. had said[45] he had "no doubt that the innumerable disputes "between shippers and cargo owners have been settled on the

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[36] [1938] A.C. 57, 80–81.

[37] [1959] A.C. 604.

[38] (1874) L.R. 9 Q.B. 122.

[39] [1923] 1 K.B. 539; 39 T.L.R. 207, D.C.

[40] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156, C.A.

[41] [1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521.

[42] (1848) 2 Ex. 251.

[43] [1941] 1 K.B. 688; [1941] 2 All E.R. 50, C.A.

[44] (1870) L.R. 5 Q.B. 501.

[45] [1959] 1 Q.B. 74, 91; [1958] 3 W.L.R. 482; [1959] 3 All E.R. 261.

"basis of this judgment," i.e., the judgment in *Angliss*.[46] Such a statement coming from so experienced a judge must carry great weight. But my difficulty lies in knowing just what were the disputes which were thus settled. As I have already pointed out, the only dispute in *Angliss*[46] was in respect of a defect due to the negligence of the shipbuilders' employees, and it may well be that what the learned judge said in regard to such a dispute has been treated as authoritative; but I find it impossible to suppose that his judgment has, in the face of all this authority, English and American, that I have cited, been regarded as governing every case where work of repair was entrusted to an independent contractor. Assuredly it should not have been.

Finally, there have been since *Angliss*[46] a number of cases in which the shipowner has successfully claimed exemption under the Hague Rules. I hope I shall not be thought wanting in respect to the learned judges who decided them if I do not traverse them one by one. So far as the question turned on negligence by the shipbuilder or his employee, I say nothing more about it; so far as it turned on the negligence of an independent contractor in respect of work upon the shipowner's ship, I do not think that the latter was rightly held to be entitled to exemption.

I will end by categorically repelling the second and third formal reasons in the respondents' case. They did not on the facts of the case by entrusting the vessel to reputable ship repairers perform their duty to exercise due diligence. They were vicariously liable for negligence of a servant of an independent contractor, namely, the fitter of Alexander Stephen & Sons Ltd. It follows that the appellants are entitled to recover from the respondents the sum of £974 0s. 3d., the admitted amount of damage. The respondents must pay the appellants' costs of this appeal and in the courts below.

Lord Merriman. My Lords, since I prepared my own opinion I have had the advantage of reading that of my noble and learned friend on the Woolsack, with which I might well have been content to say that I am wholly in agreement. But out of deference to the members of the courts below, from all of whom I am differing, I think that I ought to express my reasons for doing so in my own words.

It being found that this ship was unseaworthy because of the negligence of the fitter in the replacement of the inspection covers, it might appear on the face of it that there is some inconsistency in holding that there was lack of due diligence when it is found that it was in accordance with ordinary prudent practice to leave this task to a fitter unsupervised.

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[46] [1927] 2 K.B. 456.

Morris L.J. said [47] that the conclusion of the trial judge was succinctly expressed in the words [48]: " unless the defendants are " in law responsible for the negligence of the fitter, as I have " found it, they have discharged the onus of proving the exercise " of due diligence so far as concerns the inspection covers."

Ormerod L.J., who was in full agreement with the views of the other Lords Justices, rightly accepted that this was the sole question in issue in the appeal.

Morris L.J. was of opinion that the question was primarily one of fact. He began his judgment by a detailed summary of the main conclusions of fact made by McNair J. He quoted [49] the judge as finding (No. 15) that the cause of admission of seawater was [50] that the fitter at Glasgow " negligently failed to " secure the nuts on the inspection cover evenly or sufficiently, " with the result that the working of the ship on the outward " voyage was sufficient to produce the condition, by the time the " plaintiffs' cargo was loaded at Sydney, that the nuts had been " loosened to such an extent that with the vessel rolling and " waves striking the sides of the ship seawater was forced through " the interstices below the inspection covers." Other material facts he stated as follows [51]: " 8. The task of tightening up the " nuts, when an inspection cover is replaced, is one that is well " within the competence of a skilled fitter. It is ordinary and " prudent practice to leave this task to a fitter and not to " have the supervision either of Lloyd's surveyors or of the " owners' superintendent. 9. Once the nuts have been tightened " up no visual inspection could detect any unevenness in the " positioning of the cover or any insufficiency in tightening up. " 10. Alexander Stephen & Sons Ltd. are a ship repairing con" cern of the highest repute."

Morris L.J. considered that the case fell to be decided according to whether the carriers delegated the performance of their duty or whether they themselves performed and discharged their duty. He expressed his own view as follows [52]: " There was no " delegation by them of their duty to exercise due diligence to

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[47] [1960] 1 Q.B. 536, 551, C.A.
[48] [1959] 1 Q.B. 74, 86.
[49] [1960] 1 Q.B. 536, 551.
[50] [1959] 1 Q.B. 74, 86.
[51] [1960] 1 Q.B. 536, 550.
[52] Ibid. 552.

"make their ship seaworthy. There was a performance by them "of that duty. They did exercise due diligence by taking steps "which included employing Alexander Stephen & Sons Ltd. The "particular task in regard to the inspection covers was well within "the competence of a fitter: no supervision of a fitter was either "in prudence or according to practice called for." He added in conclusion that the negligent fitter was not their servant and there was no room for the application of the principle respondeat superior. He saw no reason why on the particular facts of this case it was not proper to hold that the carriers did exercise reasonable care to make the ship seaworthy. After saying that McNair J. had referred to what Wright J. said and decided in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*[53] and to the speech of Lord Wright in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[54] which I quote later, he pointed out that subsequently to the decision of the judge in the present case, this House had decided *Davie* v. *New Merton Board Mills Ltd.*[55] He said that the Court of Appeal therefore had the advantage of the authoritative guidance which was given in the speeches in *Davie's* case[55] and were relieved of the task of venturing to analyse the earlier pronouncements which were there considered.

The Lord Justice then reviewed the speeches in *Davie's* case.[55] That case was an action as between master and servant founded in tort, the accident to the workman being caused, it was said, by the negligence of the employers, their servants, or agents in failing to provide a suitable drift which could be hammered safely without the risk of pieces flying off.

I venture to doubt whether that case would have received the attention it did in the discussion of the present case in the Court of Appeal if it had not been for the fact that in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[56] another case between master and servant, Lord Wright had said in his speech: "But in truth the "employer's obligation, as it has been defined by this House, is "personal to the employer, and one to be performed by the em- "ployer per se or per alios. If I may take an analogy or instance "of a similar personal obligation, I note that the Carriage of Goods "by Sea Act, 1924, requires a shipowner to exercise due diligence "or to take reasonable care to provide a seaworthy ship. The "shipowner is almost certainly not an expert naval architect, "engineer, or stevedore. So far as I know it has never been

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[53] [1927] 2 K.B. 456.
[54] [1938] A.C. 57.
[55] [1959] A.C. 604.
[56] [1938] A.C. 57, 80–81.

"claimed that this obligation is fulfilled by the shipowner taking "reasonable care to appoint a competent expert; the shipowner is "absolutely held to the fulfilment of the obligation. It is the "obligation which is personal to him, and not the performance." It was the intrusion of that analogy into the law of tort as between master and servant which has, in my opinion, been responsible for the introduction of so much of this latter branch of the law into the consideration of the present problem. I do not propose to pursue the discussion which took place in the *Davie* case [57] about whether what was said by Lord Wright in the *Wilsons & Clyde Coal* case [58] was inconsistent with, or could be reconciled with, what he said as the judge of first instance in the *Angliss* case.[59] Various cases of tort in which the employment of third parties is dealt with in connection with the duty to take reasonable care have been discussed on the basis that the duty to take reasonable care is the same as the duty to exercise due diligence. Much depends, however, on the context in which the duty is postulated. I am not convinced that cases of tort based on the relationship of master and servant, invitor and invitee, and the like, afford a sufficient basis for construing words embodied by statute in a bill of lading, the interpretation of which has been the subject of a long series of decisions.

In the early part of his judgment, Willmer L.J. dealt with many of the authorities on which the cargo owners relied in support of the contention that the shipowners are in law responsible for the negligence of the fitter.

The following are the more important:

In *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[60] the Court of Appeal was concerned with a bill of lading which incorporated section 3 of the Harter Act, which had been passed by Congress in 1893. By that section it was enacted that "if the "owner of any vessel . . . shall exercise due diligence to make the "said vessel in all respects seaworthy and properly manned, "equipped, and supplied, neither the vessel, her owner or owners, "agent, or charterers, shall become or be held responsible for "damage or loss resulting from faults or errors in navigation or in "the management of the said vessel" or from perils, to which it is unnecessary to refer. Lord Esher said of this section [61]: "It "is obvious to my mind, from a consideration of the facts of this "case, that the words of section 3 which limit the owner's liability

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[57] [1959] A.C. 604.
[58] [1938] A.C. 57.
[59] [1927] 2 K.B. 456.
[60] [1895] 2 Q.B. 408.
[61] Ibid. 413.

"if he shall exercise due diligence to make the ship in all respects "seaworthy, must mean that this is to be done by the owner "by himself or the agents whom he employs to see to the sea-"worthiness of the ship before she starts out of that port." Kay L.J. said[62]: "It seems to me to be plain on the face of this "contract that what was intended was that the owner should, "if not with his own eyes, at any rate by the eyes of proper "competent agents, ensure that the ship was in a seaworthy "condition before she left port, and that it is not enough to say "that he appointed a proper and competent agent." A. L. Smith L.J. said[63]: "To get himself within the exemption which "is in his favour the shipowner must make out that he has "by himself or his agents exercised the due diligence which is "required."

American decisions were referred to which, as Willmer L.J. acknowledges in his judgment, show that the approach to the problem of construing the Harter Act was the same on both sides of the Atlantic. *The Irrawaddy*[64] decided that the purpose of the Harter Act was to relieve the shipowner from latent defects. In *The Mary L. Peters*[65] it was held that what was required was the diligence of the owner or those who represented him in the inspection and repair of the ship before sailing. In *The Colima*[66] it was held that the owner was responsible for such agents as he might employ, and that what was required was due diligence in the work itself. It was pointed out that on any other construction owners would escape all responsibility merely by employing agents of good repute. The decision in the *Nord-Deutscher Lloyd* v. *President Insurance Co. of North America*[67] was to the same effect.

In the case of *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[68] a case on which much reliance was placed both in the argument for the shipowners and in the judgment appealed from, Wright J. said[69]: "The question is: "How wide is the category of agents or servants with reference "to the obligation now being considered?"

Before returning to a closer examination of that case, I will refer to other cases which are in line with those already cited.

Paterson Steamships Ltd. v. *Canadian Co-operative Wheat*

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[62] [1895] 2 Q.B. 408, 416.
[63] Ibid. 417.
[64] (1897) 171 U.S. 187.
[65] 68 Fed.Rep. 919.
[66] 82 Fed.Rep. 665.
[67] (1901) 110 Fed.Rep. 420.
[68] [1927] 2 K.B. 456.
[69] Ibid. 460.

Producers Ltd.[70] was a case under the Canadian Water Carriage of Goods Act, 1927, by section 6 of which the protection afforded to the shipowner is conditional upon his having exercised due diligence to make the vessel seaworthy. Unlike the English Act of 1924 and the Australian Act under which the present case arises, but like the Harter Act, the Canadian Act does not contain an express abolition of the absolute warranty of seaworthiness which prevailed at common law. In the judgment it was pointed out [71] that the Canadian Act had a certain kinship with similar legislation in other countries on the same subject-matter, in particular with the Harter Act, 1893, the New Zealand Sea Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. Lord Wright said [71]: " These Acts differ in general " scheme and framework from the Canadian Act, but in certain " respects decisions under them may be helpful in construing the " Canadian Act," and added: " . . . all these Acts agree in this " respect, that they superimpose statutory restrictions on the " freedom possessed by the shipowner at common law to restrict " his liability as carrier, and at the same time give him the benefit " of statutory provisions in his favour." He went on: " These " Acts accordingly cannot be understood or construed except in " the light of the shipowners' common law liability and the usual " methods of limiting that liability previously in vogue," which he then proceeded to examine. He noted [72] that what was meant in the British Act by due diligence to make the ship seaworthy was discussed in the *Angliss* case,[73] saying: " . . . it is not " limited to personal diligence on the part of the owner," and he concluded [74] a full examination of the terms of the Canadian Act, as follows: " The operative obligation to provide a seaworthy " ship is thus under the Act reduced, even when unseaworthiness " causes the loss, to an obligation which may be compendiously " described as an obligation to use due diligence to make the ship " seaworthy."

In *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[75] the wording of section 6 of the Canadian Act was again in question. Your Lordships' House dismissed the appeal from the Court of Appeal, which had upheld the decision of MacKinnon L.J., sitting as a judge of first instance, that there had been a breach of the duty to exercise due diligence to make the ship in all respects seaworthy. In the course of his speech, with which Lord Atkin and Lord Thankerton expressed their agreement, Lord Wright said[76]: "Whether the appellants could successfully rely "on section 6 depended on whether they could show that they "exercised due diligence to make the vessel seaworthy, and thus "fulfilled the condition imposed by the section. This issue "turned solely on the sufficiency of the bunkers on leaving Vancouver. As already stated, MacKinnon L.J. held that they "had not fulfilled the condition. The obligation to make a ship "seaworthy is personal to the owners, whether or not they entrust "the performance of that obligation to experts, servants, or "agents."

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[70] [1934] A.C. 538.
[71] Ibid. 544.
[72] Ibid. 547.
[73] [1927] 2 K.B. 456.
[74] [1934] A.C. 538, 550.
[75] [1939] A.C. 397.

In *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[77] the relevant provision in the charterparty was that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy.

In delivering the leading judgment in the Court of Appeal, MacKinnon L.J. said[78]: "The limitation and qualification of "the implied warranty of seaworthiness by cutting down the "duty of the shipowner to the obligation to use 'due diligence "' . . . to make the ship seaworthy' is a limitation or qualification "more apparent than real, because the exercise of due diligence "involves not merely that the shipowner personally shall exercise "due diligence, but that all his servants and agents shall exercise "due diligence. That is pointed out in a note in Scrutton on "Charterparties (14th ed., p. 110) which says that this variation "will not be 'of much practical value in face of the dilemma that "'must constantly arise on the facts. In most cases if the "'vessel is unseaworthy due diligence cannot have been used "'by the owner, his servants, or agents; if due diligence has been "'used the vessel in fact will be seaworthy. The circumstances "'in which the dilemma does not arise (e.g., a defect causing "'unseaworthiness, but of so latent a nature that due diligence "'could not have discovered it) are not likely to occur often.'" MacKinnon L.J. was quoting from the 14th edition of Scrutton, published in 1939. The same view is expressed in the text of the 12th and 13th editions, edited by Lord Porter and McNair J.

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[76] [1939] A.C. 397, 403.

[77] 55 T.L.R. 766.

[78] Ibid. 767.

MacKinnon L.J. had very great experience in this class of case, and had himself edited the 5th to the 11th editions of that work.

Of the decisions of your Lordships' House, affirming the decision of the Court of Appeal, it is sufficient to say that Lord Wright, with whose judgment Lord Maugham and Lord Atkin concurred, says this[79]: "The unseaworthiness, constituted as it "was by loading an excessive deck cargo, was obviously only "consistent with want of due diligence on the part of the ship-"owner to make her seaworthy. Hence the qualified exception "of unseaworthiness does not protect the shipowner," and added: "In effect, such an exception can only excuse against latent defects"; and later he said[80] that he agreed with MacKinnon L.J.'s statement of the law. No disapproval of this statement of the law was expressed in any of the other speeches.

As there has been no finding that this was a case of latent defect it is unnecessary to discuss the question whether careless work which could obviously have been detected by competent supervision while the work was proceeding could be described as a "latent defect" merely because subsequent inspection would not necessarily detect it.

The *Angliss* case[81] concerned a bill of lading incorporating the Australian Sea Carriage of Goods Act, 1924, which is in all material respects identical with the English Act. It raised the question of the liability for unseaworthiness resulting from negligence of a workman in the employ of shipbuilders of repute, whom the shipowner had employed to build the ship in question. Lord Wright said[82]: ". . . the Acts have expressly abolished the "previous absolute obligation to provide a seaworthy ship and "have substituted an obligation to use due diligence to that "effect." The ratio decidendi can be found in the passage that follows. He pointed out that the carrier might not be the owner of the ship but merely the charterer; he might not have contracted for the building of the ship, as in the *Angliss* case,[82] but merely have purchased her, possibly years after she had been built, and added: "In the two latter cases the builders and their men "cannot possibly be deemed to have been the agents or servants "of the carrier and it is illogical that there should be such differ-"ence in the carrier's obligations merely because he has bought "the ship by the method of contracting with the builders to build "it for him. In addition, if the carrier were held liable for the

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[79] [1940] A.C. 997, 1001.

[80] Ibid. 1003.

[81] [1927] 2 K.B. 456.

[82] Ibid. 461.

"bad workmanship of the builders' men, he might equally be held "liable for bad workmanship by the men employed by the various "sub-contractors who supply material for the builders, such as "steel-workers in furnaces and rolling mills, or who supply special "articles such as castings, pumps or proprietary machines, which "would involve an almost unlimited retrogression."

Whatever retrogression may be involved in an attempt to fix the shipowner with liability for bad workmanship before the ship comes into existence as a ship, or before an existing ship comes into his possession at all, there is, in my opinion, no question of undue retrogression in attaching to the shipowner responsibility for a person in the employ of those to whom he has entrusted the repair of his own ship.

Paterson Steamships Ltd. v. *Robin Hood Mills Ltd.*[83] was another case under the Canadian Act of 1927. Two cases had been tried, the action of the cargo owner against the ship and an action by the shipowner to limit his liability. The latter alone was the subject of an appeal to the Privy Council. In the other action the lack of due diligence alleged was in connection with the adjustment of the compass, and the important point is that this involved the alleged neglect of a compass adjuster, who might be regarded as an independent expert, as well as of the master who had checked his adjustment.

In giving the judgment of the Board in the limitation action, Lord Roche said that in the other action the question was whether the condition of the exercise of due diligence to make the vessel seaworthy had been fulfilled, as it was necessary that it should be fulfilled to bring into operation the protective provisions of section 6 of the Act. He added [84]: "The condition is not fulfilled "merely because the shipowner is personally diligent. The condi-"tion requires that diligence shall in fact have been exercised by "the shipowner or by those whom he employs for the purpose— "see *Dobell* v. *Steamship Rossmore Co.*[85] Therefore, with "regard to the *Thordoc* in the cargo action, want of diligence in "the compass adjuster who adjusted the compasses or in the "captain who said he checked or verified the adjuster's work "would be material, and a finding adverse to the shipowner could "be arrived at upon the ground of want of diligence in these "persons."

This statement of the law was followed by the Privy Council in the *Maxine Footwear Co. Ltd.* v. *Canadian Government*

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[83] 58 Ll.L.Rep. 33.

[84] Ibid. 40.

[85] [1895] 2 Q.B. 408.

Merchant Marine Ltd.,[86] a case under the Canadian Water Carriage of Goods Act, 1936. Lord Somervell of Harrow, who delivered the judgment, also repeated what had been said by Lord Macmillan in *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.*,[87] about the importance of remembering that the Act was the outcome of an international conference, and the rules in the schedule having an international currency, and about the desirability of uniformity of interpretation. See also Atkin L.J. in *Hourani* v. *Harrison*,[88] and Lord Hailsham in *Gosse Millerd Ltd.* v. *Canadian Government Merchant Marine Ltd.*,[89] where of the words "management of the ship" in article IV, incorporated in the English Act of 1924, he said that they first appeared in an English statute in that Act, but nevertheless they had a long judicial history in this country. The same words were to be found in the well-known Harter Act and had often been incorporated in bills of lading which had been the subject of judicial consideration in the courts of this country. He was unable to find any reason for supposing that the words used in the Act of 1924 had any different meaning from that which had been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; adding "and I think that the "decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under "discussion." The same considerations apply, in my opinion, to the words in question in this appeal. It seems to me to be impossible to resist the conclusion that when those words were chosen by international convention as being the test of the carrier's liability, and at the same time of his rights and immunities, the words were selected because they had already acquired a known connotation. Equally it is impossible, in my opinion, to ignore the desirability of preserving the uniformity of interpretation which has been given to these words in American, Canadian and New Zealand authorities, as well as in decisions of the courts of this country.

Again, in *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*,[90] a case in which a defect would have been obvious if care had been exercised in the course of overhaul and repairs, the judge said: "it is my view on the authorities, that the defen"dants cannot avoid liability to the plaintiff by attempting to cast

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[86] [1959] A.C. 589, 602; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740, P.C.

[87] [1932] A.C. 328, 350.

[88] 137 L.T. 549, 556.

[89] [1929] A.C. 223, 230.

[90] [1952] 1 D.L.R. 850, 854.

"upon the shoulders of some third party, engaged by them to do "work upon this ship, a duty which the Act places upon the "defendants."

To the same effect was the decision in the New Zealand case, *B. J. Ball (New Zealand) Ltd.* v. *Federal Steam Navigation Co. Ltd.*,[91] and in *American Linseed Co.* v. *Norfolk and North American Steam Shipping Co.*[92]

Finally, in *International Packers (London) Ltd.* v. *Ocean Steamship Co. Ltd.*,[93] a case under the Australian Act of damage to cargo by the entry of seawater through the hatch covers, McNair J. said: "The obligation imposed by Article III, rule 2, "like the obligation imposed by Article III, rule 1, to exercise "due diligence to make the ship seaworthy, is an obligation "imposed upon the shipowner himself which he cannot escape on "proof that he employed a competent independent contractor who "was in fact negligent." Mr. Mocatta admitted—quite rightly, as I think—that the point is in no way affected by the learned judge's emendation in the present case of "surveyor" for "contractor."[94]

Great reliance was placed by Mr. Mocatta on the decision of Hilbery J. in *Cranfield Bros. Ltd.* v. *Tatem Steam Navigation Co. Ltd.*[95] This was a case under the Canadian Act of 1936 concerning damage to a cargo of wheat by unseaworthiness owing to the leakage of seawater through a rivet hole, held by the judge to have been in a defective condition caused by corrosion.

Hilbery J., while recognising that the shipowner does not discharge his duty to exercise due diligence to make the ship seaworthy merely by establishing that she passed her classification survey, or merely by showing that he has appointed someone who by qualification should be a skilled person to examine it, said that both these things were elements to be taken into account in considering whether the shipowner had exercised due diligence to make the ship seaworthy. He found that there had been no lack of diligence about the ship's surveys for her qualification, or about the frequency with which she was dry-docked, and he held that the graving dock company concerned were highly skilled, experienced and competent people to examine the vessel and to report upon any disrepair that might be found, and that their representative was a highly experienced and responsible man, suitably skilled to make such an examination, and to report, and that he did, when the vessel was docked in 1937, make a proper and thorough examination of her with a view to ascertaining anything that required to be done in the way of repairs, and that he saw this very rivet, but noticed nothing the matter with it then.

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[91] [1950] N.Z.L.R. 954.
[92] (1929) 32 Fed. (2d) 281, 282.
[93] [1955] 2 Lloyd's Rep. 218, 236.
[94] [1959] 1 Q.B. 74, 94.
[95] (1939) 64 Ll.L.Rep. 264.

The judge called attention to the evidence that the only way of finding that defective rivet would have been to scale the plating and that it had been said that it would have been prudent to scale the plating, in the way of the collision bulkhead particularly. But he said that it was one thing to say in court that it would have been prudent, but he had to consider the question in the circumstances that obtained in the graving dock at Barry or at Vancouver before the ship set out on her homeward voyage.

He was not satisfied that a reasonably careful owner would have scaled the plating round the area of this particular rivet, and was satisfied that a reasonable examination was made. Hilbery J., however, having been referred to the case of *The Dimitrios Rallias*,[96] doubted, though he did not think it necessary to decide, whether this was a latent defect within the strict meaning of article IV, rule 2 (*p*).

It is, however, worth noting that the industry of Mr. Roskill brought to our attention the fact that this case was decided on July 3 and 4, 1939, and that so far as the report shows, MacKinnon L.J.'s judgment, already quoted, in the *Smith*, *Hogg* case,[97] which had been given on May 12, 1939, was not cited to Hilbery J. It may well be that if Hilbery J. had been aware of what had been said by MacKinnon L.J. six weeks earlier, he might have approached the question of the responsibility of the shipowner differently, and might have felt himself obliged to come to a definite decision as to whether the case was truly one of latent defect, upon which the shipowner could escape the consequences of that recent judgment in the Court of Appeal.

Of the argument for the cargo owners, based on what he described [97a] as " a consistent stream of authority " for the principle contended for by the cargo owners, Willmer L.J. said that he certainly appreciated its force, but came to the conclusion that it was not well founded.

I confess that I am not convinced by the reasons for this decision. In the first place, he adopts the criticism of McNair J. that the construction sought to be put on article III, rule 1, would be in effect to substitute for the new qualified obligation something barely distinguishable from the old absolute undertaking except in

[96] (1922) 128 L.T. 491, 495, C.A.

[97a] [1960] 1 Q.B. 536, 580.

[97] 55 T.L.R. 766.

the necessarily rare cases of true latent defect. But that is precisely what MacKinnon L.J. had said in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[97b] Incidentally, although the point must not be pressed too far, it is the interpretation put upon the words of article III, rule 1, by the learned judge himself as editor of the 12th and 13th editions of Scrutton on Charterparties.

Next, while Willmer L.J. recognises that the words are wide enough to render the carrier liable for lack of due diligence on the part of his own servants and possibly of an independent contractor engaged by the carrier to perform on his behalf any part of the ordinary business of carrying goods (e.g., a firm of stevedores employed to load cargo), he could well understand that failure on the part of such contractor to exercise due diligence could be held to be a failure on the part of the carrier.

Similarly, the shipowner might become liable for want of due diligence on the part of some independent person to act as his representative, such as a firm of ships' agents, or surveyor or engineer appointed to supervise the building or repair of a ship, as being the equivalent of his own want of due diligence, on the ground that such persons could properly be regarded in law as his servants, pro hac vice, although not in his regular employment.

But the Lord Justice says that this is far removed from saying that every time a shipowner engages some outside person or independent contractor to perform some work on a ship which goes outside the carrier's own business of carrying goods, he renders himself liable for any lack of due diligence on the part of such person or contractor.

For my part, I doubt whether putting a ship in dry dock for a periodical survey combined, as in this case, with her load-line survey, could properly be described as going outside the carrier's own business of carrying goods.

This leads the Lord Justice to the conclusion that while the matter in question is one of the building, rebuilding or repairing of a ship, or of the supply of equipment or spare parts, there is no reason in principle why the court cannot be invited to conclude as a jury question that the carrier has exercised due diligence, upon proof (a) that he has engaged a reputable contractor or supplier; (b) that he has provided for the work to be properly superintended by his own representative; and (c) that such representative has in fact exercised due diligence.

[97b] 55 T.L.R. 766.

I am not quite clear, as a matter of law, how conditions (b) and (c) fit the case of the negligence of a fitter of whom it is said, as a matter of fact, to be the ordinary and prudent practice to leave him unsupervised by anybody.

It is to be observed that in the concluding passage of his judgment, Willmer L.J. utters the caution that on future occasions the shipowner who entrusts the performance of his duties to a negligent and unsupervised fitter may find that he is held responsible. The question is whether there is any reason why the responsibility should not attach in this case.

The Lord Justice goes on to draw a distinction between employing someone else to carry on one's own business, and engaging someone else to perform something which is his business.

It seems to me that the same operation may well be the business of both. How is it less the business of the shipowner to have some particular repair done than it is the business of the repairer whom he employs to do the repair? The conclusion reached by Willmer L.J. is that in so far as the shipowner can be said to delegate to the repairers at all, he delegates the performance of the actual job of doing the repairs and making the ship seaworthy. Just so. The authorities already quoted make it clear that what is required is due diligence in the work itself, and that this is the personal responsibility of the shipowner.

This brings me to the Lord Justice's review of the *Angliss* case.[98] For reasons which will be apparent from what I have already said, I disagree with his statement that any examination of the authorities must begin with that case. On the contrary, it is implicit in the statement already quoted from the judgment of MacKinnon L.J. in the *Smith, Hogg* case,[99] and is expressed by Lord Hailsham in the *Gosse Millerd* case,[100] that one must begin with the Harter Act and the authorities under that and similar Acts which substituted a statutory obligation for the absolute warranty of seaworthiness at common law.

Much reliance was placed on a short passage of the judgment of Wright J., when he said[101]: "Again, the need of repairing "a ship may cast on the carrier a special duty to see, as far as "reasonably possible, by special advisers for whom he is "personally responsible, that the repairs adequately make good "the defects." This passage was relied on by Willmer L.J., and in the argument, as authority for the proposition[102] that in respect of the protection of the shipowner by the employment of a specialist of repute there is no " distinction in principle between " bad workmanship on the part of the original builders' men and " bad workmanship on the part of the repairers' men at a later " period in the ship's history."

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[98] [1927] 2 K.B. 456.

[99] 55 T.L.R. 766.

[100] [1929] A.C. 223.

[101] [1927] 2 K.B. 456, 462.

[102] [1960] 1 Q.B. 536, 583–584.

In my opinion, this ignores the ratio decidendi of *Angliss*,[103] which is based upon the consideration that whether a ship is built for, bought by, or chartered to the carrier, he should not be held liable for bad workmanship for which he had no responsibility before the ship came into his possession.

There is no doubt that the judgment in the *Angliss* case [103] covers wider ground. But when it is said that the decision in *Angliss* [103] has been repeatedly followed with approval, it is important to remember how limited was the extent of the actual decision. From this it follows that valuable as was the survey of what, in this country, was new legislation dealing with the carriage of goods by sea, much of what was said was obiter, and it must be recalled that Lord Wright, as he had meanwhile become, in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[104] said what has already been quoted by way of illustrating the duty of an employer to provide a safe system of working in a mine.

Finally, Willmer L.J. found that the work done by the fitter was well within the competence of one of the engineer members of the ship's crew, and as such was something within the ordinary course of the carrier's business, rather than a matter calling for the exercise of any specialised technical skill. In fact, the work was done in this very way after the defect had been discovered. Nevertheless, he held that the case must be approached on the basis that the replacement of the inspection covers of the storm-valves was part of the specialised and technical work which Messrs. Alexander Stephen were properly engaged to do.

On this point it was argued that it would be wholly artificial and unreasonable to isolate work which was plainly incidental to the specialised operation of repairing the ship because it was in itself the type of work which required no specialised or technical knowledge or experience.

I am not convinced by this argument, but, assuming it to have some force, it seems to me that a much more unreasonable breach is made in the duty of the carrier to the cargo owner if the carrier can escape responsibility for negligent performance of work which is well within the scope of his own business and the competence of his own servants by entrusting the whole operation to a ship repairer of repute.

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[103] [1927] 2 K.B. 456.

[104] [1938] A.C. 57.

I would allow this appeal, and enter judgment for the appellants for the amount claimed.

LORD RADCLIFFE. My Lords, I have no doubt that this case is important in its implications and that it has merited the full consideration that it has received at all its hearings. Nevertheless, it appears to me that the answer to be returned to the problem it raises depends upon a very short question, what kind of obligation is imported by the words " shall be bound . . . to " exercise due diligence to make the ship seaworthy " that appears in article III (1) of the Rules scheduled to the Australian Sea Carriage of Goods Act, 1924. As we know, these are in fact the Hague Rules. Read them in one way, the answer must necessarily be for the appellants, the cargo owners: read them in another, it must be for the respondents, the carriers.

The relevant facts are of the simplest. Cargo has been damaged in the course of a voyage and it was damaged because the ship on which it was carried was unseaworthy. The unseaworthiness was caused by the carelessness of a fitter employed by skilled repairers working for the carriers. The work that they were doing was in connection with the ship's No. 2 special survey and annual load-line survey, in other words, work which was reasonably required in order to keep the ship in a seaworthy condition.

Now, I am quite satisfied that, treating the carriers as a legal person, a limited company whose mind, will and actions are determined by its officers and servants, they did nothing but what they should have done as responsible and careful persons in the carrying business. They were not themselves in the repairing business and there is no reason why they should have been, but they were mindful of their duty to have their ship in good order for its voyage or voyages and they not only entrusted her to a ship-repairing company of repute for reception in dry-dock but also employed an experienced and competent marine superintendent to act on their behalf. He, in his turn, acted with more than usual caution in requiring all the ship's storm-valves to be opened up for inspection and, although it was the carelessness of one of the repairers' fitters that left one of these valves ineffectively closed, it was ordinary prudent practice to entrust the work of closing up to a fitter and not to subject such work to an independent inspection.

I see no ground, therefore, for saying that the carriers themselves were negligent in anything that they did. If the content of their obligation is that they should, as a legal person, observe the standard of reasonable care that would be required at common law in a matter of this sort, which involves skilled and technical work, and if there is nothing more in their obligation than that, then I should not regard them as in default or, consequently, as liable to the cargo owners. Full and instructive as are the several judgments of the members of the Court of Appeal, I do not think that in the end they amount to more than an acceptance of this standard of obligation and a drawing of the necessary conclusion from the facts.

But there is, on the other hand, a way of looking at the intrinsic nature of the obligation that is materially different from this. It is to ask the question, when there has been damage to cargo and that damage is traceable to unseaworthiness of the vessel, whether that unseaworthiness is due to any lack of diligence in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy. Such persons are then agents whose diligence or lack of it is attributable to the carriers. An inquiry on these lines is not concerned with distinctions between carelessness on the part of officers or servants of the carriers or their supervising agents, on the one hand, and carelessness on the part of their contractors or those contractors' contractors, on the other. The carriers must answer for anything that has been done amiss in the work. It is the work itself that delimits the area of the obligation, just as it is the period " before " or at the beginning of the voyage " that delimits the time at which any obligation imputed to the carriers can be thought to begin. If these last points are borne in mind, I think that the difficulties about " an almost unlimited retrogression " (see *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*[105]) tend to disappear: for there is a point in each case at which defective work is not the work of any agent of the carrier and the duty to be diligent is no more than a duty to be skilled and careful in inspection. But the inspection that is relevant in such a case is not merely the carrier's inspection of his contractor's work: it is inspection on the part of anyone working for the carrier who is concerned to make sure that he does not accept defective materials or use defective tools.

If one had to choose between these two alternatives without any background in the way of previous authority or opinion with regard to the interpretation of this section of the Hague Rules, I think it would be very difficult to know which way one ought to turn. The natural meaning of the words does not seem to me to accord well with either reading. Whatever the responsibility is, it is imposed on the carrier and no one else—that is clear—but it is equally clear that no one would regard the carrier as being in the wrong merely because he gets whatever requires to be done, inspection, survey or work, done for him by someone else. If the respondents' reading is adopted, the one that has commended itself to McNair J. and the Court of Appeal, one must treat the words " due diligence to make the ship seaworthy " as if they were equivalent to " due diligence to see that the ship is " made seaworthy," and that is not the same thing. On the other hand, the reading for which the appellants contend is not in truth consistent with the grammatical meaning of the words they have to rely upon, for the exercise of due diligence to which the carrier would be held would include the performance or omission of acts that were not in law the acts of the carrier at all.

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[105] [1927] 2 K.B. 456, 461.

Such general considerations as occur to me appear to favour the cargo owner's claim. He is not in any sense behind the scenes with regard to what is done to the vessel or how or when it is done. His concern with it begins and ends with the loading and discharge of his goods. The carrier, on the other hand, must have some form of ownership of the vessel and some measure of responsibility for seeing that it is fit and in proper condition for the carriage undertaken. He may qualify that responsibility by stipulation, if the law allows him to; or the law may write out the terms of his responsibility for him; but within those limits the responsibility is there. I should regard it as unsatisfactory, where a cargo owner has found his goods damaged through a defect in the seaworthiness of the vessel, that his rights of recovering from the carrier should depend on particular circumstances in the carrier's situation and arrangements with which the cargo owner has nothing to do; as, for instance, that liability should depend upon the measure of control that the carrier had exercised over persons engaged on surveying or repairing the ship or upon such questions as whether the carrier had, or could have done, whatever was needed by the hands of his own servants or had been sensible or prudent in getting it done by other hands. Carriers would find themselves liable or not liable, according to circumstances quite extraneous to the sea carriage itself.

What I think should determine this appeal, however, is what we know of the history of these words "due diligence to make "the ship seaworthy" in connection with sea carriage of goods, and what I regard as the settled interpretation of their significance which has been alluded to from time to time in the English courts. These sources seem to me to be wholly in favour of the appellants' claim. We have, to begin with, the common learning that the words in question were adopted by international convention in the Hague Rules at a time when they had been for many years familiar in the Harter Act of the United States. We know what content successive decisions of American courts had given those words: that the carrier was responsible to the cargo owner unless due diligence in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether he was the carrier's servant, agent or independent contractor. "Merely employing agents of good "repute" was not enough. There is no point in lengthening this opinion by citing the individual cases which have already been mentioned in the opinion of my noble and learned friend on the Woolsack, and to which reference can be found in our own textbooks on carriage of goods by sea.

I regard *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[106] as affirming for English courts the same view of the significance of these words in the Harter Act, and I ought to say in passing, since the point was raised, that I cannot see why the meaning of the particular words "exercise due diligence" should be affected by the circumstance that the Harter Act was brought into force in the United States at a time when a carrier's absolute warranty of seaworthiness was still implied. It is true that the act of negligence in the *Dobell* case[106] was that of the ship's carpenter, who was probably the carrier's servant in the ordinary sense, but there is no warrant for treating the decision of the Court of Appeal as turning upon that point. On the contrary, all three Lords Justices agreed in rejecting the idea that the diligence to be exercised is merely that of the owner himself, and in insisting that his responsibility extends to the acts of anyone who may be his agent for the purpose of putting the ship in order. I will quote a passage from the judgment of Kay L.J.[107] which is crucial to this issue, for if it is correct it strikes at the root of the respondents' argument in the present case. "The essential "question then is," he says, "Was there want of due diligence "on the part of the owners? It is said that they did all that they

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[106] [1895] 2 Q.B. 408.

[107] Ibid. 416.

"could by providing proper equipment and appointing proper "agents. It was the duty of the ship's carpenter to close this "porthole, and they appointed a carpenter to whose competence "no one makes any objection. It is said, therefore, that they "personally exercised diligence, and thereby fulfilled the con-"dition. I do not agree with this contention. It seems to me "to be plain on the face of this contract that what was intended "was that the owner should, if not with his own eyes, at any "rate by the eyes of proper competent agents, ensure that the "ship was in a seaworthy condition before she left port, and "that it is not enough to say that he appointed a proper and "competent agent. It is obvious that the owner cannot himself "with his own hands make the ship seaworthy; he must act "through other persons; but I do not read the contract as "exempting him from liability in the case of the negligence of the "agents whom he employs to act for him in this respect." This is not the doctrine of respondeat superior, or of a limited company's liability for the acts of its servants.

It was in 1924 that the Hague Rules were adopted into the English law of carriage of goods by sea, the same year as that in which they became law in Australia. It appears to me that since then there has been in this country a steady current of judicial and expert opinion to the effect that article III (1) of those rules is to be understood in the sense explained in *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[108] or, to put it in another way, in the Harter Act sense. With great respect to the judgments that have been given in the High Court and the Court of Appeal, I think that if they were to stand, they would be the first diversion of that current on a different course.

Again, it is not necessary that I should make a detailed citation of what is already before your Lordships. What is stressed throughout is that the obligation of the carrier is "not limited "to his personal diligence" (see the *Angliss* case[109]). The carrier's responsibility for the diligence of all those whom he employs to discharge his own primary duty has been stated and recognised by such eminent commercial lawyers as Lord Roche in delivering the opinion of the Judicial Committee in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[110] by Lord Somervell (see *Maxime Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[111]), by Lord Wright (see *Paterson*

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[108] [1895] 2 Q.B. 408.

[109] [1927] 2 K.B. 456, 460.

[110] 58 Ll.L.Rep. 33.

[111] [1959] A.C. 589, 602; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740, P.C.

Steamships Ltd. v. *Canadian Co-operative Wheat Producers Ltd.*,[112] *Wilsons & Clyde Coal Co. Ltd.* v. *English*[113]), and by MacKinnon L.J. in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[114] The learned Lord Justice there summarises the practical effect of article III (1) in words avowedly drawn from the then current edition of Scrutton on Charterparties. The 13th edition of that work, published in 1931 and edited jointly by Mr. (later Lord) Porter and Mr. McNair (now McNair J.) makes the following comment on that article (p. 513, note (*z*)): "In appearance the undertaking to use due "diligence to make the ship seaworthy is less onerous than the "old common law undertaking that the ship is in fact seaworthy. "In reality there is no great gain to the shipowner by the "substitution. For . . . the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is "due to some cause which the due diligence of all his servants "and agents could not discover, e.g., in the case of 'latent "'defects not discoverable by due diligence.'" I cannot see that there is anything to quarrel with in this analysis of the carrier's responsibility. But it is quite inconsistent with judgment for the defendants in this case. Here there was no latent defect that could not be detected. There was carelessness in completing the work of survey for the carriers, and no one corrected it.

The passage that I have just quoted vouches the *Angliss* case[115] as its authority. It is an odd feature of the present appeal that the argument for the respondents has nevertheless treated the same decision as its main support, and that the Court of Appeal's judgments were evidently very much influenced in their favour by what the learned judges regarded as the principle of that decision. In my opinion, there was in that a misconception. I do not consider that judgment for the cargo owners in this case would be inconsistent with anything that *Angliss*[115] decided. It becomes necessary, therefore, to see clearly what the decision was.

Angliss[115] was a case about the liability of carriers for the bad workmanship of employees of shipbuilders occurring during the construction of the carrying vessel. It was not about carelessness of ship repairers in carrying out survey or repairs. The analogy between builders and repairers is as delusive as it is attractive: it leads only to confusion to argue from the situation of the one to the situation of the other when the carrier's liability for diligence in making the ship seaworthy is in question.

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[112] [1934] A.C. 538.
[113] [1938] A.C. 57, 80–81.
[114] 55 T.L.R. 766.
[115] [1927] 2 K.B. 456.

The principle of the learned judge's decision in *Angliss* [115] is stated at the outset of his judgment. Premising that the obligation of the carrier is not limited to his personal diligence, he states the essential question to be [116]: "How wide is the category "of agents or servants with reference to the obligation now being "considered." His answer is that where unseaworthiness is due to a fault of workmanship on the part of builders which was committed in the course of constructing the ship, the builders were not agents of the carrier for the purpose of discharging the duty imposed by article III (1). As a general proposition this must surely be true. The reasoning is based on the position of builders, what I may call their time situation. "The carrier," as he says,[117] "may not be the owner of the ship, but merely the "charterer; he may not have contracted for the building of the "ship, but merely have purchased her, possibly years after she "has been built. In the two latter cases the builders and their "men cannot possibly be deemed to have been the agents or "servants of the carrier and it is illogical that there should be "such difference in the carrier's obligations merely because he "has bought the ship by the method of contracting with the "builders to build it for him."

It is plain to me that this conclusion turns on the consideration that the causative carelessness took place at a time before the carrier's obligation under article III (1) had attached and in circumstances, therefore, when the builders and their men could not be described as agents for the carrier "before and at the "beginning of the voyage to . . . make the ship seaworthy." This is a tenable position for those who engage themselves upon the work of bringing the ship into existence. The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put it right. This is recognised in the judgment. But if the bad work that has been done is "concealed" [118] and so cannot be detected by any reasonable care, then the lack of diligence to which unseaworthiness is due is not to be attributed to the carrier.

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[115] [1927] 2 K.B. 456.

[116] Ibid. 460.

[117] Ibid. 461.

[118] Ibid. 462.

It is, I think, impossible to transfer these considerations which are apposite to the building of ships to the case of the survey and repair of a ship which is already in the service of a carrier. There the duty to have the necessary work done is directly upon the carrier from whatever moment of time is chosen as the date when the duty attaches, and whatever is done is necessarily done by agents on his behalf. Any faults of such agents, therefore, are attributable to him, provided only that they are employed upon the work. For this reason I am of opinion that there would be nothing inconsistent between the *Angliss* decision,[119] which exempted the carriers, and a decision in favour of the appellants in this case, which would hold the carriers to liability.

The *Angliss* judgment[119] contains a good many more observations than those that are essential to the actual conclusion, and I have no doubt that much of what the learned judge said there, though of a general and sometimes hypothetical nature, has from the first been found helpful and illuminating in expounding the significance of article III. But I cannot treat these observations as having for that reason any special authority. The only one that matters for the present purpose is the sentence[120]: "Again, "the need of repairing a ship may cast on the carrier a special "duty to see, as far as reasonably possible, by special advisers for "whom he is personally responsible, that the repairs adequately "make good the defects." I do not myself think it necessary to treat this as intended to lay down that, where repairs are in question, a carrier is automatically protected from liability once he has appointed the "special adviser" referred to. If it does mean that, it would be a return to that mistaken view that the carrier's liability is commensurate with his personal care and prudence which the learned judge had rejected at the outset of his judgment. It would be to say that it is enough for the carrier to appoint competent agents. This would be in conflict with other and later statements as to the nature of the liability which were made by the learned judge himself and by other authorities to whom I have referred. I prefer to treat it, therefore, rather as a general pointer to the sort of precautions which a carrier would be wise to take in his own interest than as a comprehensive definition of the circumstances in which his responsibility under article III (1) should be held to have been discharged.

We are dealing, of course, with the Australian, not the United Kingdom, Act. The purport of the two Acts is, however, the same, and each is designed to adopt the international Hague Rules. In the absence of any decisions of courts in Australia dealing with this particular point it is natural to found ourselves on English as well as American, Canadian and New Zealand decisions.

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[119] [1927] 2 K.B. 456.

[120] Ibid. 462.

I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, I agree. I would only add a few words out of respect to the judgment of the learned trial judge, well versed in this branch of the law, and the unanimous judgments of the Court of Appeal supporting him, from which we differ.

The weight of authority, not only in this country but in other countries of the Commonwealth and in the United States of America, whose sea trade and commerce form no negligible part of their economy, as also the history of the origins of the Hague Rules and the desirability of uniformity in their construction as between different nations, all go, in my view, to support the contentions of the appellants. These aspects have already been so fully dealt with that I find it unnecessary to refer to them further. On practical considerations alone it is, I think, only reasonable that owners of ships should be responsible to shippers with whom they contract under bills of lading for the seaworthiness of their vessels at the start of a voyage, so far as that can be achieved by the exercise of due diligence whether by themselves and their servants, or by others to whom that task is specially entrusted. There may be cases where the owners can discharge this duty through members of the crew or other servants, but in other cases, perhaps the majority of cases in these days of floating leviathans, the duty can only be discharged by the employment of persons who may conveniently be described as independent contractors. If the carrier's liability were not to subsist in all these cases the shipper, now that the carrier's absolute warranty of seaworthiness has been abolished, would be dependent for a remedy, in respect of lack of seaworthiness, on the chance whether the owner had committed the seaworthiness of his ship to the care of an independent contractor, or had dealt with that directly through his own servants. It would involve, I think, a considerable extension of the doctrine of *Donoghue* v. *Stevenson* [121] to say that he would have a remedy against the independent contractor for want of due diligence. Nor would he have a claim against an insurer, as insurance of goods for carriage by sea implies an absolute warranty by him of the seaworthiness of the carrying vessel at the commencement of the voyage, breach of which, apart from waiver by the insurer, would avoid the policy of insurance.

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[121] [1932] A.C. 562; 48 T.L.R. 494, H.L.

Apart, however, from the considerations to which I have adverted, there are certain principles which, in my opinion, at once limit and fix the liability of a carrier, in a case such as the present.

1. He cannot, subject to a possible qualification to which I shall refer in a moment, be liable for unseaworthiness in a ship which results from lack of due diligence at a time when the ship was not his to possess and control, and which could not be detected by due diligence after the ship came into his possession. This is implicit in the language of the Hague Rules themselves and was recognised by Wright J. in the case of *Angliss*.[122] Where due diligence of a carrier is concerned there can be no liability for anterior failure of diligence by a previous owner or by someone with whom the carrier had no previous concern. This, in my opinion, is the ratio of, and the only point decided by, the case of *Angliss*.[122] The point is, I think, plain enough in the case of a ship bought from a previous owner, or in the case of a ship chartered from the owner. Where a ship is built to the order of a purchaser, as was the case in *Angliss*,[122] there is no material difference in principle, though special circumstances in such a case may introduce special considerations. As Wright J. said, it would be illogical to make a distinction merely because the carrier had bought a ship by having it built for him. There may be shipbuilding contracts where the property in a ship passes in stages to the prospective owner, for various reasons convenient to the parties. But the ship as a whole cannot pass until it is completed, and it is impossible to say what defects may exist by the time it is completed. The vessel then comes into the possession of its owner for the first time. No distinction can, in general, be made between this case and the case of a ship bought from a previous owner. Liability will attach to the owner, as in the other cases, from failure to discover defects making for unseaworthiness which he ought to have discovered by the exercise of due diligence on or after the transfer of possession.

There is, however, one qualification, or rather, reservation, I would make in such a case. The prospective owner may have taken some part in the project of the building of the ship, either in the matter of design, or by supervision in the course of building, or otherwise, and in such case it may well be that he is responsible for unseaworthiness of which he is the cause, or which he should have detected in the course of the building. It may be, indeed, that in some circumstances a measure of supervision is required. These considerations were referred to by Wright J. in the case of *Angliss*,[122] and may give rise to specialties which stand apart from the general case, and which will have to be dealt with when they arise. They stand quite apart, in my opinion, from the issue that is raised here. They do not, as I see it, make the carrier responsible for the negligence of the builders, as his agents, but, if at all, for his own negligence operating retrospectively from the time when he took over the ship and put it into service for the carriage of goods. He then knew or ought to have known of defects occurring in the course of the construction of the ship. Something was said, I think, in the course of the argument about the carrier's duty to exercise due diligence to provide a seaworthy ship. But that is not what the statute says. The former common law implied an absolute obligation to provide a seaworthy ship. The qualified duty now is to make a ship seaworthy. The distinction may be a fine one, but a carrier cannot, in general, make a ship seaworthy unless he has first a ship to make seaworthy.

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[122] [1927] 2 K.B. 456.

2. The obligation is a statutory obligation imposed in defined contracts between the carrier and the shipper. There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation, and the reasons for this become, I think, more compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence. The obligation is a statutory contractual obligation. The novelty, if there is one, is that the statutory obligation is expressed in terms of an obligation to exercise due diligence, etc. There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory

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[122] [1927] 2 K.B. 456.

obligation. Perform it as you please. The performance is the carrier's performance. As was said in a corresponding case under the Harter Act: "The Act requires due diligence in the work "itself"—*The Colima.*[123] Ample other authority in the same direction has already been cited by my noble and learned friends. I am only concerned here to say that it seems to me to proceed on sound principle. I should only add that when I refer to repairers I include sub-contractors brought on to the ship by the repairers to enable them to perform the work which they contracted to do. Their failure, in my opinion, must also be the failure of the carrier on whom the statutory duty rests, unless in some very exceptional circumstances their employment can be said to be without any authority, express or implied, of the carrier, a case which can be considered if ever it arises.

3. The Hague Rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation. The old law no doubt worked hardly on shipowners and charterers, in the absence of exception or exclusion. The change in the law, not confined entirely to England, operated to afford relief to shipowners, as well as some protection to shippers. It would, however, be a most sweeping change if it had the result of providing carriers with a simple escape from their new obligation to exercise due diligence to make a ship seaworthy. If this were the plain effect of the statute, cadit quaestio. But in dubio the courts should, in a change of the suggested dimensions, lean the other way. The language of the Hague Rules does not, I think, lead to the result contended for by the respondents. The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers, and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence.

For these reasons, which I find it unnecessary further to amplify, I would allow the appeal.

LORD HODSON. My Lords, the contention of the respondents may be summarised in this way: It is a question of fact in each

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[123] 82 Fed.Rep. 665.

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Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.

Lord Hodson.

case whether due diligence has been exercised by a carrier and the question is to be answered by deciding whether a prudent shipowner would have acted in the same way. If he would have so acted the respondents say they are not liable. They do not contend that it is sufficient that they employed a competent shipyard to effect repairs. They do however maintain that, while the owner remains responsible for supervision and inspection where necessary, yet in the case of specialised work, which is to be regarded as within the competence of ship repairers rather than in that of owners of ships and their servants, this work and everything incidental thereto can properly be left to the ship repairers.

The contention of the appellants is summarised effectively in a passage from a judgment of MacKinnon L.J. in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[124] which reads as follows: " The limitation and qualification of the " implied warranty of seaworthiness by cutting down the duty " of the shipowner to the obligation to use ' due diligence . . . " ' to make the ship seaworthy ' is a limitation or qualification " more apparent than real, because the exercise of due diligence " involves not merely that the shipowner personally shall exercise due diligence, but that all his servants and agents shall " use due diligence. That is pointed out in Scrutton on Charter-" parties (14th ed., p. 110) which says that this variation will " not be ' of much practical value in face of the dilemma that " ' must constantly arise on the facts. In most cases if the " ' vessel is unseaworthy due diligence cannot have been used " ' by the owner, his servants, or agents; if due diligence has " ' been used the vessel in fact will be seaworthy. The circum-" ' stances in which the dilemma does not arise (e.g., a defect " ' causing unseaworthiness, but of so latent a nature that due " ' diligence could not have discovered it) are not likely to occur " ' often.' "

At first sight the argument which found favour with McNair J. and the Court of Appeal, that the question is one of fact to which the standard of the prudent shipowner should be applied, is an attractive one, for it can fairly be said that the obligation is indistinguishable from the obligation to exercise reasonable care to which the common law is accustomed to apply itself, so that if a shipowner has done the sensible thing in employing competent repairers to do work on his ship he ought not to be penalised because one of the servants of the repairers has been negligent.

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[124] 55 T.L.R. 766, 767.

Articles III and IV, however, cannot be construed in isolation and regard must be had to the history of the obligation and the way in which the mandatory direction contained in article III and other words to the like effect have been construed over the years not only in this country but elsewhere. As was said by Lord Macmillan in *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[125] in relation to the Carriage of Goods by Sea Act, 1924: "It is important to remember that the Act of 1924 was the "outcome of an international conference and that the rules in "the schedule have an international currency. As these rules "must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation "should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should "be construed on broad principles of general acceptation." It is true that the possibilities of research are limited and that we have had no citation of authority from European maritime countries, but so far as this country, Canada, New Zealand and the United States of America are concerned it is clear that, subject to what may be said about the decision of Wright J. in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[126] to which I will refer later, the authorities are all consistent with one another and are adverse to the contention of the respondents. The authorities go back long before 1924, the date of the passing of the English and the Australian Acts, which adopted the Hague Rules following upon the Brussels Conference of 1922.

The earliest Act to which our attention has been drawn was the Harter Act, an Act of Congress of the United States, passed in 1893, which has been called the forerunner of the Hague Rules. This Act was considered in this country by the Court of Appeal in *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[127]; the words to be construed were contained in section 3, which provides: "That if the owner of any vessel . . . shall exercise due "diligence to make the said vessel in all respects seaworthy and "properly manned, equipped, and supplied, neither the vessel, "her owner or owners, agent or charterers, shall become or be "held responsible for damage or loss, . . ." etc. It is true that the negligence therein which caused unseaworthiness was that of a ship's carpenter, the servant of the owners, and the argument was in no way addressed to the position of independent contractors. Nevertheless wide language was used by all the members of the court. A. L. Smith L.J., in discussing the phrase "if the owner . . . shall exercise due diligence to make the . . . "vessel in all respects seaworthy," said[128]: "In my opinion, "it does not mean by himself personally, but by himself and "his agents; so that if by himself and his agents he exercises "due diligence to make the vessel seaworthy, then he is not to "be liable for loss or damage resulting afterwards from faults "or errors in navigation or in the management of the vessel." In 1897 in *The Colima*,[129] where the negligence was that of stevedores acting under the direction of the ship's officers, Judge Brown referred to diligence on the part of the agents he may employ and to whom he may have committed the work of fitting the vessel for sea, and said: "the Act [that is, the Harter Act] "requires . . . due diligence in the work itself. . . . On any other "construction, owners would escape all responsibility for the "seaworthiness of their ships by merely employing agents of good "repute, whether any diligence and care to make their vessels "seaworthy were in fact exercised or not." This construction gives practical effect to the words of the Act, and the language used by the learned judge appears to me to be of great assistance, in particular by reason of his emphasis on diligence in the work itself.

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[125] [1932] A.C. 328, 350.
[126] [1927] 2 K.B. 456.
[127] [1895] 2 Q.B. 408, 417.

It is true that in the Harter Act, as also in the Canada Water Carriage of Goods Act, 1910, the absolute undertaking by the carrier to provide a seaworthy ship, implied at common law in any contract of carriage, is not expressly negatived. Contrast the English Act of 1924, which has expressly negatived the implied undertaking. This difference was noted by Willmer L.J., as it had been in earlier cases, but in my opinion no inference can properly be drawn for this reason in favour of the carrier so as to enable a more lenient interpretation to be given to the words of the statute under consideration.

Of the American cases in addition to *The Colima*,[129] *The Irawaddy*,[130] *The Mary L. Peters*[131] and *Nord-Deutscher Lloyd* v. *President Insurance Co. of North America*[132] all reflect the same view. The same is true of the Canadian cases. Of these *Canada Transport Co. Ltd.* v. *Hunt Leuchars Hepburn*

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[128] [1895] 2 Q.B. 408.
[129] 82 Fed.Rep. 665, 678.
[130] 17 U.S. 187.
[131] 68 Fed.Rep. 919.
[132] 110 Fed.Rep. 420.

Ltd., The City of Alberni[133] was decided under the Canadian Act of 1936 whereby the warranty of seaworthiness was expressly negatived. There dry rot in the ship was not discovered by surveyors employed by the owners; the dry rot was not latent, and Sydney Smith D.J.A. held that he should apply the law as found in the English authorities. In doing so he referred to the current edition of Scrutton on Charterparties which contained a summary of the passage from the judgment of MacKinnon L.J. in the *Smith, Hogg* case[134] which I have said summarises the contentions of the appellants. It is true that in *The City of Alberni*[135] the negligence found to have been committed was that of surveyors employed by the shipowners and not that of ship repairers employed as independent contractors. In another Canadian case, however, namely, *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*,[136] the owners had entrusted their ship to a dry-dock company for overhaul and repairs and it was held, applying the statement of the law to be found in *Smith, Hogg's* case,[137] that they could not be said to have complied with the statutory duty by entrusting compliance to an independent contractor.

There a cargo of wood pulp was damaged because storm valves had not been sufficiently screwed down and the ship was consequently unseaworthy. It was held that the owners could not avoid liability by attempting to cast upon the shoulders of some third party, engaged by them to do work upon the ship, a duty which the Act placed upon them. The learned judge said[138]: "It seems to me that the due diligence imposed by "the statute . . . is not made out by evidence that this duty "someone else was engaged to perform on the behalf of the "defendants—someone on whom the defendants relied and in "whom the defendants had confidence." The statute referred to is the Canadian Act of 1936.

I will not refer in detail to the cases decided in the Privy Council and to the passage in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[139] where Lord Wright himself and other members of this House have repeatedly stated the law in terms virtually indistinguishable from those employed by MacKinnon L.J. in the *Smith, Hogg* case.[140]

The stream of judicial dicta and of such direct authority as there is flows only in one direction and lends support to the contention of the appellants.

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[133] [1947] 2 D.L.R. 647.
[134] 55 T.L.R. 265, 767.
[135] [1947] 2 D.L.R. 647.
[136] [1959] 1 D.L.R. 850.
[137] 55 T.L.R. 766.
[138] [1952] 1 D.L.R. 850, 854.
[139] [1938] A.C. 57, 80.
[140] 55 T.L.R. 766, 767.

The respondents have argued, however, that the point is not expressly covered by authority and that in nearly all the cases where the question of liability for failure to exercise due diligence to make a ship seaworthy has arisen, the failure has turned out to be that of the owner or his servant or representative, not that of any independent contractor, so that there was in such cases sufficient ground for the strict application of the Rules against the owner. The position of ship repairers, it is said, is so clearly analogous to that of shipbuilders that repairers cannot fairly be distinguished from shipbuilders.

This brings me to the *Angliss* case,[141] the decision of Wright J. given shortly after the passing of our Act and containing the dictum about ship repairers which has been read and upon which the defendants strongly rely. In that case the decision was that the owners of a new ship specially built for them were not guilty of want of due diligence where the unseaworthiness complained of was caused or contributed to by bad workmanship in the construction of the ship on the part of the shipbuilders' workmen.

I do not propose to re-read the passages relied upon, but observe that the passage about ship repairing is part of a paragraph in which the learned judge is dealing with the necessity of supervision on the part of the owner. It is true, as Willmer L.J. pointed out, that the learned judge would not have said what he did about the supervision of repair work unless he had been of opinion that the shipowner would not necessarily be responsible for want of due diligence on the part of repairers. I do not, however, regard repair work on the same footing as the building of a new ship to the order of owners. It could be argued that the *Angliss* case,[141] in so far as it deals with shipbuilders, was dealing with something outside the scope of article III, for to make a ship seaworthy is not the same as to make a seaworthy ship, but the expression "to make a ship seaworthy" is, in my opinion, wide enough to cover the work of repair however extensive those repairs may be.

I recognise that the *Angliss* case [141] has been followed where the negligence of shipbuilders is involved, see *The Australian Star*,[142] and recognised as authoritative in later cases, including the recent decision of this House in *Davie* v. *New Merton Board*

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[141] [1927] 2 K.B. 456, 462.

[142] (1940) 67 Ll.L.Rep. 110.

Mills Ltd.,[143] but all the noble and learned Lords who discussed the case were careful to notice that it was a case dealing with shipbuilders and that the decision was limited to the subject-matter.

It appears that Lord Wright in his subsequent utterances in the Privy Council and in this House said nothing to support the proposition for which the owners now contend. I have in mind his dictum in *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[144] (a case on the Canadian Act of 1910) where he said: "The obligation to make a ship seaworthy is personal to the "owners, whether or not they entrust the performance of that "obligation to experts, servants, or agents," and the passage from *Wilsons & Clyde Coal Co. Ltd.* v. *English*[145] which has already been noticed.

Compare also the dictum of Lord Roche delivering the judgment of the Privy Council in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[146] a case under the Canadian Act of 1910: "The condition is not fulfilled merely because the shipowner is "personally diligent. The condition required that diligence shall "in fact have been exercised by the shipowner or by those whom "he employs for the purpose—see *Dobell* v. *S.S. Rossmore Co.*[147] "Therefore . . . want of diligence in the compass adjuster who "adjusted the compasses or in the captain who said he checked "or verified the adjuster's work would be material, and a finding "adverse to the shipowner could be arrived at upon the ground "of want of due diligence in those persons." As Willmer L.J. pointed out, a compass adjuster could fairly be regarded as belonging to the category of independent contractor. This last dictum of the Privy Council was repeated in a later case where the judgment was delivered by Lord Somervell of Harrow—*Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[148]

The respondents, recognising that they cannot contend that it is an answer to an allegation of want of due diligence merely to say they have employed competent experts, seek to justify their contention in this case by saying that the work of repair and survey is of a specialised nature and of a kind proper, subject to supervision, to be contracted out to a reputable yard. They

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[143] [1959] A.C. 604.
[144] [1939] A.C. 397, 403.
[145] [1938] A.C. 57, 80–81.
[146] 58 Ll.L.Rep. 33, 40.
[147] [1895] 2 Q.B. 408.
[148] [1959] A.C. 589, 602.

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seek to meet the difficulty on the facts of this case that the act and work of securing the valves was ultimately performed by the ship's crew and was well within their competence by saying that once a ship has gone to repair the whole job must in practice be done and that it is impossible to reserve for the master and crew the sort of work which they can easily do. Although the owner of a car can generally change a wheel himself—it is the kind of thing which is often and properly left to a garage. I find this argument about specialised work being properly handed out in appropriate cases unacceptable as a justification for excluding the owner from responsibility for want of due diligence. It is true that ships have become more and more complicated since the days of sail and complications have no doubt multiplied since the passing of the Act of 1924, but this does not justify a more lenient construction being put upon the Act in favour of shipowners.

The obligation in article III is not subject to any qualification and it is generally recognised that the Act was not passed for the relief of shipowners but to standardise within certain limits the rights of the holder of every bill of lading against the shipowner.

The position of the holders of bills of lading would be much worsened if the respondents were right in their contention that given the right conditions a shipowner can perform his obligation by putting out repair work to competent experts and shelter behind them if the work is negligently done.

Reliance was placed on common law cases in tort, not only master and servant cases like *Wilsons & Clyde Coal Co. Ltd.* v. *English* [149] (supra) but invitor and invitee cases like *Haseldine* v. *C. A. Daw & Son Ltd.*[150] and *Woodward* v. *Mayor of Hastings.*[151] It is not necessary to discuss in detail those cases where the common law duty to exercise reasonable care in other relationships has had to be considered. It may be, however, that the distinction between the last two cases based on specialised work being necessary in the case of the repair of a lift and being unnecessary in the case of the cleaning of a school may have to be reconsidered. Whether this is so or not, I do not find such cases of assistance in reaching a conclusion in the matter which the House has now to decide.

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[149] [1938] A.C. 57.

[150] [1941] 2 K.B. 343; [1941] 3 All E.R. 156, C.A.

[151] [1945] K.B. 174; 61 T.L.R. 94; [1944] 2 All E.R. 565, C.A.

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In my opinion, on the facts of this case, the respondents did not exercise due diligence to make their ship seaworthy.

I would allow the appeal.

Appeal allowed.

[The House ordered that judgment be entered for the appellants for £974 0s. 3d. with interest thereon at 5 per cent. per annum from July 22, 1953, until the date of payment, and that the respondents should pay the appellants their costs in the courts below and in the House of Lords.]

Solicitors: *Clyde & Co.; Norton, Rose, Botterell & Roche.*

F. C.

[HOUSE OF LORDS.]

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Jan. 16, 17, 18;
Feb. 13.

VERDIN AND OTHERS . . . . . APPELLANTS;

AND

COUGHTRIE (INSPECTOR OF TAXES) . RESPONDENT.

[APPEAL IN TOLLEMACHE SETTLED ESTATES TRUSTEES *v.* COUGHTRIE.]

Revenue—Income tax—Excess rents—Computation—Royalties of sand-pit—Assessment—Actual or notional receipts—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 82 (*Sch. A, paras.* 1, 2), *s.* 175 (1) (*a*).

Schedule A in section 82 of the Income Tax Act, 1952, provides: "1. Tax under this Schedule shall be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom . . . for every twenty shillings of the annual value thereof: Provided that tax . . . in the case of the following concerns, namely—(*a*) quarries of stone, slate, limestone, or chalk; and (*b*) mines of coal, tin, lead, copper, mundic, iron and other mines; and (*c*) ironworks, gasworks, salt springs or works, alum mines or works . . . and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, shall not be charged under this Schedule, but the

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* *Present*: VISCOUNT KILMUIR L.C., LORD DENNING, LORD MORRIS OF BORTH-Y-GEST and LORD HODSON.

"profits . . . shall be charged to tax under Case I of Schedule D, ". . . 2. The annual value for the purposes of this Schedule shall, "in the case of all lands, tenements, hereditaments or heritages, of "whatever nature and for whatever purpose occupied or enjoyed, "and of whatever value, be understood to be—(*a*) if they are let "at a rack rent and the amount of that rent has been fixed by "agreement commencing within the period of seven years preceding April 5 next before the time of making the assessment, the "amount of the rent by the year at which they are let; or (*b*) if "they are not let at a rack rent so fixed, then the rack rent at "which they are worth to be let by the year: . . ."

By section 175 (1): "If, as respects any year of assessment, "the immediate lessor of a unit of assessment is entitled in respect "of the unit to any rent payable under a lease or leases to which "this section applies, he shall be chargeable to tax under Case VI "of Schedule D in respect of the excess, if any, of the amount "which would have been the amount of the assessment of the unit "for the purposes of Schedule A, as reduced for the purpose of "collection, if the annual value of the unit had been determined "(in accordance, in whatever part of the United Kingdom the "unit is situated, with the provisions of Part III of this Act) by "reference to that rent and the other terms of the lease or leases, "over whichever is the greater of—(*a*) the actual amount of the "assessment of the unit for the purposes of Schedule A, as reduced "for the purpose of collection; or (*b*) the amount of any rent "payable by the immediate lessor in respect of the unit under any "short lease or short leases. . . ."

By a lease dated December 17, 1946, a sand-pit was let for a term of 21 years from March 26, 1946, at an annual surface rent of £10 and a royalty of 6d. a ton for all sand worked. In the year 1946–47 the royalties payable under the lease were £96 12s. 6d., but they rose steadily and in 1952–53 were £841 14s. 6d. In 1953–54 they were £646 1s., and in that year an assessment to tax under Schedule A was made in respect of the sand-pit for the first time in the sum of £3 5s., and assessments of £5 and £1,000 in respect of excess rents and royalties respectively were made under Schedule D. On appeal the General Commissioners held that the royalties were within section 175 and should be treated as excess rents under Schedule D, and they altered the assessment to £35 in respect of the dead rent and £646 in respect of the actual royalties received in that year, less the Schedule A assessment:—

Held, that on its true construction section 175 (1) (within which the parties now agreed the rent and royalties fell) required the calculation to be made as follows: (1) one was directed to the year of assessment; (2) one must proceed to the rent actually payable; (3) one must consider whether it was the true rent; (4) one must make the reduction for collection in accordance with Part III of the Act.

The material factors were the actual payments made and conditions obtaining in the year of assessment. The subsection did not require a computation to be made on Schedule A principles of the annual value of the land.

Barron v. *Littman* [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548, H.L. considered.

Decision of the Court of Appeal (sub nom. *Tollemache Settled Estates Trustees* v. *Coughtrie*) [1960] Ch. 475; [1960] 2 W.L.R. 825; [1960] 2 All E.R. 122, C.A. affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Pearce and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 24, 1960, allowing an appeal by the respondent, William Donald Coughtrie (H.M. Inspector of Taxes), from an order of the High Court (Upjohn J.) dated May 11, 1959, whereby an appeal by the appellants, Richard Bertram Verdin, Sir Randle John Baker Willbraham, Bart., and Wilfrid Pyemont, the trustees of the Tollemache Settled Estates, by way of case stated from a determination of the Commissioners for the General Purposes of the Income Tax for the Drayton Division of Shropshire was allowed and the determination of those commissioners was reversed.

The facts, stated by Viscount Kilmuir L.C. and Lord Denning, were as follows: The matter arose on an assessment made on the appellants under Schedule D of the Income Tax Act, 1952, for the year of assessment 1953–54 and concerned surface rents and royalties received by them under a 21 years' lease of some two acres of land in Cheshire, comprising a sand-pit, granted by them in 1946 to a firm of builders' merchants. The rent payable was a surface rent of £10 a year for the two acres and a royalty of 6d. a ton on all sand worked and gotten from the land. The tenants covenanted that they would "at all times during the "said term unless prevented by strike lock-out or unavoidable "accident or unless it would be unprofitable to work the demised "sand on account of depression of trade effectually and vigorously "work and get the demised sand." Royalties paid by the tenants rose steadily from £96 12s. 6d. in 1946–47 to £841 14s. 6d. in 1952–53. By September, 1953, the tenants had got all the sand they could from the first two acres and thereupon became entitled under the lease to take up another five acres at an additional £25 a year surface rent. They took up these extra five acres and thenceforward paid £35 a year surface rent and a royalty of 6d. a ton. It was not in evidence whether or not there was enough sand to last out the full term of 21 years. During the year April 1, 1953, to March 31, 1954, the appellants received a surface rent of £22 and royalties of £646 1s. (The rent was apportioned for two acres from April 1, 1953, to September 29, 1953, and for seven acres from September 29, 1953, to March 31, 1954.)

In the years prior to the year of assessment 1953–54 the land demised was not separately assessed to Schedule A, but for the year 1953–54 an assessment under Schedule A in respect of the land originally demised was made on the tenants in the sum of £3 5s. Later, after the commissioners had given their decision on the appeal, a further assessment under Schedule A was made on the tenants for the year 1953–54 in respect of the land demised, taking account of the increased area from September 29, 1953, bringing the total assessment under Schedule A on the tenants for the year to £10 15s. The assessment apportioned to the area occupied during the year was £7.

The assessment to income tax against which the present appeal was brought was in the sum of £5 in respect of excess rents and £1,000 in respect of royalties.

Evidence was given before the general commissioners by surveyors on behalf of the appellants and the respondent, respectively, as to what would have been a reasonable fixed rent in respect of the original area of the sand-pit, together with the additional five acres for a 21-year lease from March 25, 1946. Such reasonable rent was estimated by the appellants' surveyor at £292 per annum and by the respondent's surveyor at £500 per annum, but both surveyors were of opinion that a sand-pit would rarely be let at a fixed rent for a term of 21 years and that the only terms of letting which would be satisfactory to both landlord and tenant would be those adopted in the present case, namely, a small fixed rent and a royalty per ton of sand extracted.

Both surveyors were agreed that if required to estimate at the beginning of a year a fair annual value for occupation of the sand-pit over the coming year (in accordance with the respondent's alternative contention), they would have to consider all the circumstances, including the results of the previous year's workings and the likely commercial demand for sand in the coming year but that, in the absence of any significant change of circumstances, their valuation would not differ greatly from that shown by the previous year's working.

It was common ground between the parties that the rent and royalties fell within section 175 of the Income Tax Act, 1952, which subjected what were commonly called "excess rents" to income tax under Case VI of Schedule D, and the question at issue in the appeal was whether, as the respondent contended, the appellants were, by the provisions of that section, assessable for the year of assessment on the basis of the rent and royalties actually received by them in that year (less the amount of the Schedule A assessment on the land, and subject to such reduction as was allowable under Schedule A for the purpose of collection), or whether, as the appellants contended, the section on its true construction required a computation to be made (in accordance with certain provisions applicable to Schedule A, and having regard to the rent and royalties reserved by, and the other terms of, the lease) of the annual value of the land. It was common ground that such a computation would result in a different, and in almost all cases a lower, assessment than would be produced on the basis of the rent and royalties actually received in the year of assessment. An alternative contention of the respondent was that if, contrary to his contentions, the value of the appellants' rights had to be ascertained at the beginning of each year, it should be estimated afresh at the beginning of each year in the light of the facts then known.

H. H. Monroe Q.C. and *R. Buchanan-Dunlop* for the appellants. The excess rent is to be assessed by reference to an estimate of the annual value spread over the period of the lease. It is wrong to take the actual sum of royalties received during the year. The commissioners should be directed to find what was the consideration agreed to be paid under the lease and to express that consideration (in the light of evidence as to the amount of sand available and the rate at which it was likely to be used up) as a figure of annual value. They must estimate the amount of the sand to be gotten from the sand-pit and find whether or not it was likely to be used up before the end of the 21 years. Then they should estimate the amount of the royalties which the appellants were likely to receive during that period and take the average so as to reach a yearly figure, thus spreading the amount of the anticipated royalties over the period. If circumstances so required, the calculation could be revised, as, for example, if there were a trade depression.

Under Schedule A, liability is computed by reference to the annual value of the land. That value is assessed by reference to the rent at which the land is let when it is let at a rack-rent and, if it is not so let, then the rent at which it is worth to be let by the year, which is what a rack-rent is—the terms are interchangeable. But there are certain uses of land which do not lend themselves to this particular treatment, for example, when minerals are extracted and the tenant pays a rent and

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royalties. Thus certain lands were treated on a different basis: see rule 3 of No. III of the rules applicable to Schedule A, which goes back to the Income Tax Act, 1842. Even railways were regarded as a method of exploiting land and found their way originally into rule 3 of No. III. Section 28 of the Finance Act, 1926, transferred concerns in rule 3 of No. III to Schedule D. It tidied things up, but the method of assessment remained the same. Until the decision in *Russell* v. *Scott*[1] in 1948 a sand-pit was thought to be a "concern of the like nature" with the other concerns in rule 3 of No. III so that the profits were taxable by virtue of the proviso under Schedule D, but that view was then held to be erroneous. Section 21 of the Finance Act, 1934, provided for deduction of tax by a tenant paying royalties under a lease of the kind with which the House is now concerned, so before 1948, if the owners leased a sand-pit for a basic rent plus royalties, the tenant deducted tax from the rent and the royalties. By the Act the payments were to be treated as if they were patent royalties. If the owner granted a licence and not a lease, he was directly assessed under rule 3 of No. III. Then came the decision in *Russell* v. *Scott*[1] which held that a sand-pit was not a "concern of the like nature." It is not within section 21 of the Act of 1934. Under section 31 of the Finance Act, 1948, now section 179 of the Income Tax Act, 1952, payments for any easement or right to use any land when the landowner remains in occupation are to be taken into account in computing the profits of the trade carried on by him or as annual profits chargeable under Case VI of Schedule D, but that does not relate to the present case.

In the valuation of land the valuation for a particular year is allowed to govern the valuation for a number of years. Under section 27 of the Finance Act, 1930, valuation for the purposes of Schedule A was to be made quinquennially. There was a valuation due in 1941, but by the Finance Act, 1940, the quinquennial valuation system was suspended indefinitely because of the war and impending inflation. There are cases where the annual value is treated as the measure of the value in the case of properties usually let at a fixed rent. There are other cases where the actual profits are treated as the measure of the value, particularly profits received on a royalty basis. Section 175 of the Act of 1952 (originally section 15 of the Finance Act, 1940), was designed to deal with the situation arising from the suspension of the quinquennial valuations and to enable up-to-date computations of liability to be made on Schedule A principles where the existing Schedule A assessment was out of date. This was to be done by additional assessments to tax covering excess rent payable under current leases. Until 1948 it was thought that in the case of sand-pits the actual profits were to be treated as the measure. Here both sides agree that the case is covered by section 175. The dispute is whether (as the respondent says) the measure is to be the actual rents and royalties received, or (as the appellants say) the annual value is computed by reference to the terms of the current lease. In pure theory there is not much difference between the two, but in actual practice there is. People do not usually pay for sand-pits rents fixed in advance and so they pay royalties. No matter how this case is argued, there are bound to be results which are absurd. Thus, on the Crown's argument, if there was a lease for three years at a rent of £100 for the first, £200 for the second and £300 for the third, and the Schedule A assessment was £200, the landlord would, if directly assessed, pay tax on £100 excess rent in the third year. That is unjust on the face of it because in the first year his actual rent was less by the same amount than the Schedule A figure on which he had to pay tax. So, too, in the case of a lease for seven years granted for a premium of £700, at a rent of £100 a year, injustice would result if the Schedule A figure were fixed at £100 and the "excess" were calculated only by reference to the actual rent for the year of assessment.

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[1] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1, H.L.

Section 172 (1) of the Act of 1952 contains the relevant definitions. In section 175 the reference is to "rent" as a term of the lease. The emphasis is on the lessor's entitlement. The section directs a comparison of the actual Schedule A assessment for the relevant year with a notional Schedule A assessment made by reference to the terms of the lease relating to the unit of assessment currently in force. It is by reference to the terms of the lease that the annual value must be ascertained. The section requires the amount to be ascertained which would have been the amount of the Schedule A assessment if the annual value of the unit had been determined by reference to the terms of the current lease and nothing else, in accordance with Part III of the Act of 1952, which provides for the ascertainment of annual value for the purposes of Schedule A. The sum annually charged to tax under Case VI of Schedule D by section 175 is the difference between two estimates of annual value made in accordance with certain principles and rules applicable to Schedule A, the original estimate when the annual value was last ascertained for Schedule A purposes and a revised estimate made exclusively by reference to the terms of the lease currently in force. The section does not direct a comparison to be made between the actual Schedule A assessment and the rent actually received in the year of assessment, but between the actual assessment and what would have been the assessment if the terms of the current lease had been the only evidence available by which to assess the annual value. Nothing that is not in the rent and terms of the lease can be brought into computation. Note paragraph 2 of Schedule A in section 82 of the Act. It is only if the lease is a misleading document that one can go further. There might be a case where a rack-rent was not provided for, but where the tenant had undertaken certain valuable repairs and one would take the annual value of these into consideration.

What is to be found is the difference between the out-of-date valuation and an up-to-date valuation. A comparison between an actual figure and a valuation figure is not comparing like with like. What section 175 directs is to compare the up-to-date measure arrived at by reference to the terms of the current lease with the out-of-date measure, to take the difference and to assess on that under Case VI of Schedule D. The scheme under Schedule A for arriving at the annual value is first of all to look at the lease and, where a rack-rent is not provided for, one looks at all the terms of the lease as relevant evidence of what the lessee must pay. The use of the words " the other terms of " the lease " in section 175 (1) suggests that one is dealing with rent as a term of the lease. One must start with the rent and then add something without which one would not express the full value passing from the tenant to the landlord under the lease. Where an Act of Parliament provides that a particular assessment is to be made by reference to annual value and one is dealing with a lease such as this, one is entitled to say that the actual rent paid is only evidence for arriving at the annual value, which is a concept distinct from the actual figure. The question is: What is the property worth to be let? The normal process under Schedule A is one of arriving at the annual value by all the terms of the lease. There is no difference under section 175: see sections 84, 86, 89, 99 and 101.

When the whole consideration for the lease is expressed as rent, one simply looks at the rent. Otherwise, as where a premium is stipulated or the tenant does repairs, these things must be expressed in terms of rent. In the present case one must look at each year but take into account the fact that this is a 21 years' lease. The aim of section 175 is not to substitute a new Schedule A assessment for the old one, but to bring the old Schedule A assessment up to date by reference to the current lease. The words "other terms of the lease" indicate that one must look at the other terms that may affect the rent. Section 135, dealing with the basis of computation under Case VI of Schedule D, and section 176, lend support to the submission that one must carry out a valuation on Schedule A principles.

Inland Revenue Commissioners v. *Dickson's Executors* [2] is an illustration of the way in which a fluctuating rent should be dealt with under Schedule A and is a guide to the method of approach under section 175. *Strick* v. *Longsdon* [3] was a decision that "entitled" did not mean simply "received." It does not help to solve the problem of fluctuating rents under a royalty lease. *Barron* v. *Littman* [4] illustrates the application of section 175 and summarises the circumstances in which it was passed. Some of the expressions there used are hard to reconcile with the present contentions of the Crown. From *Reg.* v. *Westbrook* [5] it appears that the surface rent and the royalties together are to be regarded as the rent.

In arriving at the annual value the actual receipts, the £646 royalties, are no more than evidence to enable the annual value to be computed. If, under section 175, tax was on the actual Schedule A assessment and the actual rent received in the year of assessment, there might be years in which the combined tax payable under Schedule A and section 175 would exceed the tax which would have been payable if only the actual rent received each year had been taxed. The circumstance that the tax charged under section 175 is assigned to Case VI of Schedule D does not make the figure on which the tax is to be charged each year any the less a figure to be arrived at by computing the difference, if any, between two Schedule A valuations.

Roy Borneman Q.C. and *Alan Orr* for the respondent. The words "that rent" in section 175 denote the rent, including royalties, actually received or receivable in the year of assessment in question. The issue depends on the construction of that section as it stands. Eventually one must come back to the words used in the section in order to ascertain the purpose of the legislature, whatever that purpose was. Prima facie the purpose of the section was to bring into charge the actual profits of each year, year by year, considered individually, and section 175 requires an ad hoc calculation to be made of the amount on which tax is to be charged under Case VI of Schedule D for each relevant year, using for that purpose part of the mechanism of Schedule A. The section does not direct the annual value to be determined in accordance with Schedule A.

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[2] 1928 S.C. 753; 14 T.C. 69.

[3] (1953) 34 T.C. 528.

[4] [1953] A.C. 96, 104, 106–107, 111, 117; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548, H.L.

[5] (1847) 10 Q.B. 178.

One appeals to the grand scheme of the Income Tax Act, 1952, and of the Acts from 1806 onwards. When one looks at them, it is clear that the legislature has been consistently drifting towards charging actual income. In 1806, land was the only subject-matter of taxation worth thinking of; commercial profits were by comparison insignificant. But, as time went on and commercial profits became more important, there set in the drift towards charging actual profits year by year. Under Schedule D the measure of the average of three years has given place to the profits of the preceding year. But under Schedule A the machinery did not keep pace with this trend and is creaking badly. It did not keep pace with rising rents. In 1940 Parliament wanted to bring it into line, but the middle of the war was not the time to repeal Schedule A, so the legislature superimposed other sections on the Schedule A machinery, leaving Schedule A to look after itself. Section 175 was only part of the scheme. Parliament wanted to deal with the income arising from the letting of land and premises. This was only part of the scheme for charging income as it arose year by year. Sections 169 to 175 are in Part VII of the Income Tax Act, 1952, the main heading of which is: "Principal Provisions as to Interest, Rents, Divi-"dends, Annual Payments, etc." The relevant sections here are in Chapter II headed: "Rents and Other Receipts from Land "in the United Kingdom." Parliament was dealing with all leases together and no different principle was adopted for short leases and long leases. In the general scheme of the Act Parliament is bringing Schedule A up to date mainly by makeshift methods. As income arises in each year it is made to bear tax in respect of that year. Tax which is excess tax is directed to be assessed under Case VI of Schedule D. If there was any substance in the argument for the appellants, there would be no reason for not assessing it under Schedule A. Case VI is a little more than the rag bag of the Income Tax Acts. Section 175 permits one to look at Schedule D, which is concerned with "the "annual profits or gains arising or accruing," while Schedule A is concerned with something wholly different. The matter was properly put by Pearce L.J. in the Court of Appeal[6]: "The fact "that the charge is under Case VI of Schedule D makes it "clear that the assessment is aimed at a year's profit or gain." Section 175 directs one to find the actual income of the year, the actual profits or gains. It points to a figure, actual, ascertainable and dominant. Parliament provides a formula for finding what the amount of the Case VI assessment shall be. One starts with the rent and one applies that formula. The body of section 175, having started off with this actual, ascertainable figure, provides a convenient formula for fixing the top line of the subtraction sum which is directed. One takes the rent, the fixed figure, and lets the machinery play upon it, adjusting it by the terms of the lease and taking off what section 99 tells one to take off. Thus in the present case the royalties received during the relevant period (£646) plus the surface rent (£22) make the rent received under the lease £668. From this one must subtract £84 to reduce it by one-eighth for purposes of collection under section 99, leaving £584. From that must be subtracted £7, the Schedule A assessment on the land. This produces the excess rent chargeable under section 175. One must not ask the formula to do more than Parliament intended, nor read into section 175 what was never meant to be there. The language of *Barron* v. *Littman*[7] supports the contention that the calculation is to be made by reference to the actual figure of rent received by the taxpayer during the year in question. Sections 86 and 88 of the Act of 1952 are relevant to the calculation.

There is nothing peculiar in this lease to affect the computation. One is not entitled to look beyond the lease for any other terms. No new notional Schedule A assessment is to be made by virtue of section 175 which does not give that power. The thing that matters is the rent found in fact. The difference between the taxpayer and the Crown is whether one starts with a Schedule A estimate or a factual figure of actual rent. Every lease may be different and one may get different results thrown up, but here one must keep one's mind on this lease. On either contention there may be anomalies. The difficulty arises from imposing a new superstructure on an old structure.

Alan Orr following. "That rent" in section 175 is not a term of the lease but a sum of money. The royalties are dependent on the amount of sand extracted and a similar position arises where the rent depends on the price of a commodity.

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[6] [1960] Ch. 475, 484; [1960] 2 W.L.R. 825; [1960] 2 All E.R. 122, C.A.

[7] [1953] A.C. 96, 109–110, 117, 122.

Tax is normally deducted from rent by the tenant under section 173 of the Act, and where this is done there would be no injustice in the case of a rising rent, for the matter would work out fairly as regards the respective interests of the landlord and tenant. It is only in the case of direct assessment that any difficulty arises.

The words " and the other terms of the lease " are directed, and were so understood by Pearce and Harman L.JJ. in the Court of Appeal,[8] solely to the adjustments to an actual rent which may fall to be made under Chapter II of Part III of the Act. For instance, under section 88, if the tenant pays £80 as rent and is also liable to carry out repairs, the rent falls to be adjusted by reference to the cost of the repairs.

The effect of section 175 in the present case is to write into section 82 the figure of £668, being the royalties and fixed rent received in the year. It is necessary to look and see whether by reason of the other terms of the lease any adjustment falls to be made under Chapter II, and the final step is to deduct the statutory allowance under Chapter III.

The words " that rent " in section 175 are the great impediment to the appellants' argument.

H. H. Monroe Q.C. in reply. The notion of taxing actual profits is not, as the Crown's argument seems to suggest, new. It has been there since the start in the case of special concerns and it was achieved by a simple formula. What is new is section 180 of the Act of 1952, formerly section 21 of the Finance Act, 1934, which was formerly thought to apply to the very sort of lease now in question. To seek to read into section 175 the implication that it must be concerned with actual profits begs the question because there are methods of taxing actual profits.

As to the meaning of the phrase " other terms of the lease," the question is to what extent does one adjust the rent by reference to them. It is accepted that a premium is a relevant " other term " of a lease. One must look at the length of the term of years because that is the chief term of the lease. The obligation to dig out sand is a term of the lease. In this particular class of royalty case one must look at the events which actually happen to see what result the formula has in a particular

[8] [1960] Ch. 475.

year. If one looks that far, it is right to see how much sand there is. The Crown says one must stop and go no further than looking at the actual rent and making specific adjustments. The appellants wish to go further and look at the specific circumstances which may not be repeated in another year. One is entitled to have regard to the rent for the year and ask whether it gives a true picture of what the rent expressed really is.

Their Lordships took time for consideration.

Feb. 13. Viscount Kilmuir L.C. stated the facts and continued: My Lords, the history of section 175 and its statutory ancestor, section 15 of the Finance Act, 1940, is set out at length in the judgment of Upjohn J., and I need only make a short reference to it at this stage, adapting slightly the words of Lord Asquith of Bishopstone in *Barron* v. *Littman*[1]: "The [old] "system [of taxing under Schedule A only] worked fairly, so "long as Schedule A value was frequently revised and so kept "in step with commercial value. But when, during the war, "quinquennial revaluations under this Schedule were suspended, "an increasing disparity declared itself between the old Schedule "A values and the rents which the premises in fact commanded "in the market, and therewith an increasing tax-free commercial "profit lodged in the hands of the entrepreneur. Section 15 of "the Act of 1940 was clearly designed to 'catch' this profit."

It is, I think, convenient to split section 175 (1) into the following parts:

A. "If, as respects any year of assessment, the immediate "lessor of a unit of assessment is entitled in respect of the unit "to any rent payable under a lease or leases to which this section "applies, . . ."

By these words: (a) one is intructed to look at the year of assessment, in this case 1953–54; (b) the lease in question is one to which this section applies under subsection (4); (c) the appellants are immediate lessors entitled to any rent payable under this lease.

B. ". . . he shall be chargeable to tax under Case VI of "Schedule D in respect of the excess, if any, . . ."

With regard to these words I note: (a) that the assessment is under Case VI of Schedule D; (b) that it is in respect of an excess. The top line of the subtraction sum which gives the excess is derived from the formula in the subsection and the bottom line is the actual amount of the assessment for Schedule A as stated in paragraph (*a*) of the subsection.

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[1] [1953] A.C. 96, 122; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548, H.L.

C. " . . . of the amount which would have been the amount " of the assessment of the unit for the purposes of Schedule A, " as reduced for the purpose of collection, if the annual value of " the unit had been determined (in accordance, in whatever part " of the United Kingdom the unit is situated, with the provisions " of Part III of this Act) by reference to that rent and the other " terms of the lease . . ."

This is the formula and it is essential to note: (a) that despite the reference to Schedule A, the wording keeps one's view focused on an annual value determined in accordance with the words which follow. One is taken away from the conception of an objective rack-rent to the term of the lease in question. This fits in with the need for determining not the market value of the land, but the profit of the immediate lessor in question; (b) the determination of the annual value in this subsection has two constituents: (i) it must be by reference to " that rent and the " other terms of the lease." The words " that rent " refer back to " any rent payable under a lease " in the earlier part of the subsection; (ii) it must (in order to give effect to the words in brackets) be " in accordance . . . with the provisions of Part III " of this Act."

From this analysis of the subsection it is, in my opinion, impossible to escape the following construction. First and foremost, one is directed to the year of assessment. Secondly, as might be expected in a section the precondition of which is that a lessor should be entitled to rent, one proceeds to " that rent," in other words, the rent actually payable. This is emphasised by the fact that the words chosen are not " the terms of the lease " including the rent " but " that rent and the other terms of the " lease." Thirdly, having reached the figure of the rent actually paid, one has to consider whether it is the true rent.

At this point one must bear in mind the two constituents of the formula to which I have referred. In other words, one has to look at " the other terms of the lease " but " in accordance . . . " with the provisions of Part III of this Act." This means, in my view, that one has at this point to consider section 86, which deals with tenants' rates, etc., paid by the landlord and owner-occupier, and section 88, which is concerned with, inter alia, cases where the rent is not the true consideration but by reason of other terms of the lease an adjustment must be made. The fourth step is to make the reduction for collection also in accordance with Part III of the Act. That is how the top line of the necessary subtraction sum is arrived at. This construction, which is that which appealed to Pearce and Harman L.JJ., sends me to the actual payments made and conditions obtaining in this year of assessment. I have given full consideration to the view of Upjohn J. that the section uses the words "the amount which "would have been the amount of the assessment of the unit "for the purposes of Schedule A," and these predicate a notional figure. I have also considered the doubts of Lord Evershed M.R. based on the use of "annual value." I do not, however, find that there is anything in the section which drives one from reading the book to looking in the crystal, but, on the contrary, it is from beginning to end looking at the actualities of the year of assessment.

For these reasons I would dismiss the appeal.

LORD DENNING, having stated the facts, continued: My Lords, we are only concerned with the tax payable by the owners for the year 1953–54. During that year from April 1, 1953, to March 31, 1954, the owners received a surface rent of £22 and royalties of £646, making £668 altogether. These two sums together are to be regarded as the rent, see *Reg.* v. *Westbrook.*[2] The Schedule A figure for that period was only some £7, for it was apparently assessed on the agricultural value of the land.

Both sides agree that the relevant section is section 175 of the Income Tax Act, 1952, which provides for a tax on excess rents, that is, roughly speaking, on rents which exceed the Schedule A figure. But the dispute is how the excess rent is to be calculated. The Crown say that it is to be calculated by reference to the *actual* figure of rent, namely, £668 received by the owners during the year in question. The owners say it is to be assessed by reference to an *estimate* of the annual value spread over the period of the lease.

The nature of the contest can best be seen by giving the actual figures. The Crown say that the amount chargeable to tax is £577, made up as follows:

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[2] (1847) 10 Q.B. 178.

H. L. (E.)
1961

TOLLEMACHE SETTLED ESTATES TRUSTEES v. COUGHTRIE.

Lord Denning.

Royalties actually received during the year April 1, 1953, to March 31, 1954	£646
Surface rent actually received for the same period (apportioned for two acres from April 1, 1953, to September 29, 1953, and for seven acres from September 29, 1953, to March 31, 1954)	£22
The rent received under the lease was therefore	£668
This must be reduced by one-eighth for purposes of collection under section 99	£84
Leaving	£584
Less Schedule A assessment on the land (apportioned for the acreage occupied during the year)	£7
The excess rent chargeable under section 175 is therefore	£577

The owners say that the Crown's assessment is wrong in taking the *actual* sum of £646 royalties received during the year. That figure, they say, should be replaced in the calculation by an *estimated* figure of the annual value. Mr. Monroe, for the owners, said that the commissioners should be directed "to find "what was the consideration agreed to be paid under the lease "and to express that consideration (in the light of evidence as "to the amount of sand available and the rate at which it was "likely to be used up) as a figure of annual value." By this I understand that according to Mr. Monroe the commissioners should be directed to estimate the amount of sand to be gotten from the pit and see whether or not it was likely to be used up before the end of the 21 years. They should then estimate the royalties which the owners were likely to receive over the 21 years and then average it out so as to get a yearly figure. In short, they should spread the anticipated royalties over the period of the lease. Mr. Monroe said, however, that they could revise it in any particular year if circumstances required, as, for instance, if there was a depression in trade.

My Lords, I think that the Crown's contention is correct and the owners are wrong for the simple reason that the words of the Income Tax Act, 1952, compel this result. Section 175 compels you to take "that rent," that is, the rent payable under the lease for the year of assessment, and to feed that rent into the Schedule A machine in this way:

First, you take "that rent," i.e., the actual rent, as the starting-point.

Secondly, you take "the other terms of the lease" and make such adjustments, if any, in that figure of rent as are warranted by "Part III of this Act." For instance, if the landlord pays the rates, the figure must be reduced under section 86. If the tenant does the repairs, the figure must be increased under section 88 (3) (*b*). And so forth. No such adjustments arise in the present case.

Thirdly, you must deduct one-eighth, being the repairs allowance permitted "for the purpose of collection," under section 99.

The result of that calculation is to give you the top figure. Then in order to ascertain "the excess" on which tax is chargeable, you do this: You take the "actual amount" of the Schedule A assessment (usually a low figure left over from the past), reduce it by one-eighth for the purpose of collection, then deduct it from the top figure and you have "the excess" on which tax is chargeable under Case VI of Schedule D.

Mr. Monroe sought to escape from this result by minimising the impact of the words "that rent." He wished to read the section as if it read that you must determine the annual value "by reference to the terms of the lease." Whereas it distinctly says that you must determine it "by reference to *that rent* and "the other terms of the lease." *That rent* is clearly the actual figure.

Mr. Monroe sought to support his argument by saying that injustice would result unless the section was read in his way. He took two hypothetical cases:

First, a lease for seven years granted for a *premium* of £700 and a rent of £100 a year. Secondly, a lease for three years granted at a *rising rent* of £100 for the first year, £200 for the second year and £300 for the third year. Injustice, said Mr. Monroe, would result in those cases if the Schedule A figure was fixed at £200 and in addition "the excess" was calculated on the actual rent for the year of assessment.

My Lords, I am always ready, I hope, to look at any possible injustices said to be created by an Act of Parliament and to construe it whenever possible so as to remove them: for I take it that Parliament never intends to do an injustice to anyone. But I am quite unmoved by the possible injustices suggested by Mr. Monroe in this case. They are purely hypothetical and I doubt if they will ever arise in practice. If they should, there are ways and means, as Mr. Orr suggested, of overcoming them.

On the other hand, I see every reason in common sense for taking the *actual* figure of rent and not resorting to an estimate: and that is what I think the statute requires. I would therefore dismiss the appeal.

Lord Morris of Borth-y-Gest. My Lords, the opening words of section 175 show that from year to year a lessor may be chargeable to tax under Schedule D. He will be so chargeable in respect of any excess that in any one year there may be of one amount denoted by the words of the section over another. In the present case no question arose as to the latter amount. It was the actual amount of the Schedule A assessment (as reduced for the purpose of collection). In order to arrive at the other amount denoted by the section it has to be ascertained whether, in the particular year of assessment which is being considered, the lessor (the immediate lessor) was entitled to a rent which was payable under a lease to which the section applies. When ascertained that rent becomes an essential part of the determination or special calculation which the section requires. The section requires a determination as to what "would have been" the Schedule A assessment (as reduced for the purpose of collection) on a certain given basis. What would it have been if the annual value had been determined by reference to "that rent" and the other terms of the lease? The rent so referred to is, in my judgment, the actual rent for the year in question as ascertained. In the present case the lessors were entitled to a surface rent and to a royalty per ton "for all sand "worked and gotten." The combined amount of the rent and royalty payments can be regarded as the rent payable.

When assessment for the purposes of Schedule A is being made and the annual value of property is being ascertained it has to be considered whether there has been a letting at a rack-rent fixed within a certain period and, if not, what is the rack-rent at which the lands are worth to be let by the year. When the directions given in section 175 are being followed, then inquiry has to take place as to what would have been the Schedule A assessment if the annual value had been determined (in accordance with the provisions of Part III) by reference to the actual rent payable to the lessor in the particular year of assessment (and to the other terms of the lease). Instead, therefore, of determining the annual value by making an assessment or a valuation under section 82, the figure actually payable to the lessor in the particular year is to be taken. Stated otherwise, if for the purposes of Schedule A the annual value had been determined by reference to the actual figure payable, then that actual figure would take the place of (or would be regarded as) the rack-rent. No occasion for any further valuation or calculation under section 82 (2) (*a*) or (*b*) would arise.

Section 175 also requires the supposition that annual value had been determined in accordance, in whatever part of the United Kingdom the unit of assessment is situated, with the provisions of Part III of the Act. This introduces the relevant provisions of Part III for determining assessments. Sections 86 and 88 may, for example, in particular cases require consideration. Furthermore, section 175, in directing the inquiry as to what, on the given basis, would have been the amount of the assessment of the unit for the purposes of Schedule A, uses also the words "as reduced for the purpose of collection." Such a reduction may be seen in section 99.

This being as a matter of construction my reading of section 175, I add that this reading of it conforms with what must have been the object of the section which, broadly stated, was to impose an annual tax, being a tax under Schedule D, on differences between out-of-date Schedule A assessments and rents actually being received.

I would dismiss the appeal.

LORD HODSON. My Lords, section 175 of the Income Tax Act, 1952, repeats the language of section 15 of the Income Tax Act, 1940, which was considered by your Lordships' House in the case of *Barron* v. *Littman*.[3] That case sustained the claim of the taxpayer to deduct losses suffered by him in respect of certain properties from excess rents chargeable under section 15. All of their Lordships considered the operation of that section. My noble and learned friend, Lord Reid, said[4]: ". . . the "provisions of section 15 can be regarded as supplementary to "Schedule A. But they are not an extension of Schedule A. They "tax a new kind of profits or gains, and they tax it under Case VI "of Schedule D because it does not come within the scope of any "other Schedule or Case. Moreover, liability to pay tax under "section 15 is imposed directly on the lessor who makes the "profit, whereas the occupier pays tax, at least in the first "instance, under Schedule A. Section 15 imposes liability to "tax if a notional revaluation of the property, based on the rent

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[3] [1953] A.C. 96.

[4] Ibid. 117.

"which the taxpayer actually receives, exceeds whichever is "the greater of the actual Schedule A assessment or any rent "which he has to pay under a short lease. Broadly speaking, that "is a case where the taxpayer has made a profit by letting or "sub-letting and where tax on the amount of his profit would "exceed the tax due under Schedule A, or such part of that tax "as he has to bear himself: and the amount of tax payable "under section 15 when added to the tax under Schedule A or that "part of it which he bears himself will roughly correspond to "what he would have had to pay in tax if he had to pay "nothing under Schedule A but had been taxed on his whole "profit from letting or sub-letting the property."

Later, Lord Reid said[5]: "The calculation which section 15 "directs is simply the method by which the profits from the "transaction are to be measured for income tax purposes, and "the assessment and charge to tax under the section are in "respect of the profits so measured."

True that the House was not concerned with how the notional revaluation or, as it may be called, "the top figure" was to be calculated, but the language used supports the contention of the Crown that the calculation is to be made by reference to the actual figure of rent received by the taxpayer during the year in question.

The appellants contended that the measure to be used is not the actual rent, including in this case royalties received, but the annual value computed by reference to the terms of the current lease. They argued that the figure of £646 (the royalties received during the year April 1, 1953, to March 31, 1954) is only relevant evidence to enable the annual value to be computed and that the commissioners should be directed to find what is the consideration agreed to be paid under the lease and to express that consideration in the light of evidence as to sand available and the rate at which it is likely to be used up as a figure of annual value.

The words of the section, however, are, in my opinion, too strong for them. The section provides a formula by which the excess rent is to be calculated. It begins by referring to the year of assessment and to "any rent" to which the lessor is entitled. This rent must be the sum of money payable as rent in respect of that year. The "top figure" is to be calculated by reference to "that rent and the other terms of the lease," but the calculation is to be made in accordance with the provisions of Part III of the Act. This means that such adjustments are to be made as are to be found in Part III of the Act as, for example, provisions relating to repairs and payments of rates: see sections 86 and 88 (3) (*b*) of the Act. Finally, by section 99, a repairs allowance is permitted, as the result of which the assessment is, for the purposes of collection, reduced by one-eighth.

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[5] [1953] A.C. 96, 119.

The emphasis is on the word "rent"; that rent is the rent for the year of assessment and there is no ground for treating the rent as one of the terms of the lease to be used only as evidence upon which a notional rent is to be fixed on a Schedule A basis. The words "other terms" cannot embrace rent for other years. The assessment is a Schedule D assessment under Case VI on profits and gains for the year of assessment and the reference to Schedule A provisions is necessary in order that the taxpayer may not suffer the injustice of being deprived of any adjustments to which he should be entitled.

The appellants sought to support their argument by the example of a case where the Crown's contention that the actual rent for the year is the basis of assessment would cause an injustice. If, it is said, one takes a lease for three years at a rent of £100 for the first, £200 for the second and £300 for the third year, the Schedule A assessment being £200, the landlord would, if directly assessed, pay tax on £100 excess rent in the third year, which on the face of it is unjust, since in the first year his actual rent was less by the same amount than the Schedule A figure on which he had to pay tax. Anomalies there must be, perhaps not infrequently, in tax cases, but I am not driven by this apparent anomaly to adopt the construction of section 175 put forward by the appellants.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Peake & Co.; Solicitor of Inland Revenue.*

F. C.

DIRECTOR OF PUBLIC WORKS
AND ANOTHER . . . . APPELLANTS;

AND

HO PO SANG AND OTHERS . . . . RESPONDENTS.

J. C.*

1961
May 15.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Statute—Repeal—Whether right acquired or accrued under repealed provisions—Landlord and tenant legislation—Rebuilding certificate —Right to have it determined whether certificate should be given— Not itself a right preserved by Interpretation Ordinance—Landlord and Tenant Ordinance (Hong Kong), 1947, *c.* 255 *(as amended by Ordinances No.* 22 *of* 1953 *and No.* 11 *of* 1954), *ss.* 3*A–E— Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38*—Interpretation Ordinance (Hong Kong), c.* 1, *s.* 10.

Hong Kong — Landlord and tenant — Repeal of legislation — Whether right acquired or accrued—Rebuilding certificate—Right to investigation—Not itself a right preserved by Interpretation Ordinance— Landlord and Tenant Ordinance, 1947, *c.* 255 *(as amended by Ordinances No.* 22 *of* 1953 *and No.* 11 *of* 1954), *ss.* 3*A–E— Interpretation Ordinance, c.* 1, *s.* 10.

By section 10 of the Interpretation Ordinance of Hong Kong (which corresponds with section 38 of the Interpretation Act, 1889): "The repeal of any enactment shall not— . . . (*c*) affect any right, "privilege . . . acquired, accrued or incurred under any enactment "so repealed; . . . (*e*) affect any investigation . . . in respect of "any such right."

The second appellant, the Crown lessee of premises in Hong Kong, of which the respondents were tenants and subtenants, applied for a renewal of his lease, and a memorandum of agreement was signed which provided, inter alia, that he was, after demolition of the then existing buildings which were subject to the Landlord and Tenant Ordinance, to erect new buildings on the site. Sections 3A–E of the Ordinance as amended provided, inter alia, that if the Director of Public Works (the first appellant) gave a rebuilding certificate the lessee was entitled to call on those in occupation to quit. The lessee applied for a rebuilding certificate, and on July 20, 1956, the director notified him of his intention to give a certificate. Thereupon, in compliance with section 3B (1) of the Ordinance the lessee served notices of the director's intention on the tenants who, pursuant to section 3B (2), appealed by way of petition to the Governor in Council, and the lessee cross-petitioned under section 3B (3).

By the Landlord and Tenant (Amendment) Ordinance, 1957 (effective from April 9, 1957), sections 3A–E of the Ordinance were repealed. By that date no decision had been taken by the Governor in Council in regard to the petition and cross-petition. On October 12, 1957, however, the director purported to give the lessee a rebuilding certificate under section 3A (1) and the latter, in purported pursuance of section 3E (1), served notice to quit on all the persons in occupation. The tenants and subtenants thereupon began the present proceedings, contending, inter alia, that after the repeal of sections 3A–E the director had no legal authority to issue a rebuilding certificate:—

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* *Present*: LORD DENNING, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

Held, (1) that on April 9, 1957—the date of repeal—the lessee, after the director had given notice of his intention to give a rebuilding certificate, had under the Ordinance no *right* to a certificate which by reason of the Interpretation Ordinance remained unaffected by the repeal. On April 9, 1957, the lessee did not and could not know whether he would or would not be given a rebuilding certificate; he had not an accrued right to one, and accordingly had no accrued right to vacant possession of the premises. He had no more than a *hope* that a certificate would be given.

(2) That the entitlement of the lessee in the period before April 9, 1957, to have the petition and cross-petition considered by the Governor in Council was not a right or a privilege either accrued or acquired within the meaning of the Interpretation Ordinance. At the date of the repeal he had no accrued right. Further, there was a manifest distinction between an investigation in respect of a right and an investigation which was made to decide whether some right should or should not be given. Upon a repeal the former was preserved by the Interpretation Ordinance, the latter was not. The intended investigation—the consideration by the Governor—was in order to decide whether a right should or should not be given; it was not itself a right or privilege which was preserved by the Ordinance.

Accordingly, when sections 3A–E were repealed on April 9, 1957, the lessee had no right to vacant possession under those sections, there was no validity in the purported rebuilding certificate, and he could only recover possession under the sections of the Landlord and Tenant Ordinance remaining in force, which provided for compensation.

Heston and Isleworth Urban District Council v. *Grout* [1897] 2 Ch. 306; 13 T.L.R. 504, C.A., and *Hamilton Gell* v. *White* [1922] 2 K.B. 422; 38 T.L.R. 829, C.A. distinguished.

Moakes v. *Blackwell Colliery Co. Ltd.* [1925] 2 K.B. 64; 41 T.L.R. 296, C.A., *Briggs* v. *Thomas Dryden & Sons* [1925] 2 K.B. 667, C.A., and *Boddington* v. *Wisson* [1951] 1 K.B. 606; [1951] 1 All E.R. 166, C.A. considered.

Judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) affirmed.

APPEAL (No. 14 of 1960) from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (Blair-Kerr and Mills-Owens JJ.) (December 31, 1959) allowing an appeal by the plaintiffs in the action from a judgment of the Supreme Court of Hong

Kong (Original Jurisdiction) (Gregg J.) (July 13, 1959) by which the claims of the plaintiffs were dismissed.

The following facts are taken from the judgment of the Judicial Committee: There were two groups of plaintiffs. The first plaintiffs were the tenants of property known as Nos. 230, 232, 234 and 236, Temple Street, Kowloon, in the colony of Hong Kong. The second plaintiffs were the subtenants of these premises. (Hereinafter referred to as the tenants and the subtenants.) The action was brought against two defendants. The first, who may be referred to as the director, was the Director of Public Works of the colony of Hong Kong. The second defendant, Kwong Siu Kau, may be referred to as the lessee. He had held a Crown lease in respect of the above-mentioned premises. The tenants were his tenants. His Crown lease expired on December 24, 1951. He had, however, applied on April 9, 1950, for a renewal of his lease. Negotiations took place between him and the director as to the particulars and conditions for the grant of a new Crown lease. These were agreed and were reduced to writing. A memorandum of agreement was signed by the director and by the lessee on June 7, 1955. The lessee had continued to pay rent down to that date: he had paid at the rate prescribed by the terms of his expired Crown lease.

Stating the matter very generally, the new terms provided that the lessee was to develop the site by erecting buildings on it within a certain time. The buildings were to involve a certain minimum expenditure. The lessee was then to have a new lease or leases on terms which, effectively, would give him a period of 75 years from December 24, 1951. A premium was to be payable and the rent was to be higher than before. It had been assumed for the purposes of the litigation that the erection of the buildings contemplated by the new agreement would necessitate the demolition of the then existing buildings and that such buildings were premises which were subject to the Landlord and Tenant Ordinance (chapter 255). Before the lessee could proceed to demolish the existing buildings he would need to have vacant possession. There were provisions in the Ordinance under which in certain circumstances the director could give a rebuilding certificate. If such a certificate were given to a lessee he was enabled, on taking certain steps, to call upon those in occupation to quit. The parts of the Ordinance containing those provisions were repealed as from April 9, 1957. Before that date steps had been taken with a view to obtaining a rebuilding certificate, and one of the questions raised in the appeal was whether, despite the repeal, the provisions of the Interpretation Ordinance enabled the procedure to be followed through to a conclusion so as to result in the giving of a valid rebuilding certificate after April 9, 1957.

The Landlord and Tenant Ordinance, cap. 255, was amended by Ordinance 22 of 1953 by the addition, inter alia, of sections 3 A-E. There was a further amendment by Ordinance No. 11 of 1954. Section 3A so far as material read as follows:

"3A (1) Whenever any person becomes liable to the Crown "under a building covenant compliance wherewith involves the "demolition of premises subject to this Ordinance of which premises such person is in law or equity the lessee of the Crown, "vacant possession of such premises shall, subject to the provisions of this section and of sections 3B, 3C, 3D and 3E, be "recoverable by such lessee upon the expiration of two months "from the giving of a certificate by the Director of Public Works "(in this Ordinance referred to as a rebuilding certificate) that in "the opinion of the Director of Public Works it is reasonable that "such building covenant should be complied with and that such "person should be given vacant possession of the premises.

"(2) After due consideration of an application for a rebuilding "certificate, the Director of Public Works shall deliver written "notice to the applicant of his intention either to give or not to "give such certificate.

"(3) No rebuilding certificate shall be given until the applicant "has proved to the satisfaction of the Director of Public Works "that he has complied with section 3B, nor until after the time "for any appeal provided for by that section has expired nor, in "the event of any such appeal being made, until it has been "determined.

"(4) This section shall apply notwithstanding any agreement "or condition that the Crown lease will not be granted until the "building covenant which would bring subsection (1) into operation has been fulfilled."

Section 3B read: "3B (1) Where, pursuant to the provisions "of subsection (2) of section 3A, the Director of Public Works "gives notice of his intention to grant a rebuilding certificate, "the applicant may, within three weeks after receipt of such "notice, serve in manner specified in section 32 notice in the "prescribed form upon each tenant in occupation of the premises "to which his application relates of the intention of the Director "of Public Works to give a rebuilding certificate.

"(2) Any such tenant may, within three weeks after service "upon him of such notice, appeal by way of petition to the

"Governor in Council against the proposal of the Director of "Public Works to give a rebuilding certificate, and any tenant "so appealing shall, within the said period, serve upon the "applicant a copy of his petition.

"(3) Any applicant for a rebuilding certificate who is served "with a copy of a petition pursuant to the provisions of subsection (2) may, within fourteen days after such service, present a "cross-petition to the Governor in Council, and in such event shall "serve a copy of such cross-petition upon the tenant who has so "appealed."

Section 3C dealt with the situation where the director gave notice of his intention not to give a rebuilding certificate and laid down procedure which, in that event, mutatis mutandis, corresponded with the procedure prescribed by section 3B. Section 3D read as follows: "3D (2) No person lodging a petition or cross-"petition as aforesaid shall be entitled to appear before the "Governor in Council, but every petition and cross-petition lodged "in due time shall be taken into consideration by the Governor "in Council who may direct that a rebuilding certificate be given "or be not given as he may think fit in his absolute discretion.

"(3) The decision of the Governor in Council shall be final."

Section 3E read: "3E (1) Within one month after the giving "of a rebuilding certificate by the Director of Public Works, "it shall be lawful for the lessee, notwithstanding any contractual tenancy, to serve in manner specified in section 32 a notice "in the prescribed form calling upon all persons in occupation of "the premises peaceably to quit the same on or before the expiration of the prescribed period of two months from the giving "of the said certificate: Provided that where a new contractual "tenancy exists in respect of which the period of notice to be "given exceeds one month the prescribed period of two months "shall be extended if necessary to enable notice in the prescribed "form to operate as a notice to quit under the contractual "tenancy, which such notice shall in such case be deemed to be.

"(2) Upon the expiration of the prescribed period the person "who is in law or in equity the lessee of the Crown shall be "entitled to vacant possession of the premises to which the rebuilding certificate relates in like manner and with the like "remedies as if an order for possession thereof had been made "under section 18, and the provisions of section 24 shall apply "upon production of the rebuilding certificate and of a statutory "declaration that the provisions of subsection (1) have been

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"complied with, in like manner as they apply upon production "of a copy of an order of a tribunal under section 24."

In the definition section of the Ordinance it was provided that: "lease" or "tenancy agreement" included every agreement for the letting of any premises whether oral or in writing. One part of the definition of "tenant" was that it included a subtenant.

Further mention must now be made of the terms of the agreement made between the director and the lessee in 1955. The document of June 7, 1955, recorded the "Particulars and conditions for the grant of a new Crown lease of Kowloon Inland "Lot No." The particulars were as follows:

"*First Schedule*

"PARTICULARS OF THE NEW LOT

Registered No.	Situation	Boundaries	Area in sq. ft.	Annual Rental	Premium
Kowloon Inland Lot No. 6516	Temple Street, Kowloon	As per plan signed by the Lessee Area coloured red	2,950	From 25.12.51 $270·00	$70,800·00

"*Second Schedule*

"PARTICULARS OF THE OLD LOT TO BE SURRENDERED

"Kowloon Inland LOT No. 63 Sec. A.R.P."

There followed certain general and special conditions. The first three general conditions were as follows:

"(1) A surrender to the Crown of the old lot together with all "rights of way and other rights and easements (if any) used and "enjoyed therewith shall be executed by the lessee at his own "expense and without payment or compensation such surrender "to be made when required by and in a form to be approved by "the land officer."

"(2) The lessee shall pay into the Government of Hong Kong "the sum of $70,800·00 as premium for the grant of the new "Crown lease by instalments (incorporating interest at 5 per cent. "per annum) in accordance with special condition (*b*) hereinafter "contained.

"(3) Crown rent for the new Lot commencing from the date "of this agreement shall be as specified in the First Schedule "and shall be payable by equal half-yearly payments on the 24th "day of June and the 25th day of December the first half-year's "rent or a due proportion thereof being payable on the next half-"yearly date following the date hereof."

Provided that the conditions were complied with to the satisfaction of the director and the land officer the lessee was to be entitled to a lease of the new lot for a term of 150 years from December 25, 1876, and it was provided (see condition 4 (*b*)) that in the event of more than one building being erected on the lot the lessee would be required to take up a separate lease for the site of each separate building.

General condition 4 (*c*) was in the following terms: "4 (*c*) "Pending the issue of such new lease the tenancy of the new lot "shall be deemed to be upon and subject to and such new Crown "lease when issued shall be subject to, and contain, all exceptions, reservations, covenants, clauses and conditions as are "contained in the existing lease or agreement for tenancy under "which the same is held as varied modified or extended by the "general and special conditions herein contained, and a covenant "to provide for the payment by instalments of the balance of "the premium then remaining unpaid."

The exact boundaries of the new lot were to be determined by the director before the issue of the Crown lease.

The first part of general condition 6 (*a*) was as follows: "6 (*a*) "The lessee of the lot shall develop the same by the erection "thereon of the building(s) specified in special condition (*c*) with "such materials as may be approved by the Director of Public "Works, and in all other respects in accordance with the requirements of the special conditions and the provisions of all "Ordinances, Byelaws and Regulations relating to buildings or "sanitation as shall or may at any time be in force in the colony, "such buildings to be completed before the expiration of 24 "calendar months from the date hereof and shall expend thereon "a sum of not less than $200,000·00 (such sum to exclude "moneys spent on site formation, foundations, access roads, and "other ancillary works) . . ."

It was further provided (by general condition 6 (*b*)) that the fulfilment by the lessee of his obligations under the general and special conditions was to be deemed to be a condition precedent to the grant or continuance of the tenancy. General condition 9 gave the Crown a right to retain any premium that the lessee might have paid and to re-enter and take possession of the new lot without payment or compensation to the lessee in respect of the value of the land or any buildings on it if the lessee neglected or failed to comply with any of the general or special conditions.

Special condition (*a*) was in the following terms: "(*a*) The "lessee, his executors, administrators and permitted assigns "shall not assign, underlet or part with the possession of "or otherwise dispose of the new lot or any part thereof or any "interest therein or enter into any agreement so to do unless and "until he has in all respects observed and complied with the "general and special conditions to the satisfaction of the Director "of Public Works and the Land Officer and shall not mortgage "or charge the new lot except by way of a building mortgage "in connection with the development thereof. The form of "building mortgage shall be approved by the Land Officer and "every assignment, mortgage, charge, subletting or other alienation of the new lot or any part thereof shall be registered at the "Land Office."

The memorandum of agreement was signed by the lessee and by the director and was in the following terms:

"MEMORANDUM OF AGREEMENT

"Between Kwong Siu Kau of No. 44 Bonham Strand "ground floor Hong Kong Merchant (the lessee) of the one "part and the Director of Public Works for and on behalf of "the Governor of the other part

"Whereby It Is Agreed that the lessee shall surrender the "lot and premises set out in the Second Schedule of the foregoing "particulars and shall be entitled to a lease of the new lot "described in the First Schedule subject to and on the terms and "conditions hereinbefore contained.

"C/R No. 5206

"Dated this 7th day of June, 1955."

More than a year after the signing of the memorandum of agreement the lessee made application (on June 11, 1956) to the director for a rebuilding certificate. He made such application in reliance upon the provisions of section 3A of the Ordinance. In order that the lessee should be entitled to rely upon those provisions the position would have to be (1) that the lessee was liable to the Crown under a building covenant (2) that compliance with the covenant involved the demolition of premises subject to the Ordinance and (3) that the lessee was in law or equity the lessee of the Crown in respect of the premises.

The tenants and subtenants asserted in the action that there was no "covenant" to build and furthermore they said that the memorandum of agreement was void and of no effect in that it was not made by the Governor under the Public Seal of the Colony.

The application of June 11, 1956, having been made by the lessee, the director took it into consideration and on July 20, 1956, he delivered written notice to the lessee of his intention to give a rebuilding certificate (see section 3A (2) of the Ordinance).

The lessee then complied with the requirement indicated in section 3B (1) and served notices of the director's intention. The tenants and subtenants then appealed by way of petition to the Governor in Council. There followed a cross-petition by the lessee to the Governor in Council. (See section 3B (2) and (3).) The requirements as to time were in each case satisfied.

If for present purposes it was assumed that the agreement of June 7, 1955, was not void and if it was assumed that the lessee brought himself within the wording of section 3A (1)—the position then was that a decision as to the granting of a rebuilding certificate rested within the absolute discretion of the Governor. When the two years period from June 7, 1955, was nearing its termination the Government on March 20, 1957, granted to the lessee (subject to some variation of other terms) an extension of time to June 28, 1958, within which to fulfil his obligations to build.

By April 9, 1957, no decision had been taken by the Governor in Council in regard to the petitions and the cross-petition presented to him. Then by the Landlord and Tenant (Amendment) Ordinance, 1957 (No. 14 of 1957), which was to be deemed to have had effect as from April 9, 1957, sections 3A, 3B, 3C, 3D and 3E of the Landlord and Tenant Ordinance above referred to were repealed. There was no express provision which enabled consideration to be given to any pending petitions or cross-petitions or which permitted the subsequent giving of any rebuilding certificate.

In view of this repeal on April 9, 1957, the issue was raised in the action as to whether the provisions of the Interpretation Ordinance became applicable which read: " 10. The repeal of any " enactment shall not— . . . (*b*) affect the previous operation of " any enactment so repealed, or anything duly done or suffered " under any enactment so repealed, or (*c*) affect any right, privi- " lege, obligation or liability acquired, accrued or incurred under " any enactment so repealed . . . (*e*) affect any investigation, legal " proceeding or remedy in respect of any such right."

The provisions cited corresponded with provisions contained in section 38 of the Interpretation Act, 1889.

The subsequent events were that on some date before October

12, 1957 (but after the repeal of sections 3A to E), the Governor directed that a rebuilding certificate be given. On October 12 the director gave the lessee a rebuilding certificate under section 3A (1) by which he certified that in his opinion it was reasonable that the building covenant relating to 230–236, Temple Street, should be complied with and that the lessee (who was referred to as " the " Crown lessee of this lot ") should be given vacant possession. Thereupon the lessee, claiming to be entitled to follow the procedure which had been set out in section 3E (1), served notice to quit in the prescribed form calling upon all persons in occupation of the premises to quit within two months and after the expiration of that time he claimed to be entitled to vacant possession of the premises.

The tenants and subtenants thereupon commenced proceedings (on December 10, 1957) against the director and the lessee. They presented three main contentions, viz., (1) that after the repeal of sections 3A to E the director had no legal authority to issue a rebuilding certificate; (2) that the purported agreement of June 7, 1955, was null and void in that it was contrary to clause 13 of the Letters Patent of the Colony of Hong Kong in that it was a disposition of land not under the hand of the Governor and that consequently section 3A never applied or came into operation so as to authorise the director to issue a rebuilding certificate; (3) that in the alternative even if the rebuilding certificate was validly issued—the subtenants were protected from eviction under the provisions of the Landlord and Tenant Ordinance and (under section 23) became direct tenants of the lessee. The plaintiffs asked for relief in the form of declarations and injunctions appropriate to their contentions.

Article XIII of the Letters Patent dated February 14, 1917, constituting the office of Governor and Commander-in-Chief of the Colony was in the following terms: " XIII. The Governor, in " Our name and on Our behalf, may make and execute, under " the public seal of the Colony, grants and dispositions of any " lands which may be lawfully granted or disposed of by Us. " Provided that every such grant or disposition be made in con" formity either with some law in force in the Colony or with " some Instructions addressed to the Governor under Our Sign " Manual and Signet, or through one of Our Principal Secretaries " of State, or with some regulation in force in the Colony. " Nothing in this article shall be construed as preventing the " enactment of laws by the Legislature of the Colony regarding " the making and execution of such grants and dispositions."

By the Hong Kong Letters Patent, 1960, a new Article XIII was substituted for the Article as just quoted, but in this litigation it was the Article as it formerly stood that applied.

The judge (Gregg J.) in the Supreme Court held that the agreement of June 7, 1955, was not technically an express " grant " or disposition " of land as was contemplated by Article XIII but was rather in the nature of a binding preliminary agreement for a lease of Crown land which gave no right of assignment and which did not need to be signed by the Governor himself under the Public Seal of the Colony. He held that the rebuilding condition in condition 6 of the agreement was a " covenant " for the purposes of section 3A of the principal Ordinance. Though there had been a repeal of sections 3A to E he considered that the lessee's position was preserved by section 10 of the Interpretation Ordinance, first, because the application for a rebuilding certificate constituted something " duly done " under the repealed sections, and secondly, because it amounted to an acquired right within section 10 (*c*) to have his claim determined, and that in the result the rebuilding certificate was validly given. Lastly, the judge held that an order for " possession " under section 18 as referred to in section 3E (2) of the Ordinance could only mean, having regard to the wording of sections 3E and 3A, an order for vacant possession which meant an order ejecting all tenants including subtenants. Holding therefore that the lessee was entitled to vacant possession of the premises he dismissed the action with costs.

The tenants and subtenants successfully appealed against this decision. Blair-Kerr J. held that no particular right was conferred by section 3A (1) of the Ordinance and that the existence of a building covenant gave a lessee no more than a privilege to apply under the procedure set out, and that the fact that there had been an application for a rebuilding certificate did not give the applicant a " right " to the continuance of the procedure after a repeal and that he had no " right acquired " or " accrued."

Mills-Owens J. held that at the date of the repeal of the relevant sections of the Ordinance the lessee had no vested right but had a mere hope or expectation of obtaining a rebuilding certificate and that the fact that the director had given notice of his intention to issue a rebuilding certificate did not improve the lessee's position. The judge considered that when sections 3A to E were repealed the position of a landlord of protected premises became as it was before those sections were enacted in 1953: if he wished to rebuild he could in general only secure vacant possession upon obtaining an order which would invariably be conditional upon the payment of compensation to the tenants.

Both judges were of the opinion (agreeing with Gregg J.) that if the rebuilding certificate had been validly issued the resulting steps taken by the lessee would have enabled him to secure vacant possession against the subtenants as well as against the tenants.

In regard to the questions whether the agreement of June 7, 1955, was or was not a " disposition of land " and whether it was competent for the director to enter into the agreement on behalf of the Governor, Mills-Owens J. held (with the concurrence of Blair-Kerr J.) that the agreement was a purported " disposition " within Article XIII which it was not competent for the director to enter into on behalf of the Governor in the absence of enabling legislation. He further held that the receipt of instalments of the premium and rent paid by the lessee was insufficient to amount to a ratification by the Governor of the agreement if it was originally void.

1961. Feb. 20, 21, 22, 23. *Peter Foster Q.C.* and *Raymond Walton* for the appellants. The agreement of June 7, 1955, was merely an agreement for a lease and was not a " disposition of " land " within the meaning of Article XIII of the Letters Patent of the colony and thus did not require execution by the Governor. If that is right, the second question—that under the Interpretation Ordinance the lessee has an accrued right—will not arise. The meaning of " grants and dispositions " in Article XIII should not be too widely extended: *Carter* v. *Carter*.[1] A case very much nearer to the present one is *Borman* v. *Griffith*.[2] As a result of an agreement for a lease there is no alienation of land either legal or equitable. For there to be a " disposition " an interest in land must be disposed of; nothing is being disposed of by the agreement. Section 40 of the Law of Property Act, 1925, shows very clearly a distinction between a contract for sale and an actual disposition. In a nutshell, if by a document one agrees to convey, one does not do it; for there to be a disposition something must pass from one to the other; a legal or equitable interest must be created in land.

Secondly, even if the doctrine in *Walsh* v. *Lonsdale* [3] applied to this case, the agreement is still not a disposition; before the doctrine can apply there must be three things: (i) the tenant

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[1] [1896] 1 Ch. 62, 65.
[2] [1930] 1 Ch. 493, 497.
[3] (1882) 21 Ch.D. 9, C.A.

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must be in valid possession; (ii) he should pay rent, and (iii) he should be entitled to call for a lease. On this second submission see also *Coatsworth* v. *Johnson*,[4] *Swain* v. *Ayres*,[5] *Manchester Brewery Co.* v. *Coombs*,[6] *Purchase* v. *Lichfield Brewery Co.*[7] and *Foster* v. *Reeves*.[8] The third submission, a corollary to the second, is that in any event the doctrine of *Walsh* v. *Lonsdale*[9] does not apply here. If the construction contended for is right, the *Walsh* v. *Lonsdale* doctrine would not arise unless one finds that he is entitled to call for a lease; if he is not, the doctrine does not start to run: *Lowther* v. *Heaver*.[10] Here it is quite clear that no court of equity would grant him a decree of specific performance until the building was completed: *Inland Revenue Commissioners* v. *Earl Derby*.[11]

The fourth submission is that the tenant had a yearly tenancy (1) by holding over from 1951 to 1955 after the expiration of his Crown lease; (2) on the signing of the agreement of June 7, 1955, and the subsequent retention of possession and the payment of rent and the payment of instalments of premium. As to a tenancy from year to year, see *Bennett* v. *Ireland*[12]; possession and payment of rent makes the tenant a yearly tenant at law. On the assumption that the agreement does, contrary to the earlier submission, give rise to an interest in land, there is a tenancy from year to year between the first and the second appellants.

The fifth and sixth submissions both proceed on the same footing—that the agreement is pro tanto invalid in so far as it created no interest in land. On that supposition, there is ratification because the Crown received rent and took no action—the Crown will be held to ratify what is otherwise an invalid agreement. The Crown is always one and indivisible. The sixth submission on this point is that, even if the agreement is not of an interest in land and is pro tanto invalid, the covenant to build is valid and, there being a tenancy, the provisions of the Ordinance apply: s. 3A (1). There was no suggestion that the Director of Public Works would not sign a building contract. The building covenant is in no way dependent on the grant of a tenancy.

The next main submission is that the second appellant is

[4] (1886) 55 L.J.Q.B. 220, 222; 2 T.L.R. 351, C.A.

[5] (1888) 21 Q.B.D. 289, 291; 4 T.L.R. 609, C.A.

[6] [1901] 2 Ch. 608, 617; 16 T.L.R. 299.

[7] [1915] 1 K.B. 184, 186, D.C.

[8] [1892] 2 Q.B. 255, 257, C.A.

[9] 21 Ch.D. 9.

[10] (1889) 41 Ch.D. 248, 262, 264, C.A.

[11] [1914] 3 K.B. 1186.

[12] (1858) E.B. & E. 326.

within the provisions of section 3A (1) of the Ordinance; he is a tenant and therefore entitled to take advantage of the provisions of sections 3A to E. On the date when those provisions were repealed—April 9, 1957—the second appellant had in the events which had happened an accrued right, first, to have his application for a rebuilding certificate determined in accordance with the provisions of sections 3A to 3E, and, secondly, he also had an accrued right to vacate possession of the premises in certain events which happened. As to rights on the repeal of an Act, reliance is placed on *Abbott* v. *Minister for Lands*.[13] See also *Reynolds* v. *Attorney-General for Nova Scotia*,[14] *Heston and Isleworth Urban District Council* v. *Grout*,[15] *Hamilton Gell* v. *White*,[16] *Moakes* v. *Blackwell Colliery Co.*[17] and *Briggs* v. *Thomas Dryden & Sons*.[18] In all those cases there are other provisions in the amending statute; here there are no others. Reliance is placed on the *Heston* case.[19] Here the intention to give a certificate was an accrued right within the meaning of the Interpretation Ordinance. The accrued rights survived the repeal of sections 3A to E of the Landlord and Tenant Ordinance with effect from April 9, 1957, by virtue of the provisions of section 10 of the Interpretation Ordinance.

Raymond Walton following. Article XIII of the Letters Patent is only dealing with those dispositions and grants of land which require a deed, and is saying that they must be under the public seal of the colony. If that is right, then it would not apply at any stage to this agreement.

Brook Bernacchi Q.C. and *John Knox* for the respondents. The whole of this case turns on whether there has been any, and if so what, right acquired by or accrued to the Crown lessee. *Rex* v. *Morris*[20] was before the Interpretation Act, which settled the doubts in that case, and said that repeal does not affect the operation of what has already been done. The issue of the rebuilding certificate does not give him any acquired or accrued right to serve a notice requiring possession, which is a condition precedent to taking possession. [Reference was made to *Boddington* v. *Wisson*.[21]] It is not conceded, however, that any right to a rebuilding certificate was acquired merely by the Director of Public Works serving this notice of intention to give the certificate. Even if it did give an acquired right, it was divested by the notice of appeal to the Governor in Council. The serving of the notice of intention is nothing but a form of machinery to enable the matter to be brought to the notice of the tenants, so that, if they so desire, the whole matter may be referred to the Governor in Council for the exercise of his absolute discretion whether to grant a certificate or not. As to the absolute discretion of the Governor, see *Johnson & Co.* v. *Minister of Health.*[22] It has always been conceded that the Governor in Council acts in an executive and not in a judicial capacity: *Lui Man Ma* v. *Governor in Council.*[23] The Governor in Council sitting on matters under this Landlord and Tenant Ordinance is essentially an executive and not a judicial officer.

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[13] [1895] A.C. 425, 431, P.C.

[14] [1896] A.C. 240, P.C.

[15] [1897] 2 Ch. 306; 13 T.L.R. 504, C.A.

[16] [1922] 2 K.B. 422, 426; 38 T.L.R. 829, C.A.

[17] [1925] 2 K.B. 64, 69; 41 T.L.R. 296, C.A.

[18] [1925] 2 K.B. 667, 672, C.A.

[19] [1897] 2 Ch. 306.

[20] (1830) 1 B. & Ad. 441, 450.

[21] [1951] 1 K.B. 606, 610, 612, C.A.

It follows, then, that the Crown lessee at the time of the repeal of sections 3A to E of the Ordinance had no right to a rebuilding certificate either immediately or by way of a judicial determination by proving certain facts. The very most that he could possibly be said to have had was a hope or expectation that if matters proceeded the Governor in Council would have given a purely executive decision in his favour. The right to the exercise of such executive discretion is not in any way a right accrued or acquired to the rebuilding certificate. One is concerned here only with the acquisition of a right at the time when the repeal was enacted: see *Kerr* v. *Bryde.*[24] The lessee had not obtained a substantive right at the date of the repeal, and that was what he needed. All the authorities are cases of the right to the substantive relief having been acquired before the repeal: *Hamilton Gell* v. *White* [25]; *Reynolds'* case [26] is by no means on all fours with the present case, but in so far as it is relevant it supports my argument; *In re Coal Mines Control Agreement* [27] is in direct contradistinction to this case—it stresses the difference between the right and the machinery; *In re Tithe Act, 1891, Roberts* v. *Potts* [28] is also perhaps of some assistance.

In the present case the right to possession, quite apart from any right to a rebuilding certificate, only arises after the notice in the prescribed form has been given pursuant to section 3E. That is in effect the end of the lessee's case in the sense that he cannot get possession unless he can show an acquired right to

[22] [1947] 2 All E.R. 395, 406, C.A.

[23] [1959] H.K.L.R. 177, 181, 185, 197, 199.

[24] [1923] A.C. 16, 27; 39 T.L.R. 61, H.L.

[25] [1922] 2 K.B. 422, 430.

[26] [1896] A.C. 240, 244.

[27] (1923) 92 L.J.Ch. 445, 448; 39 T.L.R. 258, C.A.

[28] [1894] 1 Q.B. 213, 221, 224, C.A.

possession at the date of the repeal. In *Abbott's* case[29] the distinction now contended for seems to be drawn, namely, that one must distinguish between the existence of an acquired right and the existence of the machinery whereby that right may be acquired. See also *Lewis* v. *Hughes*.[30] The basis of the respondents' case here is that no right had vested at the time when the petition and cross-petition were made to the Governor in Council. The *Heston* case[31] is clearly explainable on the basis that there was a right in the council which was not affected by the repeal. In *Briggs* v. *Thomas Dryden & Sons*[32] and in *Moakes'* case[33] they were dealing with rights which did exist, and it was merely a question of ascertaining the amount of compensation; *Moakes'* case gives no assistance at all. Whatever right the lessee here may have, it is not an acquired right to a certificate and therefore not an acquired right to possession. It is stretching the Interpretation Act too far to say that it keeps alive the machinery where there is no acquired right.

In summary, the application of the second appellant for a rebuilding certificate conferred no right on him which was preserved after the repeal of sections 3A–E, but merely conferred the hope or expectation that the Governor in Council would exercise his executive or ministerial discretion in his favour and the first appellant would thereafter issue a certificate. Similarly, the issue by the first appellant of notice of intention to grant a rebuilding certificate conferred no right on the second appellant which was preserved after the repeal, but merely instituted a procedure whereby the matter could be referred to the Governor in Council. The repeal disentitled the first appellant from thereafter issuing any rebuilding certificate where the matter had been referred by petition to the Governor in Council but had not been determined by the Governor.

Turning to the second issue, the submission is that the agreement of June 7, 1955, is from its very nature a disposal of an interest in land within the meaning of Article XIII of the Letters Patent. Words are used in the document consistent only with the creation of a present tenancy in the land and are clearly within the meaning of "disposition." [Reference was made to the Land Registration Ordinance, c. 128, ss. 2–5.] The agreement is or purports to be a disposition of land since, if valid and registered pursuant to the Land Registration Ordinance, it would be binding on the whole world. It was not executed by the Governor in person and is therefore invalid. Accordingly, the second appellant was not at any material time entitled to rely on it as containing a building covenant such as to justify the issue of a rebuilding certificate. When it is provided in Article XIII that dispositions of land are to be made by the Governor in the name of the Crown, that cannot be limited to a disposition at law of a nature that requires to be under seal. There would be a void in an important matter if Article XIII does not cover equitable dispositions: *Edwards* v. *Edwards*.[34] Cases on "disposition" are *Duke of Northumberland* v. *Attorney-General*[35] and *Grey* v. *Inland Revenue Commissioners*.[36] This is not a mere estate contract; it is a present tenancy, and, if necessary, reliance is placed on *Walsh* v. *Lonsdale*[37] in relation to that present tenancy quite apart from the right to a Crown lease in the future. The cases cited by Mr. Foster in this respect do not take the matter very much further. [Reference was made to Foa's General Law of Landlord and Tenant, 8th ed., p. 17.]

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[29] [1895] A.C. 425, 431.

[30] [1916] 1 K.B. 831, 836, C.A.

[31] [1897] 2 Ch. 306.

[32] [1925] 2 K.B. 667.

[33] [1925] 2 K.B. 64; 41 T.L.R. 296, C.A.

Bearing in mind the position in Hong Kong, to suggest that possession affects the question of whether or not a document is a disposition would mean that nothing under Article XIII would be by itself a grant or disposition because it would require an entry into possession to complete it. [Reference was made to the *Manchester Brewery* case,[38] *Borman* v. *Griffith*,[39] *Purchase* v. *Lichfield Brewery Co.*,[40] *Foster* v. *Reeves*,[41] *Inland Revenue Commissioners* v. *Earl Derby*[42] and *Cornish* v. *Brook Green Laundry Ltd.*[43]] It is conceded that there must be some yearly tenancy, and it is on the holding over from the original Crown lease. But whatever else would be incorporated in the yearly tenancy, this building covenant would not be. [Reference was made to Woodfall on Landlord and Tenant, 26th ed., p. 296, para. 723, *Read* v. *Brown*,[44] *Bowes* v. *Croll*[45] and *Lace* v. *Chantler*.[46]] So here, if it is not what the parties intended it to be, namely, an immediate tenancy, there is no question of the building covenant being an enforceable covenant on the basis of something else. It is at best a straightforward yearly tenancy by operation of law; whereas the document contemplates a covenant connected with the new tenancy: *Boyce* v. *Edbrooke*.[47]

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[34] (1876) 2 Ch.D. 291, 297, C.A.

[35] [1905] A.C. 406, 410; 21 T.L.R. 639, H.L.

[36] [1958] Ch. 690, 707, 721; [1958] 3 W.L.R. 45; [1958] 2 All E.R. 428, C.A.; [1960] A.C. 1, 12, 15, 17; [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603, H.L.

[37] 21 Ch.D. 9.

[38] [1901] 2 Ch. 608, 617.

[39] [1930] 1 Ch. 493.

[40] [1915] 1 K.B. 184.

[41] [1892] 2 Q.B. 255.

[42] [1914] 3 K.B. 1186.

[43] [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; [1959] 1 All E.R. 373, C.A.

[44] (1888) 5 T.L.R. 97, C.A.

[45] (1856) 6 E. & B. 255, 264.

[46] [1944] K.B. 368, 371; 60 T.L.R. 244; [1944] 1 All E.R. 305, C.A.

With regard to ratification, the agreed facts contain no detailed information as to the manner in which rent was paid and received, and the appellants have therefore put it beyond their power to develop the argument on ratification: see *Ashbury Railway Carriage and Iron Co.* v. *Riche*[48] and *Rhyl Urban District Council* v. *Rhyl Amusements Ltd.*[49]

Lastly, one is straining section 3E to bring subtenants within it when they are in effect excluded by sections 18 and 23. Even if, contrary to the respondents' contention, the issue of the rebuilding certificate to the second appellant was valid and effectual, he was only thereby enabled to secure vacant possession against the first respondents, the tenants, and not against the second respondents, the subtenants.

Knox following. Assuming that there is an obligation on the Governor to give a decision, and assuming further that that position was preserved by the repeal, the submission is that only such rights as are equivalent to entitlement to a vested or contingent interest are preserved by section 38 (2) (*c*) of the Interpretation Act. An analogy may be drawn with the case of a discretionary trust.

Peter Foster Q.C. in reply. The respondents put forward the case now that on the particular construction of this agreement it did in fact create a tenancy. The general submission for the appellants is that this document does not create an interest in land; there is no disposition of an interest in land under this agreement on any view. If that is so, it is an end of the matter.

There is nothing in *Boddington* v. *Wisson*[50] which assists the respondents on the "accrued" point. If the lessee has a right to a rebuilding certificate, he has a right to give the notice to quit. On April 9, 1957, the second appellant had in the events which had happened an accrued right to have his application for a rebuilding certificate determined in accordance with the provisions of sections 3A to E, and also an accrued right to vacant possession of the demised premises in certain events which happened.

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[47] [1903] 1 Ch. 836, 842.

[48] (1875) L.R. 7 H.L. 653.

[49] [1959] 1 W.L.R. 465, 474, 477; [1959] 1 All E.R. 257.

[50] [1951] 1 K.B. 606.

May 15. The judgment of their Lordships was delivered by LORD MORRIS OF BORTH-Y-GEST, who stated the facts set out above and continued: Before their Lordships' Board the appellants submitted two main contentions. In the first place they submitted that the agreement of June 7, 1955, was valid and effective as between the parties to it at least to the extent to which there was thereby imposed upon the lessee an obligation to redevelop. They submitted that the agreement was merely an agreement for a lease and was not a " disposition of land " within the meaning of Article XIII, and would not become a disposition until the lessee had established his right to specific performance. If, however, because of the provisions of Article XIII, the agreement was not originally binding upon the Crown, they submitted that by the acceptance and collection of rent and of the other moneys due under the provisions of the agreement the agreement had been ratified by the Crown. Alternatively, they submitted that even if the agreement was void as a disposition of land the obligation to redevelop was valid and attached to the yearly tenancy of the premises which, by possession and the payment of rent, was established in favour of the lessee.

In the second place they submitted that the lessee had an accrued right to possession under the Ordinance prior to the repeal of sections 3A to E and that, in consequence of the provisions of the Interpretation Ordinance, that right survived the repeal. There was, they submitted, an accrued right in the lessee in certain events which in fact happened to have vacant possession of the whole of the premises: and there was an accrued right in the lessee to have his application for a rebuilding certificate determined in accordance with the provisions of sections 3A to 3E.

It becomes necessary to consider whether on April 9, 1957, the lessee possessed some " right " under the Ordinance which, by reason of the provisions of the Interpretation Ordinance, remained unaffected by the repeals which had effect as from that date. This can be considered on the assumption (for the purposes of dealing with his point) that the lessee could bring himself within the provisions of section 3A (1), i.e., if it is assumed (*a*) that the lessee became liable to the Crown under a building covenant, (*b*) that compliance with the covenant involved the demolition of premises, (*c*) that such premises were subject to the Ordinance and (*d*) that in respect of such premises the lessee was in law or in equity the lessee of the Crown.

It was submitted on behalf of the lessee that after the director had given notice (see section 3A (2)) of his intention to give a rebuilding certificate some kind of a right (even though one that might be defeated) to such a certificate was then acquired by the lessee. Their Lordships cannot accept this view. After the director gave notice of his intention to issue a certificate there could have been no giving of it until certain conditions were satisfied. The lessee was under obligation to give notices as required by section 3B (1). Had there been no appeals by tenants and subtenants, and had the time for appeals expired, the director would then have been in a position to give a certificate. Had those been the circumstances then, inasmuch as the director had indicated what his intention was, doubtless he would in fact have given his certificate. But the Ordinance did not impose an obligation upon the director to give a certificate in accordance with his declared intention: it merely provided that he could not follow up his declared intention unless and until certain conditions were satisfied. Though, in the events that happened, this point does not call for decision, it would not seem that in any circumstances any right to a certificate could arise at least until, after notices given, the time for appeals by tenants and subtenants went by without there being any appeal. In a case, however, where (as in the present case) the giving of notices under section 3B (1) resulted in appeals by way of petition to the Governor, followed by a cross-petition to the Governor presented by the applicant, then any decision as to the giving of a rebuilding certificate no longer rested with the director. In the present case the position on April 9, 1957, was that the lessee did not and could not know whether he would or would not be given a rebuilding certificate. Had there been no repeal, the petitions and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion.

The Governor would have directed either that a certificate be given or be not given, and the decision of the Governor in Council would have been final. In these circumstances their Lordships conclude that it could not properly be said that on April 9 the lessee had an accrued right to be given a rebuilding certificate. It follows that he had no accrued right to vacant possession of the premises. It was said that there were accrued rights to a certificate, and consequently to possession, subject only to the risk that these rights might be defeated, and it was said that in the events that happened the rights were not defeated. In their Lordships' view such an approach is not warranted by the facts. On April 9 the lessee had no *right*. He had no more than a *hope* that the

Governor in Council would give a favourable decision. So the first submission fails.

The further and perhaps more attractive submission which was presented on behalf of the lessee was that on April 9 he had an accrued right to have the matter taken into consideration by the Governor in Council and that such right was (by reason of the Interpretation Ordinance) unaffected by the repeal, and that consequently the Governor in Council necessarily acted after April 9 and that in the result a rebuilding certificate of full validity was issued, which led to entitlement to vacant possession of the premises. These submissions raise an interesting question. At the time of the repeal all the procedure under sections 3A and 3B had been followed and it can properly be said that the stage had been reached when the lessee could expect and was entitled to have the petitions and cross-petition considered in due course by the Governor in Council and to have a decision reached. Could such expectation or entitlement be regarded as a right or a privilege, either acquired or accrued, within the meaning and intendment of the Interpretation Ordinance? Or was such expectation or entitlement something that necessarily came to an end at the time of the repeal? There might have been some express provision in the 1957 repealing Ordinance by which it could have been ordained that petitions and cross-petitions awaiting consideration should receive such consideration in spite of the repeal, and that subsequently an effective rebuilding certificate could be given. The argument for the lessee is that the provisions of the Interpretation Ordinance made any such express enactment unnecessary. The argument for the tenants and subtenants is that the repeal of sections 3A to E put an end to certain special methods of obtaining vacant possession without paying compensation in cases where lessees of the Crown had obligations under building covenants. The tenants and subtenants did not concede that, assuming that a valid rebuilding certificate had been given immediately before April 9, the steps under section 3E could thereafter have been taken so as to result in a right to vacant possession: they recognised, however, that very different considerations might in such circumstances apply. The question so raised does not arise for decision.

Was the lessee therefore possessed on April 9 of a "right" (or privilege) within the meaning of the Interpretation Ordinance? In their Lordships' view the entitlement of the lessee in the period prior to April 9 to have the petitions and cross-petition considered was not such a "right." On April 9 the lessee was quite unable to know whether or not he would be given a rebuilding certificate, and until the petitions and cross-petition were taken into consideration by the Governor in Council no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects.

It is to be observed that under section 10 (*e*) a repeal is not to affect any investigation, legal proceeding or remedy "in respect "of any such right." The right referred to is the right mentioned in section 10 (*c*), i.e., a right acquired or accrued under a repealed enactment. This part of the provisions in paragraph (*e*) of section 10 does not and cannot operate unless there is a right as contemplated in paragraph (*c*). It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not. Their Lordships agree with the observation of Blair-Kerr J. that: "It is one thing "to invoke a law for the adjudication of rights which have al- "ready accrued prior to the repeal of that law; it is quite another "matter to say that, irrespective of whether any rights exist at "the date of the repeal, if any procedural step is taken prior to "the repeal, then, even after the repeal the applicant is entitled "to have that procedure continued in order to determine whether "he shall be given a right which he did not have when the pro- "cedure was set in motion."

A consideration of the authorities confirms their Lordships in the view which has been expressed. A case much relied upon on behalf of the lessee was *Heston and Isleworth Urban District Council* v. *Grout*.[1] In that case notices had been given to frontagers in a private street requiring them to sewer and make up. That was in October 1891. The notice had been given under the authority of section 150 of the Public Health Act, 1875, which empowered the local authority in the event of the notices not meeting with compliance to execute the works themselves (if they thought fit) and to recover the expense from the frontagers according to the frontage of their premises. Default was made by the owners in complying with the notice and the local authority resolved to do the work by means of a loan. In 1892 they applied to the Local Government Board for power to raise a loan in order to execute the improvements. Sanction to the raising of the loan was delayed, and in June 1894—nearly three years after the giving of the notices—the local authority resolved to adopt the Private Street Works Act, 1892, which by section 25 provided that from its adoption in any district section 150 of the Public Health Act, 1875, should not apply to that district. The Act of 1892 was adopted as from August 1, 1894. The loan was sanctioned in November 1894, and the work was subsequently done by contractors who contracted with the local authority. The expense was apportioned and the local authority took out an originating summons to obtain a declaration that a particular apportioned sum was due from a frontager. The claim succeeded before North J., and his decision was affirmed in the Court of Appeal. In his judgment Lindley J. referred to the Interpretation Act and continued [2]: " But that Act appears to me to apply; " for I cannot help thinking that when s. 150, by force of s. 25 " of the Act of 1892, ceases to apply to this district as from " August 1, 1894, that is a repeal of s. 150 as from that day so " far as regards this district. That, I think, lets in the provision " contained in the Interpretation Act, 1889 (52 and 53 Vict. c. 63), " s. 38, which says: ' (2) Where this Act, or any Act passed after " ' the commencement of this Act, repeals any other enactment, " ' then, unless the contrary intention appears, the repeal shall " ' not . . . (*b*) affect the previous operation of any enactment so " ' repealed, or anything duly done or suffered under any enact- " ' ment so repealed.' That to my mind preserves that notice " and the effect of it. Then s. 38 goes on to say: ' or (*c*) affect " ' any right, privilege, obligation, or liability acquired, accrued, " ' or incurred under any enactment so repealed.' If there would " otherwise be any doubt about the question, it appears to me " that those enactments are amply sufficient to remove such " doubt. I cannot come to the conclusion which Mr. Macmorran " and Mr. Ribton have urged upon us, that the true construction " of the Act of 1892 is to render the previous notice and every- " thing done under it absolutely futile for future purposes. Of " course, after the Act of 1892 comes into force in this district, no " fresh notice under s. 150 can be given, and no notice can be

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[1] [1897] 2 Ch. 306; 13 T.L.R. 504, C.A.

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[2] [1897] 2 Ch. 306, 313.

"given involving the consequences mentioned in that section; but "it appears to me that the Act of 1892 does not at all affect the "validity of a notice given before it came into operation in a "district."

In that case the position on August 1, 1894, was that the frontagers, being in default, were under a liability and the local authority had a right. The liability of the frontagers was nonetheless a liability even though no claim in money could be presented against them unless and until the local authority executed the works. So, also, the local authority possessed rights on August 1, 1894. They possessed rights against the frontagers even though they could present no money claims unless and until they executed the necessary works.

The position in the present case is different. The validity of "anything duly done" before April 9, 1957, was not affected by the repeal. Accordingly the procedural steps which had been taken as a preliminary to obtaining a decision of the Governor were not invalidated: they were, however, rendered abortive, for the repeal ended the hope or possibility of being given a rebuilding certificate. The lessee enjoyed no right which was kept alive. He did not have any right even of a contingent nature. He was not in the position of the local authority in the case just cited, for they possessed an existing right (corresponding with an existing liability in the frontagers)—even though the enforcement of the right depended upon their taking certain steps.

Reliance was also placed upon a passage occurring in the judgment of the Board in *Abbott* v. *Minister of Lands*.[3] The Lord Chancellor said[4]: "It may be, as Windeyer J. observes, that the "power to take advantage of an enactment may without impro-"priety be termed a 'right.' But the question is whether it is "a 'right accrued' within the meaning of the enactment which "has to be construed.

"Their Lordships think not, and they are confirmed in this "opinion by the fact that the words relied on are found in con-"junction with the words 'obligations incurred or imposed.' "They think that the mere right (assuming it to be properly so "called) existing in the members of the community or any class "of them to take advantage of an enactment, without any act "done by an individual towards availing himself of that right, "cannot properly be deemed a 'right accrued' within the mean-"ing of the enactment."

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[3] [1895] A.C. 425, P.C.

[4] Ibid. 431.

Reliance was placed on behalf of the lessee in the present case upon the words "without any act done by an individual "towards availing himself of that right" and it was argued that in the present case steps had been taken by the lessee which could be regarded as acts done towards availing himself of a right to have a rebuilding certificate. In *Abbott* v. *Minister of Lands* [5] the point now being discussed in the present case did not arise and their Lordships cannot ascribe to the words quoted above the wide significance suggested on behalf of the lessee. In the present case the lessee had taken procedural steps in the hope of being able to obtain a rebuilding certificate, but at the date of the repeal he had no accrued right.

The case of *Reynolds* v. *Attorney-General for Nova Scotia* [6] does not assist the lessee. In that case the appellants had a licence under a section of a statute and after a repeal of the section applied under it for a renewal of their licence. It was held that the power to renew had gone and that, even if the repealing provision could be so construed as not to interfere with accrued rights, the appellants had under the repealed section a privilege to get an extension but no accrued right.

The case of *Hamilton Gell* v. *White* [7] furnishes an example of an accrued right and the facts are in contrast with the facts in the present case. In that case the landlord of an agricultural holding gave his tenant notice to quit: he gave it because he wished to sell. The tenant then became entitled to compensation upon the terms and subject to the conditions of section 11 of the Agricultural Holdings Act, 1908. The tenant duly complied with one condition. He duly gave notice of his intention to claim compensation. Another condition was that he should make his claim within three months of quitting. But before the time for him to quit arrived section 11 was repealed. He did nevertheless make his claim within three months of quitting. It was held that his claim could proceed and that he could recover compensation under section 11. He had an accrued right which resulted from the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by section 11 were conditions not of the acquisition of the right but of its enforcement. As he had an accrued right it was preserved by the operation of the Interpretation Act and, further, as he had an accrued right the repeal did not affect the investigation in respect of that right.

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[5] [1895] A.C. 425.

[6] [1896] A.C. 240, P.C.

[7] [1922] 2 K.B. 422; 38 T.L.R. 829, C.A.

The investigation was by arbitration. Scrutton L.J. said [8]: "In "the course of that arbitration he would no doubt have to prove "that that right in fact existed, that is to say that the notice to "quit was given in view of a sale, and he would also have to "prove the measure of his loss. But he was entitled to have "that investigation, which had been begun, continue, for section "38 expressly provides that the investigation shall not be affected "by the repeal."

The difference between that case and the present is that in that case a right existed and the investigation, which was unaffected, was an investigation in respect of it; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e., the consideration by the Governor in Council) was an investigation in order to decide whether a right should or should not be given. It was not itself a right or privilege which was preserved by the Interpretation Ordinance.

Their Lordships have considered other decisions such as *Moakes* v. *Blackwell Colliery Co. Ltd.*,[9] *Briggs* v. *Thomas Dryden & Sons* [10] and *Boddington* v. *Wisson* [11] and can find no support for any view contrary to that which their Lordships have expressed.

The result is, therefore, that when sections 3A, 3B, 3C, 3D and 3E were repealed on April 9, 1957, the lessee had no right to vacant possession under those sections: and he could only recover possession under the sections remaining in force, which provide for compensation.

As their Lordships' conclusion on this issue is decisive of the appeal it is not necessary to express any final view in regard to the other issues. The issue in regard to Article XIII depends upon an examination of the nature and contents of the agreement of June 7, 1955—an agreement which is peculiar to this case. If that agreement was no more than an agreement thereafter to grant a lease their Lordships would not regard it as being a grant or disposition of land. It is one thing to make a grant or disposition of land. It is quite another thing to enter into an agreement to make thereafter a grant or disposition of land. A mere agreement thereafter to grant a lease would not, their Lordships conclude, be a grant or disposition within Article XIII. This, however, does not conclude this case because there can be no

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[8] [1922] 2 K.B. 422, 430.

[9] [1925] 2 K.B. 64; 41 T.L.R. 296, C.A.

[10] [1925] 2 K.B. 667, C.A.

[11] [1951] 1 K.B. 606; [1951] 1 All E.R. 166, C.A.

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doubt that there are many provisions in the document of June 7, 1955, which might be said to amount to an immediate grant of a present interest in land which was of such a substantial character as to be a grant or disposition of land. Thus the document provided for a surrender of what was called the "old lot." The lessee became entitled to occupy the "new lot." That new lot had boundaries as designated in a plan which the lessee signed. He became obliged to pay rent at a new rate. He became obliged to pay a first instalment of $3,900 of a total premium of $70,800 within fourteen days of June 7, 1955, to pay a second instalment (of $3,900) on December 25, 1955, and to pay subsequent instalments annually. He further became under obligation to build. He had a period of two years within which to build. (That period was later extended.) When he had built he would become entitled to a long lease or leases. He had security upon specified terms until he built; after he had built he was to be granted a formal lease on the terms which were in great detail set out in the written agreement. By conferring on him these large rights for this substantial period the agreement might itself be a grant or disposition of land. But their Lordships feel that it is unnecessary to come to a final conclusion on this point because for the reasons earlier given it follows that on October 12, 1957, there was no validity in what purported to be a rebuilding certificate which was given to the lessee.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Solicitors: *Charles Russell & Co.; A. Kramer & Co.*

C. C.

J. C.*
1961
July 17.

SUNSHINE PORCELAIN POTTERIES PTY. LTD. . . . . Appellants;

AND

IRIS DOREEN NASH . . . . . . Respondent.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Statute—Retrospective effect—Workmen's compensation—Silicosis—Disablement first manifested years after termination of employment—Statutory provisions, construction of—Injury due to nature of

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* *Present*: Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Hodson.

J. C.

1961

Sunshine Porcelain Potteries Pty. Ltd. v. Nash.

employment "at any time" before disablement—Employee entitled to compensation—Workers' Compensation Act, 1951 (*Victoria*) (*No.* 5601) (*as amended by Act No.* 5676 *of* 1953), *ss.* 5 (1), 12 (1).

Australia—Victoria—Workmen's compensation—Silicosis—Disablement manifested after termination of employment—Due to nature of employment "at any time"—Employee entitled to compensation—Workers' Compensation Act, 1951, *No.* 5601 (*as amended by Act No.* 5676 *of* 1953), *ss.* 5 (1), 12 (1).

By section 5 (1) of the Workers' Compensation Act, 1951, of Victoria (as amended by Act No. 5676 of 1953): "If in any "employment personal injury . . . arising out of or in the course of "the employment is caused to a worker his employer shall . . . be "liable to pay compensation. . . ."

By section 12 (1): "Where—(*a*) a medical practitioner certifies "that a worker is suffering from a disease and is thereby disabled "from earning full wages at the work at which he was employed ". . . (*b*) . . . and the disease is due to the nature of any employment in which the worker was employed at any time prior to the "date of disablement, then . . . the worker . . . shall be entitled "to compensation. . . ."

Section 12 (1) of the Act of 1951, which was a consolidating Act which repealed the Workers' Compensation Acts of 1928 and 1946, was in the same terms as section 18 of the Act of 1928 as substituted by section 8 of the Act of 1946. The original section 18 of the Act of 1928 was restricted to certain specified industrial diseases which did not include silicosis, whereas the section 18 substituted by the Act of 1946 admittedly covered silicosis. Further, under the Act of 1928, the disease had to be due to the nature of the employment in which the worker was employed within 12 months previous to the date of disablement, whereas in the 1946 substitution the words were "at any time" prior to that date.

The respondent, who had been employed as an insulator cleaner by the appellant company from 1931 to 1938, was during her work exposed to dust containing silica, and she developed silicosis, the first manifest symptoms of which did not appear, however, until about 1950. She obtained in 1955 a medical certificate which stated that her disablement began about 1950. In 1956 she claimed compensation under the Act of 1951 as amended:—

Held, that section 12 of the Act of 1951 did not follow section 5 in requiring that the injury must occur during the employment. The Act of 1946 applied to the respondent although she was not in employment after it was passed. The question was one of construction—the presumption against a statute being intended to be retrospective having little weight if, indeed, applicable at all—and the words of the new section 18 substituted by the Act of 1946 applied exactly to the present case—the certificate and disablement were subsequent to its passing and the disease was due to the nature of the employment in which the respondent was employed "at any time "prior to the date of disablement." There was nothing in the context or in the circumstances to require that any restricted meaning should be given to the words of the section. It was no answer to the respondent's claim to show that the real cause of the injury was inhaling noxious material before the Act was passed.

The Act of 1946 must be held retrospective in substance at least to the extent that all those who were working in noxious employment after 1946 would get compensation when disablement occurred even if it was clear that the disease was contracted or the whole or most of the damage was done before the Act of 1946 was passed.

Dictum of Cockburn C.J. in *Reg.* v. *Ipswich Union* (1877) 2 Q.B.D. 269, 270; *Blatchford* v. *Staddon and Founds* [1927] A.C. 461; 43 T.L.R. 424, H.L.; *Clement* v. *D. Davis & Sons Ltd.* [1927] A.C. 126; 43 T.L.R. 10, H.L.; and *Bellambi Coal Co. Ltd.* v. *Clark* (1953) 53 S.R.(N.S.W.) 440 considered.

Victoria Insurance Co. Ltd. v. *Junction North Broken Hill Mine* [1925] A.C. 354; 41 T.L.R. 191, P.C., could not be regarded as establishing a principle of general application.

Greenhill v. *"Daily Record," Glasgow Ltd.*, 1909, 1 S.L.T. 344 dissented from.

Order of the High Court of Australia (1959) 101 C.L.R. 353 affirmed.

APPEAL (No. 54 of 1960), by special leave, from an order of the High Court of Australia (Dixon C.J., McTiernan and Windeyer JJ., Fullagar and Taylor JJ. dissenting) (March 2, 1959), allowing an appeal from an order of the Full Court of the Supreme Court of Victoria (Herring C.J. and Smith J., Gavan Duffy J. dissenting) (March 21, 1958).

The following introductory statement is taken from the judgment of the Judicial Committee: The case arose out of an application by the respondent under the Workers' Compensation Act claiming compensation from the appellants in respect of the disease of silicosis. On February 21, 1957, the Workers' Compensation Board awarded compensation at the rate of £2 2s. per week, and thereafter at the request of the present appellants the board stated a case for the determination of the court: the following facts were therein set out as being admitted or proved:

"(*a*) Between the years 1931 and 1938 the applicant worker "was employed by the [appellants] as an insulator cleaner. She "was about 15 years of age when her employment began.

"(*b*) The applicant married in December, 1937, and ceased "to work for the [appellants] in May, 1938. Since that time she "has been supported by her husband.

"(*c*) At no time since she ceased to work for the [appellants] "has she worked for wages and at the time of hearing of this "application she had no intention of again taking up any employ-"ment. At the date of the hearing she had two children under "the age of 16 years and was fully engaged in the domestic duties "involved in being a housewife.

"(*d*) During her employment with the [appellants] she was "exposed to dust containing silica and as a result of this exposure "she developed the disease of silicosis although it was not known "to her nor manifested by any signs or symptoms until within "the last few years. The first symptom noticed by her was "breathlessness from about 1950 onwards.

"(*e*) On the 20th day of December, 1955, Dr. K. J. Grice "certified that the applicant was disabled from earning full wages "by reason of silicosis. It was admitted by the [appellants] that "the applicant had been physically totally disabled for work by "reason of the disease for the last 24 months preceding the date "of hearing. By reason of the disease the applicant has incurred "expenses for medical treatment since 1953, and she was in "Fairfield Hospital for about a month in 1956.

"(*f*) No notice of injury nor claim for compensation was given "or made before January 5, 1956, and the [appellants] have not "paid any sums by way of compensation.

"The question of law submitted for the opinion of the Full "Court is: Whether upon its findings of fact the board was "justified in law in making the said award or any and what part "of it."

The Act in force during the period of the respondent's employment by the appellants was the Workers' Compensation Act, 1928 (No. 3806). Under section 18 of that Act compensation was only payable in respect of certain scheduled industrial diseases which did not include silicosis. By an amending Act of 1946 (No. 5128), which was to be read and construed as one with the Act of 1928, it was provided by section 8 that for section 18 of the principal Act there should be substituted the following section: "18. Where—(*a*) a medical practitioner certifies that a worker "is suffering from a disease and is thereby disabled from earning "full wages at the work at which he was employed; or (*b*) the "death of a worker is caused by any disease—and the disease is "due to the nature of any employment in which the worker was "employed at any time prior to the date of the disablement, then "subject to the provisions hereinafter contained the worker or "his dependants shall be entitled to compensation under this Act "as if the disease were a personal injury by accident arising out "of or in the course of that employment and the disablement "shall be treated as the happening of the accident."

In 1951 the Workers' Compensation Acts were consolidated

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by Act No. 5601. Section 12 (1) of that Act reproduced from the Act of 1946 section 18 as quoted above. That section differs from section 18 of the Act of 1928 in two respects material to the present case. In the first place it was not restricted to scheduled diseases and admittedly it covered silicosis, and secondly, whereas under the Act of 1928 the disease had to be due to the nature of employment in which the worker was employed within the 12 months previous to the date of disablement, after 1946 it was sufficient if the disease was due to the nature of employment in which the worker was employed at any time prior to the date of disablement. It should also be noted that, whereas under the Act of 1928 injury by accident had to arise out of and in the course of the employment, it was sufficient under the Act of 1946 and subsequent Acts if it arose out of or in the course of the employment. By an amending Act of 1953 (No. 5676) the word injury was substituted for the phrase injury by accident throughout the principal Act, and by a consequential amendment the last part of the section which has been quoted now read "the "disablement shall be treated as the happening of the injury."

Section 20 of the Act of 1951 provided that the date of disablement should be deemed to be such date as the medical practitioner certified as the date on which the disablement commenced, or, if he was unable to certify such a date, the date on which the certificate was given. The certificate in this case was given on December 20, 1955. In it the medical practitioner stated: "I certify that the disablement commenced about 1950 "according to the history given."

1961. May 2, 3, 8. *Eustace Roskill Q.C.* and *R. A. MacCrindle* for the appellants. Silicosis first manifested itself in the respondent in April, 1950, about 12 years after she had left the appellants' employment, and the certificate of disablement is dated December 20, 1955, about 17 years after she left her employment. If the appellants are wrong, and the respondent can claim compensation by virtue of section 12 (1) of the Act of 1946, any retired worker, however old, even someone who had previously claimed and had had his claim rejected by the Workers' Compensation Board many years ago, could by the device of obtaining a medical certificate dated sometime after 1946 or after 1951 claim compensation for an industrial disease contracted from an employment which may have ended, say, half a century ago. The Act of 1946 came into operation on September 1, 1946, and the respondent says that the effect of section 12 (1) is really completely retrospective, and that once a worker has at any time, however long ago, been in employment prior to the date of this Act, and the disease is due to the nature of that employment and the employee has obtained a medical certificate, he is entitled to compensation. That is wrong. The first submission is that if the employment ended before September 1, 1946, then the new Act had no application at all; that section 12 (1) only applies to cases where the employee is employed after September 1, 1946, in employment to which the disease is due. That is accepted by Fullagar J. in his judgment in the High Court and, if right, is sufficient for the appellants to succeed in this appeal. It is contended further and alternatively that the Act of 1946 has no application unless the worker is disabled by a disease the origin of which was attributable to that employment after September 1, 1946—the contraction of the disease has to be due to employment after 1946. In other words, both the disease and the employment have to be after September 1, 1946. The majority view below is that the employer is liable if the disablement occurred at any time, however long ago, if a medical certificate was obtained.

The issue comes down to a narrow point of construction of section 12 (1), and is whether or not the change made by the Act of 1946 is to be given a retrospective operation so as to impose on the appellants in respect of events which occurred prior to September, 1946, a liability which they did not have before that date. There is a presumption against retrospectivity of legislation: Maxwell on Interpretation of Statutes, 10th ed., p. 221; *West* v. *Gwynne*.[1] The Victorian Acts Interpretation Act, 1928, s. 6 (2) —which is the same as the English Interpretation Act, 1889, s. 38 (2)—is very strong against construing the Act of 1946 retrospectively. To construe the words "at any time prior to "the date of disablement" in section 12 (1) of the Act of 1946 as imposing new liabilities on employers in respect of the employment of workers who had ceased to be employed by them before September, 1946, would give a retrospective effect to the words and would be contrary to well-established rules of construction. Further, in construing the words "at any time" one cannot disregard the words which those words replaced, namely, "within "the twelve months previous to the date of the disablement." In both cases, it is submitted, there must be employment after the date of the relevant legislation, and the cause of the disease

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[1] [1911] 2 Ch. 1, 11; 27 T.L.R. 444, C.A.

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must also occur after that date. The difference between those two submissions is illustrated by *Miller* v. *J. W. Handley Pty. Ltd.*[2]—that case is referred to with approval in all the judgments below, and it comes down in the end to Fullagar J.'s analysis of it.[3] Just as injury has to stem from an employment after the date of the Act, so the disease must do likewise, and this approach is in accord with *Greenhill* v. *"Daily Record," Glasgow Ltd.*,[4] *Bellambi Coal Co. Ltd.* v. *Clark*[5] and *Victoria Insurance Co. Ltd.* v. *Junction North Broken Hill Mine.*[6]

English cases on the application to workmen's compensation of retrospective legislation are *Moakes* v. *Blackwell Colliery Co. Ltd.*,[7] which is not without significance in its application to the present case; *Clement* v. *D. Davis & Sons Ltd.*,[8] which was not cited below in the present case; and *Bridges* v. *New Rock Collieries Co.*,[9] which, without reference to the *Moakes*[10] and *Clement*[11] cases, did apply legislation retrospectively, and appears to be the highest that can be found against the appellants here. [Reference was also made to *British Broken Hill Pty. Co. Ltd.* v. *Simmons*[12] and *Kraljevich* v. *Lake View and Star Ltd.*[13]] Reliance is placed on the *Victoria Insurance* case,[14] where Lord Wrenbury, giving the judgment of the Board, said: "The date "of contraction of the disease and not the date of its ascertain-"ment or its certification is the date for fixing liability." In the present case the employment had terminated before the passing of the Act which made the disease an "injury." It is very difficult to fit the *Victoria Insurance* case[14] and *Blatchford* v. *Staddon and Founds*[15] together. [Reference was also made to *Ellerbeck Collieries Ltd.* v. *Cornhill Insurance Co. Ltd.*,[16] *Richards* v. *Goskar*[17] and *Walden* v. *Mono Concrete Co. Ltd.*[18]] The date of contraction of the disease and not the date of its ascertainment or certification is the date for fixing liability. The authorities cited suggest that the foundation of the respondent's case as to the effect of the certificate of disablement is not sound. The certificate is clear machinery.

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[2] (1948) 2 W.C.D.(Vict.) 134.

[3] (1959) 101 C.L.R. 353, 378–379.

[4] 1909, 1 S.L.T. 344; 2 B.W.C.C. 244.

[5] (1953) 53 S.R.(N.S.W.) 440.

[6] [1925] A.C. 354; 41 T.L.R. 191, P.C.

[7] [1925] 2 K.B. 64, 70; 41 T.L.R. 296, C.A.

[8] [1927] A.C. 126; 43 T.L.R. 10, H.L.

[9] (1932) 101 L.J.K.B. 557.

[10] [1925] 2 K.B. 64.

[11] [1927] A.C. 126.

[12] (1921) 30 C.L.R. 102.

[13] (1945) 70 C.L.R. 647.

[14] [1925] A.C. 354, 357.

[15] [1927] A.C. 461; 43 T.L.R. 424, H.L.

[16] [1932] 1 K.B. 401, 411; 48 T.L.R. 78, C.A.

[17] [1937] A.C. 304; 53 T.L.R. 149, H.L.

[18] [1943] K.B. 683, 688, 692; 59 T.L.R. 380; [1943] 2 All E.R. 306, C.A.

In the end it all comes back to the point of construction—whether the words " at any time " are completely retrospective in the sense for which the respondent contends. The answer is " No." The decision of the majority of the Full Court of the Supreme Court of Victoria was correct and should be restored.

Anthony Cripps Q.C. and *J. G. Le Quesne* for the respondent. The appellants have based their argument on the presumption against retrospectivity. There is no presumption here at all. The respondent submits that if, in respect of a living person, it is established (a) that a medical practitioner has certified, *after the coming into operation of the section*, that the person is suffering from a disease and is thereby disabled from earning full wages at the employment hereinafter mentioned; and (b) that the date of commencement of the disablement mentioned in the certificate, or the date of the certificate if the medical practitioner is unable to certify such a date, is a date *after the coming into operation of the section*; and (c) that the person concerned has been employed *at any time prior to the date of disablement*, ascertained in accordance with the Act by reference to the certificate, in some employment to the nature of which the disease referred to in the certificate is due (*whether before or after the section came into operation*); the person concerned is entitled to compensation under the Act as if the disease were a personal injury arising out of that employment, happening at the disablement so ascertained.

The proper approach to the section is first to see if it is reasonably capable of clear meaning, and then, and only then, to call in a presumption against retrospectivity if it appears necessary to do so. It would be quite wrong to call section 12 (1) a retrospective enactment. It was suggested that if the appellants were wrong a worker could by the device of obtaining a medical certificate claim compensation for an industrial disease contracted 50 years ago. This, it was said, was ridiculous, and therefore the appellants were right. As regards 50 years, the problem is the same if the period is six months; and, secondly, the argument is not ridiculous at all, but is precisely what the Act itself contemplates. Therefore mere time is no support for the appellants.

There is a distinction between actual and notional injury cases. The basic fallacy in the argument for the appellants is to equate them for all purposes, and then to apply to a notional injury, incorrectly, an argument which could only properly be applied to an actual injury. The cases which have been referred to, *Moakes*,[19] *Clement*[20] and the *British Broken Hill*,[21] are all actual injury cases and as such are all section 5 cases, and, because they are section 5 cases, when one applies them to section 12 cases one gets an absurd result. [*Blatchford's* case[22] was referred to.] The considerations in which the right to compensation arises are all set out in section 12 (1) before one gets to the words "shall be entitled to compensation." The difficulties in the argument arise from taking section 12 as subordinate to section 5 and applying that section as not to assist section 12 but to limit it. All that is required under section 12 is that it is a former employment; the only requirement is that the worker should have been at some time a worker. The section is not retrospective. [Reference was made to the *Ellerbeck Collieries* case.[23]] It is submitted, if necessary, that *Greenhill* v. "*Daily* "*Record*," *Glasgow Ltd.*[24] is wrong; but taking into account the differences between the legislation in the United Kingdom and Victoria that decision does not apply at all.

There are three completely separate legislations in the United Kingdom, New South Wales and Victoria, which all differ essentially in regard to insurance, so any argument based on insurance should be looked at with great suspicion; there is no validity in it, and it would be quite unsound to take as authorities in this case authorities where the insurance provisions are substantially different.

The only qualification at the moment when section 12 (1) operates is that the worker should have been employed; then the words are "at any time prior to the date of disablement." In their natural meaning those words are equally apt to cover the time prior to or subsequent to the passing of the Act of 1946. Section 20 states what the date of disablement is in relation both to certification and to death. The date of death is the date which in appropriate circumstances could be the date of disablement for the purposes of section 12 (1). The purpose of the Act of 1946 was to extend the compensation rights, not to cut them down. Section 12 is complete and comprehensive in itself. The curtain should not come down at the date of enforcement of the Act so as not to permit compensation in the case of a man injured the day before it came into force but allow it to a man injured in similar circumstances the day after it came into force. The Act of 1946 is a successor Act and an enlarging Act. A lead-poisoned man, on the appellants' argument, cannot look back beyond September 1, 1946.

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[19] [1925] 2 K.B. 64.

[20] [1927] A.C. 126.

[21] 30 C.L.R. 102.

[22] [1927] A.C. 461, 481.

[23] [1932] 1 K.B. 401, 413.

[24] 1909, 1 S.L.T. 344.

With regard to the authorities, under the Victorian Act of 1953 there is no mention of accident at all, and it is only necessary in Victoria to find injury. There are a number of authorities in which there is difficulty about finding something to equate with injury and something to equate with accident. *Moakes's* case [25] is a case of actual as opposed to a notional injury—it is not a disease case—and if it is right that section 5 ought not to be applied to limit section 12, then that case would not apply. In *Clement's* case [26] an attempt to reopen the matter was not permitted. The *Bridges* case [27] is entirely in the respondent's favour; it is a silicosis case. The *British Broken Hill* case,[28] a case of actual injury, was under a different Act and is not an authority against this respondent. The whole point in *Kraljcevich's* case [29] was that the amendment was procedural only, and therefore advantage could be taken of it. If necessary, it is submitted that the *Bellambi* case [30] is wrongly decided; it is against this respondent, but the whole structure of the Act in Victoria is different. In the *Victoria Insurance* case [31] the disease was contracted during the year of insurance; again there is a slight difference in the wording of the Act, and it cannot be an authority of very great significance on the Victorian legislation. Reliance is placed on *Blatchford's* case,[32] with the possibility that it does not cover the present case because of difference of legislation. The *Ellerbeck* case [33] is clearly in this respondent's favour. *Richards* v. *Goskar* [34] contains nothing on which this case ought to be decided. In *Walden's* case [35] is found the difficulty of knowing what to equate with injury and what to equate with accident. The respondent's case is fully and concisely put in the judgment of Dixon C.J. in the High Court.

Eustace Roskill Q.C. in reply. It was said that the basic fallacy in the argument for the appellants was to equate all disablement by disease with notional injury and then apply to the notional injury what applies to actual injury. There is no fallacy in that argument; it is right on the authorities and as a matter of construction. Injury means disease, among other things, and disease is defined as a personal injury by accident. It is conceded that section 5 is prospective and therefore looks forward and only forward in respect of what may be called disease by injury. It would be astonishing that by the introduction of the words " at any time " section 12 should have the effect of being retrospective; one comes back in the end to the question of construction whether those words have that effect. The argument in the *Greenhill* case [36] must have been the same as that for the respondent here; the only distinction between that case and this is that here there are the words " at any time." *Greenhill's* case [36] is quite indistinguishable and it has never been criticised. " As if " in section 12 (1) means subject to his having been in relevant employment since the passing of the Act. This Act is not retrospective—that is the sole issue to be decided.

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[25] [1925] 2 K.B. 64.
[26] [1927] A.C. 126.
[27] 101 L.J.K.B. 557.
[28] 30 C.L.R. 102.
[29] 70 C.L.R. 647.
[30] 53 S.R.(N.S.W.) 440.
[31] [1925] A.C. 354.
[32] [1927] A.C. 461, 481.
[33] [1932] 1 K.B. 401, 410, 414.
[34] [1937] A.C. 304, 312.
[35] [1943] K.B. 683.

July 17. The judgment of their Lordships was delivered by LORD REID, who stated the facts and statutory provisions set out above and continued: It is unnecessary to determine whether on the certificate of the medical practitioner the date of disablement is 1950 or 1955.

The respondent's contention is that the section quoted clearly applies to her case. Her disablement—the happening of the " injury " to her—occurred after it came into operation: her disablement and the disease which caused it were admittedly due to the nature of her employment by the appellants; and the long interval which elapsed between the termination of her employment and the onset of her disease and disability is immaterial because the Act by using the words " at any time " expressly entitles a worker to relate his disablement to past employment no matter how long that interval may be.

The appellants rely on the strong presumption that an Act is not intended to be retrospective and contend that this section can and should be construed so as to avoid retrospectivity: the general rule of construction is " that where a statute is passed altering " the law, unless the language is expressly to the contrary, it is " to be taken as intended to apply to a state of facts coming into " existence after the Act " (*per* Cockburn C.J. in *Reg.* v. *Ipswich Union* [1]).

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[36] 1909, 1 S.L.T. 344.

[1] (1877) 2 Q.B.D. 269, 270.

Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that. So if a worker has already sustained injury or contracted a disease at a time when the employer is under no statutory liability to him arising out of that injury or disease, there would in general be a presumption that an Act bringing that injury or disease within the scope of compensation would not apply to that case: otherwise there would be liability on the employer arising out of a state of things which existed before the Act was passed. But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it. In their Lordships' judgment the circumstances of this case clearly prevent its application at least in so wide a form.

Notoriously, silicosis is a disease of slow onset; it may result from the inhalation of noxious matter over a long period of years, there is no certainty as to when that inhalation reaches the danger point, and after the damage has been done a long period may elapse, as it did in this case, before the disease manifests itself. It cannot be supposed that the legislature intended that every worker disabled by this disease after 1946 must prove that the disease was contracted or that the damage was done to him after 1946, because that would involve there being a period of many years of uncertainty: there would be doubt in the case of many workers disabled long after 1946 as to whether their disablement resulted from a state of things already in existence in that year, and there is no provision in the Act to deal with a case where the disease was contracted before 1946 but aggravated by further exposure to noxious inhalation after that date. None of the judges in Australia supported the appellants' argument to this extent. So the 1946 Act must be held retrospective in substance at least to this extent, that all those who were working in noxious employment after 1946 will get compensation when disablement occurs even if it is clear that the disease was contracted or the whole or most of the damage was done before the 1946 Act was passed.

The appellants' main argument was directed to a much more limited application of the presumption that a statute is not retrospective. Admitting that a worker may be entitled to compensation although the disease had manifested itself and the whole or substantially the whole of the damage had been done before the Act of 1946 came into operation, the argument is that a line must be drawn between those who ceased to be workers (or workers in noxious employment) before that date and those who continued in such employment thereafter. That means that, if two workers both contracted the disease before 1946 and both only suffered disablement after 1946, one who happened to remain in employment for a short time after the 1946 Act was passed would get compensation, but the other who ceased to be employed just before the Act was passed would not. An examination of the various statutory provisions and of the authorities may show that that result cannot be avoided, but it is not a result which would seem to follow naturally from an application of the broad principle which gives rise to the presumption—that it is not reasonable to suppose that a legislature intends to impose a new liability in respect of something which has already happened.

Moreover, the success of this argument would lead to a further difficulty. Section 14 of the Act of 1951, which took the place of similar earlier provisions, entitles the employer who last employed the disabled worker, and who is primarily liable to pay him compensation, to seek relief against earlier employers if he can show that the disease was contracted while in their employment, or that the disease being contracted by a gradual process, a contribution should be made by an earlier employer. So an employer who employed a disabled worker for a short time after 1946 may be able to show that the disease was due in whole or in part to earlier employment before 1946. But counsel for the appellants rightly admitted that if his argument is correct it must mean that in such a case the last employer must pay the compensation, but is deprived of the relief which section 14 appears to give him because this argument must absolve an employer who ceased to employ a worker before the Act of 1946 was passed from any liability to pay compensation in respect of his disablement by silicosis.

Their Lordships must now consider the relevant sections of the statutes, and it will be convenient to take the sections of the Act of 1951 since the argument is the same whether one takes those sections or the corresponding sections of the earlier Acts. The main difficulty is the proper correlation of sections 5 and 12. Section 5 (1) provides: "If in any employment personal injury "by accident arising out of or in the course of the employment "is caused to a worker his employer shall . . . be liable to pay "compensation." Section 12 has already been quoted: in cases to which it applies the worker is entitled to compensation "as if "the disease were a personal injury (by accident) arising out of "or in the course of that employment and the disablement shall "be treated as the happening of the injury (accident)." The words in brackets occurred in the Act of 1951; as already noted, they are now omitted by reason of the amendments made in 1953. But it was not argued that this change was material in the present case.

In the ordinary case under section 5 it would seem clear that the injury must be sustained while the worker is still in the employment, but the position under section 12 is far from clear. The appellants argue that section 12 merely adapts section 5 to apply it to diseases: section 5 is the leading section and section 12 follows it in requiring that here again the injury must happen or be sustained during the employment while the claimant is still a worker. On this view the question at once arises—what is the injury: is it the contracting of the disease or the first manifestation of the disease, or the disablement resulting from the disease? The respondent answers that in the case of some diseases, including silicosis, it is often impossible to discover when the disease was contracted, that the date of the first manifestation of the disease may be very doubtful, and that the legislature has foreseen and avoided the difficulty by enacting expressly in section 12 that the disablement shall be treated as the happening of the injury. The next step in the argument is that the legislature cannot have intended that the right to compensation should depend on whether or not disablement occurred while the claimant was still in employment; under section 20 the date of disablement may be the date on which the medical certificate is given and it would be absurd to suppose that a claimant can lose his compensation merely because he does not get a certificate while he is still in employment. Therefore it must be held that section 12 does not follow section 5 in requiring that the injury must happen or be sustained during the employment. Before proceeding to deal with these arguments their Lordships must consider the authorities.

Victoria Insurance Co. v. *Junction North Broken Hill Mine*[2] was an action to recover from an insurance company compensation paid to certain workers in respect of the disease of nystagmus. It was admitted that they contracted this disease during the period covered by the insurance but their disablement did not occur until after that period. The insurance company was held liable under its policy. Their Lordships' ground of judgment, if of general application, would probably enable the present appellants to succeed. Lord Wrenbury said [3]: "The date of contraction of the "disease and not the date of its ascertainment or its certification "is the date for fixing liability. . . . The disablement or suspen- "sion establishes the happening of the accident, but not the date "at which it happened. . . . It is an accident to be attributed "in point of date so far as liability is concerned to the time at "which the disease was contracted, but subject to 'modification' "as mentioned in section 12 (1) (*a*), that is to say, as regards "'compensation' . . . the accident is to be taken as having "happened when disablement or suspension supervened. . . . "The liability to pay arose so soon as the disease was con- "tracted." Their Lordships did not consider what the position would be if, in the case of a disease of gradual onset, it was impossible to say when the disease was contracted, and they appear to have been influenced by a view that unless liability arose during the period of employment there would be no valid claim for compensation. This case arose under New South Wales legislation which is in general similar to the British legislation and to the Victorian legislation.

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[2] [1925] A.C. 354; 41 T.L.R. 191, P.C.

Blatchford v. *Staddon and Founds* [4] was an English case. Here quite a different view was taken of similar provisions, the *Victoria Insurance Co.* case [5] not having been cited. The disease in this case was lead poisoning. Viscount Sumner pointed out that such diseases [6] "come on gradually; their first steps may "not be perceptible for some time: their rate of progress may "vary widely. . . . If there was to be an effective remedy, much "more had to be done than simply to declare the disease to be "an accident. Means had to be found for enabling the workman "to recover compensation from an employer even though he could "not prove the precise time when the disease was contracted." He then dealt with the provisions entitling the workman to sue his last employer and said that they [7] "provide a means, perhaps "rough and ready, of enabling a suffering workman to get com- "pensation from someone certain in respect of a disease contracted "at a wholly uncertain time." He said in a later passage [8]: "The difficulty of proving the date when the disease was con- "tracted is met by treating the date of the disablement as the "date of the happening of the accident." Lord Wrenbury said that the Act [9] "says that the disease or suspension is to be

[3] [1925] A.C. 354, 357–358.

[4] [1927] A.C. 461; 43 T.L.R. 424, H.L.

[5] [1925] A.C. 354.

[6] [1927] A.C. 461, 467.

[7] Ibid. 468.

[8] Ibid. 470.

[9] Ibid. 478.

" considered as the personal injury by accident. Does this mean " that the contraction of the disease is the accident, or does it " mean that the ascertainment in a defined way of the fact of " the disease having been contracted is the accident? On the " whole from that which I have to say further, I think it must " mean the latter."

Ellerbeck Collieries Ltd. v. *Cornhill Insurance Co. Ltd.*[10] was, like the *Victoria Insurance Co.* case,[11] an action under an insurance policy. The Court of Appeal followed the decision in *Blatchford.*[12] Scrutton L.J. was unable to reconcile this decision with that in the *Victoria Insurance Co.* case: their Lordships cannot regard the attempt of Greer L.J. to reconcile them as successful. *Richards* v. *Goskar* [13] and *Walden* v. *Mono Concrete Co.*[14] dealt with a different question, the recurrence of a disease after the initial disability caused by it had ceased. They indicate that the date of the onset of a disease may be relevant if ascertainable but the argument in *Blatchford's* case [15] was not dealt with and their Lordships have derived little assistance from these two cases.

In considering these authorities their Lordships note that two of the three members of the Board in the *Victoria Insurance Co.* case, Lords Atkinson and Wrenbury, concurred in the decision in *Blatchford's* case. Moreover, it is impossible to apply the grounds of decision in the *Victoria Insurance Co.* case without radical modification to a case where owing to the gradual onset of a disease no particular date can be held to be the date of its contraction. Accordingly, in their Lordships' view the *Victoria Insurance Co.* case [16] cannot be regarded as establishing a principle of general application.

Their Lordships can deal more briefly with the other authorities cited. There are many cases, Australian and British, a leading example being *Clement* v. *D. Davis and Sons Ltd.*,[17] where it has been held that an amending Act does not apply to cases where the injury or injury by accident occurred before the Act was passed. So if the " injury " in this case occurred before 1946 the appellants must succeed. But these cases do not help in determining when the injury must be held to have occurred. The other authorities dealt with the particular point in this case to which their Lordships must return after completing their consideration of section 12. That point is whether it is fatal to the respondent's case that she was never in employment after the Act of 1946 was passed.

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[10] [1932] 1 K.B. 401; 48 T.L.R. 78, C.A.

[11] [1925] A.C. 354.

[12] [1927] A.C. 461.

[13] [1937] A.C. 304; 53 T.L.R. 149, H.L.

[14] [1943] K.B. 683; 59 T.L.R. 380; [1943] 2 All E.R. 306, C.A.

[15] [1927] A.C. 461.

[16] [1925] A.C. 354.

[17] [1927] A.C. 126; 43 T.L.R. 10, H.L.

In their Lordships' judgment section 12 does not follow section 5 in requiring that the injury must occur during the employment. It could only be held to do so if (first) notwithstanding the express provision that "the disablement shall be treated as the happening "of the injury," it could be held that contracting the disease is the injury, and (secondly) it could be assumed that the disease is always contracted while still in the employment. Their Lordships are unable to assume that, where a long interval has elapsed, as in this case, between the last inhalation of noxious material and the first manifestation of the disease, it is a medical fact that the disease was contracted before that inhalation ceased, and then lay dormant for many years. They have no reason to exclude the possibility that the noxious material remaining in the claimant's body may only have brought on the disease after a long time. If that be a possibility then it is quite unreasonable to suppose that the legislature intended the success of a claim for compensation to depend on whether or not the claimant could prove by medical evidence that his disease was in fact contracted before he left the employment. But if section 12 requires that the injury must occur during the employment that would have to be proved. No one has said that the inhalation of the noxious material is itself the injury, and that is the only thing that certainly occurs during the employment.

The appellants submitted an argument to the effect that the requirement of compulsory insurance by section 72 is unworkable if an injury can occur long after a worker has left the employment. That requirement is in very general terms and their Lordships express no opinion whether it could cover a case like the present. But even if it could not, that is not in their Lordships' view a sufficient reason for giving to section 12 an interpretation open to the grave objections which have been stated.

The particular point in this case is whether the Act of 1946 can apply to a person who was not in employment after it was passed. That Act amended and has to be read with the earlier Act under which the respondent was a worker. The point must be considered in light of the conclusions already reached. Section 12 does not require that a person shall still be in employment when he sustains an injury arising out of his employment, and the respondent did sustain an injury arising out of her employment after the Act of 1946 was passed. Further, it is no answer to a claim to show that the real cause of the injury was inhaling noxious material before the Act was passed. In these circumstances the presumption against a statute being retrospective can have little weight, if indeed it can apply at all. The question becomes one of construction of the Act of 1946.

Their Lordships were referred to a majority decision of the Full Court of the Supreme Court of New South Wales, *Bellambi Coal Co. Ltd.* v. *Clark*,[18] October 1, 1953, where the grounds of judgment of the majority were similar to those of the minority in the High Court in the present case. Their Lordships were also referred to a decision of the First Division of the Court of Session, *Greenhill* v. "*Daily Record*," *Glasgow Ltd.*,[19] in which the facts were not unlike those of this case. The man had left his employment disabled by disease before the Workmen's Compensation Act, 1906, came into operation, and died later. That Act for the first time made his disease, lead poisoning, a subject for compensation. The statutory provisions were rather different but the reasoning of the short judgment of the Lord President, Lord Dunedin, would apply to the present case. He regarded the claim as an attempt to make the Act retrospective but the considerations which have been developed at length in later cases and in the present case were not before him, and their Lordships with all deference to the importance of any opinion of Lord Dunedin, are for that reason unable to accept it.

Their Lordships recognise the strength of the arguments adduced by the judges who have taken a different view and regard this as a narrow and difficult case. But in the end they must return to the words of the new section 18 enacted by the Act of 1946. Those words apply exactly to the present case. The certificate and disablement were subsequent to its passing. The disease was "due to the nature of any employment in which "the worker was employed at any time prior to the date of "disablement." In their Lordships' judgment there is nothing in the context or in the circumstances to require that any restricted meaning should be given to the words of this section.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *Nicholas Williams & Co.; Markby, Stewart & Wadesons.*

C. C.

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[18] (1953) 53 S.R.(N.S.W.) 440.

[19] 1909, 1 S.L.T. 344.

WALTER ANNAMUNTHODO . . . APPELLANT; J. C.*

AND 1961

OILFIELDS WORKERS' TRADE UNION . RESPONDENTS. *July* 26.

ON APPEAL FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES.

Trade Union—Expulsion—Right of action—Charges and conviction of offences against specified union rules—No charge in respect of rule under which expulsion ordered—Necessity for notice of charge under that rule—Construction of rules—Breach of requirements of natural justice.

Natural Justice—Opportunity to meet charge—Expulsion from trade union—Adjourned hearing—Accused not present at adjourned hearing—Finding of more serious charge than those already preferred—Need for notice—No need to prove prejudice.

Tribunal—Domestic—Control by courts—Expulsion from trade union—Decision of appeal tribunal to be "final and binding"—Whether court entitled to find original expulsion ultra vires.

West Indies—Trinidad and Tobago—Trade union—Expulsion—Breach of rules of natural justice.

The appellant, a member of a trade union, was charged before the General Council of the union with offences against certain of the union rules. There was no power under those particular rules to expel him, since expulsion thereunder could be ordered only in the case of second or third offences and these were the first offences alleged against the appellant, for which under those rules a small fine only could be imposed. The appellant having been convicted of the offences charged, the General Council purported to expel him under another rule, rule 11 (7), under which he had not been charged, which provided for expulsion where a member had been guilty of "conduct prejudicial to the interests of the union." The appellant had attended before the General Council when the evidence was taken, but, owing to a previous engagement, did not attend the adjourned hearing a week later, when the charges were found proved. His expulsion was upheld on his appeal under rule 11 (7) to the Annual Conference of Delegates, whose decision under the rule was to be "final and binding." In an action by the appellant against the union claiming that his purported expulsion was ultra vires and void:—

Held, that rule 11 (7) was not a rule which merely empowered the General Council to impose more severe penalties for the various other offences specified in the rules provided that the conduct of which a member was convicted under them was prejudicial to the interests of the union. Rule 11 (7) created a separate and distinct offence and should not have been invoked for the purpose of expelling the appellant unless he had been given notice of the charge under it and had had a fair opportunity of meeting it. If a domestic tribunal formulated specific charges which led only to a fine, it could not without notice resort to other charges which led to far more serious penalties. When the General Council at the adjourned hearing desired to proceed under rule 11 (7) the hearing should again have been adjourned so as to give the appellant notice of the fresh charge, and by failing to do so the council had not observed the requirements of natural justice.

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* *Present*: LORD DENNING, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

Further, the appellant had not, by appealing to the Annual Conference of Delegates, lost his right to complain of rule 11 (7) being invoked. By having appealed he did not forfeit his right to redress in the courts and could still complain that the original order was invalid for want of the observance of the rules of natural justice.

The decision of the General Council convicted the appellant of an offence against the rules with which he had never been charged and must be set aside and the purported expulsion declared invalid.

Wolstenholme v. *Amalgamated Musicians' Union* [1920] 2 Ch. 388; and *White* v. *Kuzych* [1951] A.C. 585; [1951] 2 T.L.R. 277; [1951] 2 All E.R. 435, P.C. considered.

Judgment of the Federal Supreme Court of the West Indies (1960) 2 W.I.R. 73 reversed.

APPEAL (No. 51 of 1960) by special leave in forma pauperis from a judgment of the Federal Supreme Court of the West Indies (January 25, 1960) affirming a judgment of the Supreme Court of Trinidad and Tobago (June 25, 1959).

The following facts are taken from the judgment of the Judicial Committee: Walter Annamunthodo had worked in the oil industry in Trinidad ever since the year 1944. In 1952 he joined the Oilfields Workers' Trade Union and he remained thereafter an ordinary member of the union. He never became an officer. The rules of that union required that every member should give a pledge that he would obey the rules and regulations of the union: and it might be presumed that Walter Annamunthodo gave that pledge. At any rate he did not dispute that he was subject to the rules. Prior to the events hereinafter mentioned he had never been charged with any offence against the rules.

On May 15, 1957, the general secretary of the union notified Walter Annamunthodo that he was required to appear before the General Council of the union on Sunday, June 9, 1957, to answer four charges of offences against the rules. Walter Annamunthodo attended the hearing on that day and denied the charges. The hearing was adjourned until Sunday, June 16, 1957, but Walter Annamunthodo did not attend on that day as he had a previous engagement. On June 17, 1957, the general secretary informed him that he had been convicted on all the charges laid against him, and that the General Council had as a result seen fit to expel him. He appealed to the Annual Conference of Delegates, but they on March 30, 1958, upheld the expulsion.

Thereupon Walter Annamunthodo sought relief in the courts. On May 17, 1958, he brought this action against the union claiming that his purported expulsion was ultra vires and void: an injunction to restrain the union and its servants or agents from excluding him: and damages for breach of contract. The Supreme Court of Trinidad and Tobago (Phillips J.) dismissed his claim. He appealed to the Federal Supreme Court (Rennie, Archer and Wylie JJ.) who dismissed his appeal. He now appealed, by special leave, in forma pauperis, to Her Majesty in Council.

The terms of the charges against the appellant and of the relevant rules of the union appear from the judgment of the Judicial Committee.

1961. June 28, 29. *Ralph Millner* for the appellant. The appellant's case in short is that whereas he was charged and found guilty under rules 25, 26 and 27 of the union rules—the charge under rule 32 was misconceived and should be disregarded—with specific breaches of those rules, and under each of those rules he was only liable to a small fine, the General Council of the union in fact purported to expel him under another rule, rule 11 (7), under which he was not charged and which was not mentioned during the hearing. There is no complaint about the conduct of the hearing as a hearing on the three charges; the principal contention being that as there was no charge under rule 11 (7) it was not open to the General Council to find the appellant guilty under that rule and to expel him. The critical issue, as stated in the judgment of the trial court, is whether rule 11 (7) is to be construed as creating a specific offence of "being guilty of conduct prejudicial to the interests of the union" or as merely conferring on the General Council the power of imposing the stipulated penalties in any case where, after due inquiry into specific charges which have been proved to its satisfaction, the council is of opinion that the conduct, which is the subject-matter of the charges, is prejudicial to the interests of the union. The submission is that rule 11 (7) makes a separate offence, and that there was here a breach of natural justice on two grounds: (1) On the construction of rule 11 (7)—there must be a separate charge under that rule; and (2) even if that be wrong, it was never brought to the appellant's mind that the General Council would act under that rule—he was never given an opportunity to show cause why he should not be expelled.

To say that rule 11 (7) is an "enabling power" is a misuse of what Eve J. said in *Wolstenholme* v. *Amalgamated Musicians' Union*[1]: in that case the plaintiff was given notice to show cause why he should not be expelled. The fact that conduct covered by the other rules may be covered by rule 11 (7) presents no difficulty—it would be quite impossible to draft rules without overlapping. It is conceded that the conduct with which the appellant was charged was prejudicial to the union, but the fact that if he had been properly charged under rule 11 (7) he could have been expelled, does not assist, for he was charged under rules under which only the lesser penalty could be imposed.

It is a principle of natural justice that a man must be given notice of the charge and an opportunity to meet it, and provided that he is, it is his fault if he chooses not to take advantage of it, but the notice must be such as to convey to his mind what is in danger. An accused person should not be convicted of one thing and punished for another: *D'Arcy* v. *Adamson*.[2] See also *Andrews* v. *Mitchell*.[3] The appellant was not told that the General Council would act under rule 11 (7) and was therefore given no opportunity to argue in mitigation, and that also was a departure from the principles of natural justice: *Fisher* v. *Keane*.[4] In *Maclean* v. *Workers' Union*[5] Maugham J. referred to the right to defend and explain. Rule 25 is penal and should be construed against the union: *Bonsor* v. *Musicians' Union*[6]; Maxwell on The Interpretation of Statutes, 8th ed., p. 230; 10th ed., p. 262.

There is nothing in the argument that the appellant's appeal to the Annual Conference of Delegates makes his expulsion valid. The question was raised, but not answered, in *White* v. *Kuzych*[7] whether the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, is appealable, or is simply void and not subject to appeal at all. The answer to that question does seem to be that the order of expulsion here was a nullity. See also

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[1] [1920] Ch. 388, 399–401.

[2] (1913) 29 T.L.R. 367, 368; 57 S.J. 391.

[3] [1905] A.C. 78, H.L.

[4] (1878) 11 Ch.D. 353, 360.

[5] [1929] 1 Ch. 602, 621.

[6] [1954] Ch. 479; [1954] 2 W.L.R. 687; [1954] 1 All E.R. 822, C.A.

[7] [1951] A.C. 585, 599; [1951] 2 T.L.R. 277; [1951] 2 All E.R. 435, P.C.

Fisher's case.[8] If the decision was null and void the appeal to the Annual Conference cannot make any difference. [Reference was also made to *Lee* v. *Showmen's Guild of Great Britain*[9] and *Barnard* v. *National Dock Labour Board*.[10]] The appeal to the Annual Conference cannot render the appellant's expulsion valid when the General Council had failed to deal with his case in accordance with the principles of natural justice.

R. S. Lazarus, Q.C. and *Dudley Collard* for the respondents. The submissions are threefold: (1) There was no violation of the principles of natural justice. (2) On the true construction of the rules, rule 11 (7) gave the General Council a power to expel the appellant in the circumstances in which the inquiry was held. (3) If the penalty the General Council imposed was excessive, any breach of the principles of natural justice was put right by the appeal to the Annual Conference, or, alternatively, the appellant has condoned whatever irregularity there was, if any, and cannot now complain. A construction point may be raised for the first time before the Board, and in a case like the present it is sound sense that it should be so.

"Natural justice" is not the same thing as sophisticated justice; the most famous passage on the point is in *Local Government Board* v. *Arlidge*.[11] There are three basic elements which, by and large, make up the sum of natural justice: (i) The complainant must be given fair notice of the charge against him. (ii) He must have a fair opportunity of meeting that charge, and under that is included a fair hearing. (iii) The tribunal must reach a decision which is honest and unbiased. The authority for those three propositions is Bowen L.J. in *Leeson* v. *General Council of Medical Education and Registration*.[12] The phrase "the accused must be given notice of the charge" as used in that context is imported from the criminal law. For the purposes of natural justice the present charge is constituted by particulars—the allegations of fact alleged to constitute the misconduct of which the complainant must be notified. What label is attached to it does not matter for the purposes of natural justice. There are two other cases which illustrate the propositions on which reliance is placed: in *Dawkins* v. *Antrobus*[13] it

[8] 11 Ch.D. 353.

[9] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175, C.A.

[10] [1953] 2 Q.B. 18, 47; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113, C.A.

[11] [1915] A.C. 120, 138; 30 T.L.R. 672, H.L.

[12] (1889) 43 Ch.D. 366, 383, C.A.

[13] (1881) 17 Ch.D. 615, C.A.

was plainly said that a member of a club could condone a departure from the rules; the charge, it was said, was the statement of fact, the particulars: see also *Allinson* v. *General Council of Medical Education and Registration.*[14] The point, therefore, is that it is the facts, the allegation of facts, of which the complainant must be informed, and, if that is done, natural justice is satisfied. It is that which distinguishes the present case from *Andrews* v. *Mitchell.*[15] The appellant ought here to have realised that he was in the most serious position in which it was possible for a member of the union to be and that they had power to expel him.

The second point on natural justice is that he had a right to be heard but the complainant under natural justice does not have the right to be heard on sentence: *per* Lord Atkinson in *Weinberger* v. *Inglis* [16]—which is also another case in which the word "charge" was used to mean the facts. Lastly on the natural justice point, the court does not interfere on the ground of a breach of the principles of natural justice unless the complainant has been prejudiced by that breach: *Davis* v. *Carew-Pole* [17]; *Byrne* v. *Kinematograph Renters Society Ltd.*[18] Applying the above propositions to the present case, it is quite clear that the appellant had ample notice of the allegations of fact which he was required to meet. It is clear that he had a full and fair hearing on those allegations, because he at no time made any complaint to the contrary. On the facts proved—and it must be accepted that the particulars of the charges were proved—it would be impossible to quarrel with the decision that the facts amounted to conduct prejudicial to the interests of the union; really, res ipsa loquitur. It was conceded that if the appellant was convicted on charges 1, 2 and 4 he had acted in a manner prejudicial to the interests of the union. So the conclusion is reached that he richly deserved expulsion, and yet he says that the General Council were wrong to expel him on the principles of natural justice.

On the construction point the question is, does rule 11 (7) create a separate offence, or does it provide a means or power to the General Council to deal with other offences dealt with in other rules? On its true construction rule 11 (7) is an enabling rule

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[14] [1894] 1 Q.B. 750; 10 T.L.R. 304, C.A.

[15] [1905] A.C. 78.

[16] [1919] A.C. 606, 631; 35 T.L.R. 399, H.L.

[17] [1956] 1 W.L.R. 833; [1956] 2 All E.R. 524.

[18] [1958] 1 W.L.R. 762; [1958] 2 All E.R. 579.

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entitling the General Council to expel a member guilty of specific offences under the rules which, in the council's opinion, constitute conduct prejudicial to the interests of the union. It really defines the punishment giving authority. The punishment available to the General Council in a case of this description is entirely discretionary, with supervision in the Annual Conference. Rule 11 (7) overlaps with rule 25. If rule 11 (7) is a separate offence-making provision, then there is left out of account those matters which are made offences by other rules for which no penalty is provided: rr. 16 (1), 32 (9). The general offences are grouped together in rules 25 to 30, and had it been intended that conduct prejudicial to the interests of the union should be a separate offence it is in that group of rules that one would have expected to find it.

The appellant was aware between June 17, 1957, and March 30, 1958, that rule 11 (7) was being invoked against him, and was in a position to submit reasons to the Annual Conference of Delegates why he should not be expelled, yet he has never complained of the decision of that body to uphold his expulsion. If the General Council was disentitled to apply its powers under rule 11 (7) then there was no right of appeal. The appellant permitted the union to proceed on the footing that there was no point about the inapplicability of rule 11 (7).

Millner in reply. It was for the defence to adduce evidence in support of their defence that there was a hearing before the Annual Conference and that the appellant had an opportunity to deal with rule 11 (7); there is nothing to show that there was any hearing in the proper sense of the word; one cannot speculate as to whether the appellant had an opportunity. On the natural justice point, see *per* James L.J. in *Dawkins* v. *Antrobus*.[19] *Weinberger* v. *Inglis*[20] differs on its facts from the present case.

July 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Stripped of their legal form, the charges against Walter Annamunthodo were in substance that during the lunch-hours on August 15 and 17, 1956, he had attended meetings in the works, at which non-members were present, during which he had alleged that the President-General of the union had embezzled $25,000 of the union's funds, that during those meetings he had levelled charges of theft and corruption against the officers of the union; and that he had repeatedly made those statements in public.

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[19] 17 Ch.D. 615, 629.

[20] [1919] A.C. 606, 632, 638.

Their Lordships notice that the President-General and officers of the union did not take action for slander against Walter Annamunthodo but proceeded instead to formulate charges against him under the union rules. The rules which they invoked were as follows:

" *Rule 25: Irregular Discussion of Union's Business*

" It shall be irregular for any officer or member of the Union " to discuss the business of the Union in public or with persons " who are not members of the Union and any officer *or member* " so charged and found guilty shall forfeit his office or be suspended from membership or be fined any sum not exceeding " five dollars or expelled. Any other member found guilty of such " breach shall be fined two dollars ($2.00) for the first offence, " for the second offence he shall be suspended from membership " for three months, and for a third similar offence he shall be " expelled."

Their Lordships have put the words " or member " in italics because Phillips J. thought they enabled the General Council to expel Walter Annamunthodo. But the Court of Appeal thought those words must have been inserted in error, for they could not be reconciled with the second part of the rule. They should therefore be ignored and treated as if deleted. Their Lordships agree with this view, which was indeed not disputed before them: so Walter Annamunthodo could not be expelled under this rule.

" *Rule 26: Plotting of Members*

" (1) Any officer or member who is charged with plotting " against fellow officers or members shall on conviction, if an " officer forfeit his office, or be suspended or fined any sum not " exceeding five dollars or be expelled; and if a member be fined " two dollars for the first offence; for a second offence he shall " be suspended from membership for three months or may be " expelled from the Union."

Their Lordships notice that Walter Annamunthodo was an ordinary member and this was his first offence, so he could not be expelled under this rule.

" *Rule 27: Respect to Officers*

" All officers and members are required to show due respect to " the officers of the Union who have been duly elected. Anyone " charged and found guilty of disrespectful conduct in this connection, if he be an officer shall, for the offence, either forfeit " his office or be suspended from office. If he be an ordinary " member he shall for the first offence be fined the sum of one "dollar. Anyone found guilty for a second offence may be "expelled."

Their Lordships again notice that Walter Annamunthodo was an ordinary member and this was his first offence. So he could not be expelled under this rule.

"*Rule 32: Complaints and Appeals*

"(5) All charges made by any member or officer against "another must be in writing and if any charge, on investigation, "is proved to be made through malice and without foundation, "the member or officer preferring such charge shall be liable to "suspension or expulsion or be fined any sum not exceeding five "dollars as the case deserves."

Their Lordships think that the General Council misconceived this rule. It is intended to deal with charges brought before the General Council or Executive Committee of the union and says that if they are unfounded and malicious, it is an offence. In short, something in the nature of "malicious prosecution." Walter Annamunthodo had brought no such charge. He should not therefore have been convicted under rule 32 and was not liable to expulsion under it. Phillips J. so held, and it was not disputed before the Federal Supreme Court nor before their Lordships.

There was a slight reference before their Lordships to rule 32 (9), but it was never mentioned in the courts of the West Indies and it is not open to the union now to rely on it. In any case it has no relevance.

Now those rules 25, 26, 27 and 32 were the only rules which the general secretary invoked in his letter charging Walter Annamunthodo with a breach of the rules. They were specified in the greatest particularity. The letter followed the familiar form of an indictment:

"*Charge* 1.

"*Statement of Offence*: Plotting. Contrary to rule 26.

"...

"*Particulars*. . . .

"*Charge* 2.

"Irregular Discussion of Union Business contrary to rule "25.

"*Statement of Offence*: . . .

"*Particulars*. . . .

"*Charge* 3.

"*Offence*: Breach of rule 32, *Complaints and Appeal*. . . .

"*Particulars*. . . .

"*Charge* 4.

"*Statement of Offence*: Disrespectful conduct contrary to "rule 27. . . .

"*Particulars*. . . ."

Their Lordships have already observed that under none of those rules was there any power to expel Walter Annamunthodo. Yet when it came to sentencing him the General Council did expel him: and for this purpose they invoked another rule, namely, rule 11 (7). He had not been charged with a breach of it, but nevertheless they claimed a right to expel him under it. The letter informing him of it, dated June 17, 1957, was in these words: "This is to inform you that you have been "convicted on all the charges laid against you by the General "Secretary of the Oilfields Workers' Trade Union. The General "Council has as a result seen fit to expel you under the provisions "of Rule 11, Section 7, on the ground that your general conduct "has been prejudicial to the best interest of the Union." Now rule 11 (7) is in these words: "The General Council may fine "any member who is proved to the satisfaction of the said "Council, to have been guilty of conduct prejudicial to the interests of the Union any sum not exceeding $5.00 and/or may "suspend or expel such member from the Union. Any member "so fined, suspended or expelled shall have the right of appeal "to the Annual Conference of Delegates whose decision shall be "final and binding."

The first question is: Did rule 11 (7) create a *separate and distinct offence* of "conduct prejudicial to the interests of the "Union"?—for in that case it ought to have been separately charged—or did rule 11 (7) merely empower the General Council to impose *more severe penalties* for the various *other offences* specified in the rules provided that the conduct of which he was convicted under them was prejudicial to the interests of the union?—for in that case rule 11 (7), so it was said, need not be separately charged, but only the other offences. Phillips J. in the Supreme Court and Archer and Rennie JJ. in the Federal Supreme Court thought that rule 11 (7) only empowered the General Council to impose *more severe penalties* and sought support for this view from some observations of Eve J. in *Wolstenholme* v. *Amalgamated Musicians' Union.*[1] But Wylie J. thought it created a *separate and distinct offence*, and their Lordships agree with him. As he said, "it stands entirely on

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[1] [1920] 2 Ch. 388, 400–401.

"its own, authorising expulsion of a member who is proved to "the satisfaction of the General Council 'to have been guilty "'of conduct prejudicial to the interests of the Union.'" In the opinion of their Lordships it should not have been invoked for the purpose of expelling Walter Annamunthodo unless he was given notice of the charge under it and had a fair opportunity of meeting it.

But even if rule 11 (7) only empowered *more severe penalties*, nevertheless those severe penalties could only be imposed when the conduct was prejudicial to the interests of the union: and their Lordships think that, even on that view, the rule should not have been invoked without giving Walter Annamunthodo notice of it.

Mr. Lazarus sought to treat the specific formulation of *charges* as immaterial. The substance of the matter lay, he said, in the *facts* alleged in the letter as to the meetings which Walter Annamunthodo had attended and the allegations he had made. Their Lordships cannot accede to this view. If a domestic tribunal formulates specific charges, which lead only to a fine, it cannot without notice resort to other charges, which lead to far more severe penalties.

The second question is this: Is Walter Annamunthodo debarred from complaining of rule 11 (7) being invoked because he did not appear at the adjourned hearing? He had attended the first hearing on June 9, 1957, when the evidence was taken: but he did not attend at the adjourned hearing on June 16, 1957, giving as his reason that he had made a previous engagement to be the judge at a "Mock Trial" sponsored by a Girl's Group. That seems a poor excuse. And it was said that, if he had appeared at the adjourned hearing, he could have been given notice in writing then and there of the intention to proceed under rule 11 (7) and thus expelled without any violation of natural justice. This argument appealed to Wylie J. who thought that, as he had been given an opportunity of appearing at the adjourned hearing and had not appeared, that was enough to satisfy natural justice. Their Lordships realise the force of this reasoning but they cannot agree with it. Walter Annamunthodo must be taken to have known that, at the adjourned hearing, the General Council might proceed to award the full penalty prescribed for the offences then charged against him—which was only a small fine—but he could not be expected to know that he might be dealt with for a separate and distinct offence which involved expulsion. When the General Council at the adjourned hearing desired to proceed under rule 11 (7), and found that he was not present, they ought to have adjourned the hearing once again so as to give him notice of the fresh charge: and they would have had to do it in writing under rule 32 (5). By failing to do so, they failed to observe the requirements of natural justice.

The third question is whether Walter Annamunthodo has lost his right to complain by appealing to the Annual Conference of Delegates. As soon as he knew of his expulsion by the General Council, he gave notice of appeal under rule 11 (7). He had the opportunity to put before the Annual Conference of Delegates all his objections to his expulsion. He does not complain of any failure of natural justice by that body. And they affirmed his expulsion. So can he now complain? This reasoning was accepted by Archer and Wylie JJ. They held that, by appealing, he had lost his right to complain of rule 11 (7) being invoked. Indeed, he himself invoked rule 11 (7) so as to appeal under it. So how can he now repudiate it? Their Lordships recognise the force of this reasoning, but they cannot agree with it. Even if the order of expulsion were capable of being affirmed or disaffirmed their Lordships cannot regard an appeal as an act of affirmance. On the contrary, it is a disaffirmance—a complaint against the order of expulsion. If he had not appealed, it might have been said that he should have done so, that he should have exhausted all internal means of redress, before having recourse to the courts. Such a plea was upheld in the special circumstances that prevailed in *White* v. *Kuzych*.[2] It was therefore quite proper for him to appeal to the Annual Conference before coming to the courts, even though he was not bound to do so. But, having appealed and failed, he does not by so doing forfeit his right to redress in the courts. If the original order was invalid, for want of observance of the rules of natural justice, he can still complain of it, notwithstanding his appeal.

Mr. Lazarus did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside.

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[2] [1951] A.C. 585; [1951] 2 T.L.R. 277; [1951] 2 All E.R. 435, P.C.

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In the result their Lordships think the decision of the General Council on June 16, 1957, was vitiated by reason that it convicted Walter Annamunthodo of an offence against the rules with which he had never been charged. He is entitled, therefore, to have it set aside. But he gave no evidence that he had suffered any damage from it.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed and that it should be declared that the purported expulsion of the plaintiff from the defendant union by resolution of its General Council on or about June 16, 1957, was invalid, and that an order should be made to set it aside. The respondents must pay the costs of the appeal before their Lordships (so far as costs are allowed to an appellant in forma pauperis) and also his costs in the courts below.

Solicitors: *T. L. Wilson & Co.; Pothecary & Barratt.*

C. C.

JAMES ALBERT DE GREGORY . . . APPELLANT;
AND
GENERAL MEDICAL COUNCIL . . . RESPONDENTS.

J. C.*
1961
July 26.

ON APPEAL FROM THE DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL COUNCIL.

Medical Practitioner — Infamous conduct in professional respect — Improper association—Standard of conduct.

A medical man must not abuse his professional position as the family doctor so as, by act or word, to impair the confidence and security which should subsist between husband and wife, and if he becomes friendly with the family he must maintain the same high standard—no distinction in that respect can be permitted between his conduct on professional and social occasions. Where he has gained access to the family home in the first place by virtue of his professional position it is an abuse of his professional relationship with the husband and father for him to enter upon an improper association with the wife, and is infamous conduct in a professional respect, even though she herself has ceased to be his patient before the improper association begins.

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* *Present*: LORD DENNING, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST.

APPEAL (No. 69 of 1960) under section 36 (3) of the Medical Act, 1956, from a determination of the Disciplinary Committee of the General Medical Council (November 25, 1960), whereby it was adjudged that the appellant, a registered medical practitioner who had practised in Rhyl, North Wales, for 15 years, had been guilty of infamous conduct in a professional respect, and it was ordered that his name should be erased from the Register of Medical Practitioners.

The following facts are taken from the judgment of the Judicial Committee: The charge preferred against Dr. de Gregory arose out of his association with Mrs. Round, who was the wife of one of his patients, John Round. From July, 1959, onwards Dr. de Gregory frequently committed adultery with her. As a result on May 25, 1960, Round divorced his wife. On June 15, 1960, she gave birth to a child of which Dr. de Gregory was the father, and on June 16, 1960, she married Dr. de Gregory. So she was now Mrs. de Gregory, but will be referred to as Mrs. Round as that was her name at the times material to this appeal.

The charge against Dr. de Gregory as originally framed was, so far as material, in these words: "After you had entered into "professional relationship with Mr. and Mrs. Round and their "family, you improperly associated with Mrs. Round, and from "a date in or about December, 1958, you frequently committed "adultery with her, and between October 30, 1959, and Novem-"ber 14, 1959, and thereafter from November 28, 1959, onwards "you lived and cohabitated with her . . . and that in relation to "the facts alleged you have been guilty of infamous conduct in "a professional respect."

After all the evidence had been heard the charge was amended so as to charge adultery only from July, 1959. The date "De-"cember, 1958," in the charge was amended to "July, 1959."

1961. July 17, 18, 19. *Andrew Rankin* and *Somerset Jones* for the appellant. Until about 1957 the marriage of Mr. and Mrs. Round was reasonably happy, but during 1958 their relationship deteriorated. At no time between August, 1958, and the Spring of 1959 was any complaint made by Round to the appellant about the wife's conduct or about the appellant's relationship with her. She was a patient of the appellant until December, 1958, when she removed her name from his list. It was conceded that he visited the Rounds' house between August, 1958, and the Spring of 1959, but he was requested by the wife to do so and did so for professional purposes. An inquiry agent was called by the appellant to say that on the instructions of Round's solicitors he had made careful investigation for three days, but was unable to find any evidence of association between the appellant and Mrs. Round in that period; at no time had he seen any signs of familiarity between them or gestures of affection.

Before the Disciplinary Committee the case against the appellant was put in two ways. It was said (1) that during a period of at least a year or two before December 9, 1958, the appellant was taking advantage of his professional relationship with Mrs. Round to woo her and to lay the foundations of the adulterous relationship which later occurred after she had ceased to be his patient; and/or (2) that at the time the appellant and Mrs. Round first committed adultery and thereafter Round and his three children were patients of the appellant and it was submitted that the appellant had thereby been guilty of infamous conduct in a professional respect. There is no judgment of the Disciplinary Committee or any indication of what facts were found by them. There is a very serious conflict as to when the alleged improper association began; one does not know what in fact the committee did find. In the charge as amended the appellant was not charged with adultery until seven months after Mrs. Round had ceased to be his patient. This appeal, brought under section 36 of the Medical Act, 1956, is a rehearing—the whole case is open to review—and it is open to this Board to make any order which it thinks proper: *Fox* v. *General Medical Council*[1]; *Felix* v. *General Dental Council*[2]; *Gardiner* v. *General Medical Council.*[3]

Excluding hearsay evidence, there is absolutely no evidence of improper association apart from what Round could speak to of his own knowledge. The determination of the General Medical Council has not to be lightly disregarded, but in cases of this character, when there are allegations of adultery, it becomes even more important for the committee to indicate what it is that they find. Their findings as such did not reject the appellant's case on the alleged improper association: *Felix* v. *General Dental Council*[4]; *Benmax* v. *Austin Motor Co. Ltd.*[5] There is no presumption that the judgment in the tribunal below is right. What this committee did as to accepting the evidence of improper association one just does not know. After there was adultery one need not worry about improper association, but that is not the way in which the charge was formulated. There is no presumption that the appellant's case must have been rejected, but I am content to argue the case on the basis that the committee must have rejected it.

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[1] [1960] 1 W.L.R. 1017, 1020; [1960] 3 All E.R. 225, P.C.

[2] [1960] A.C. 704; [1960] 2 W.L.R. 934; [1960] 2 All E.R. 391, P.C.

[3] The Times, June 1, 1961, P.C.

[4] [1960] A.C. 704, 718.

[5] [1955] A.C. 370, 373; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326, H.L.

To bring this charge home the committee has to be satisfied that this doctor has abused his professional position. For a doctor to commit adultery with the wife of a patient is not in itself infamous conduct in a professional respect. If there was no evidence on which it could be said that the appellant had been guilty of infamous conduct in a professional respect the committee went beyond its jurisdiction in entertaining and adjudicating upon the case: *Allinson* v. *General Council of Medical Education and Registration.*[6] The words "infamous or disgraceful conduct" should be construed in conjunction with the words "in a professional respect": *Felix* v. *General Dental Council.*[7] A high standard of proof is required, and judgment should not be given on a mere balance of probabilities; accordingly, it must be proved to the committee's satisfaction that the doctor is not only guilty of infamous conduct but that the infamous conduct was in a professional respect. Quite plainly, adultery is infamous conduct, but that is not what is meant by adultery in a professional respect. Further, it is submitted that it is adultery with a patient that is necessarily within the section. It is not, and never was, suggested that the appellant had committed adultery with a patient—Mrs. Round had ceased to be his patient when adultery occurred. As to the effect of the decree of the Divorce Court, what was said in *General Medical Council* v. *Spackman*[8] is adopted as part of this argument.

An act which is not done in a professional respect does not come within the section—there must be an abuse of the professional position of the doctor. Merely to show that the doctor has committed adultery with the wife or mother of a patient, and to show nothing more, is not a sufficient discharge of the burden of proof; there has to be cogent evidence that there has been an abuse of the professional position. There is no evidence here to warrant the finding that there was improper association before the adultery; there are no findings of fact, and on this aspect of the matter it is plain that there was a vital conflict. The only evidence of association was that he visited the wife. There was an association on a purely social plane—the appellant had in fact become a friend of the family. It is very important in a case of this kind, however, where there was this close social relationship, that cogent evidence should be given to show that what eventually occurred did so because the doctor abused his professional position; he may have abused his social friendship, but that is not enough: each aspect must be approached independently. The committee apparently rejected the evidence of Mrs. Round, of the appellant and of the inquiry agent. The appellant never at any time visited the house when Mrs. Round was there alone; there is absolutely no evidence that he sought to woo her. Each case has to be determined on its own facts. The onus is correctly expressed in *Bhandari* v. *Advocates Committee*.[9]

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[6] [1894] 1 Q.B. 750, 760; 10 T.L.R. 304, C.A.

[7] [1960] A.C. 704, 719.

[8] [1943] A.C. 627, 645.

If it is to be said that it is sufficient to warrant striking off a doctor to show that he has committed adultery with a relative of a patient, and nothing more, that is extremely unjust. This adultery was seven months after Mrs. Round ceased to be the appellant's patient; it is difficult to say that he used his professional relationship with the family to foster his social relationship with the intent to commit adultery with the wife. There is no evidence of abuse of professional position. The committee are not entitled as a matter of law upon a finding of infamous conduct such as this to erase the doctor's name from the register; this case does not warrant the extreme penalty.

Somerset Jones following. It is more likely than not that the committee did accept the appellant's evidence as to improper association rather than reject it: see *Felix's* case[10] as to the inference to be drawn in the absence of a finding by the committee. Since no express finding was made, it should be presumed as a matter of law that the appellant's evidence was accepted. One cannot but have suspicion, looking at the evidence, but suspicion is not enough to discharge the burden of proof. It should be found that no improper relationship has been made out. Whether there was improper association involves two things—association and impropriety; there is no evidence whatever of impropriety in the association when the appellant visited the house two or three times a week for years. There is not the slightest suggestion anywhere of any undue familiarity between the doctor and Mrs. Round; indeed, were it not for the admission that he had committed adultery, there would have been no

[9] [1956] 1 W.L.R. 1442, 1452; [1956] 3 All E.R. 742, P.C.

[10] [1960] A.C. 704, 719.

evidence at all against him. The evidence falls far short of showing that he cultivated his social relationship with a view to abusing his professional position.

John Hobson Q.C. and *Peter Boydell* for the respondents. It is plain that the Disciplinary Committee by its findings, and in particular by its finding that there was improper relationship, was rejecting the appellant's and Mrs. Round's version of the affair from well prior to December, 1958, or at least from about that date. If that is right, the second proposition is that on a review of the evidence by this Board—this being admittedly in the nature of a rehearing—this is not a case in which it would interfere with the findings of the committee. Thirdly, if the Board think that the first proposition is wrong, and it does not know what the committee did decide about improper association and whether it did or did not accept the evidence of the appellant and Mrs. Round, the Board will have to consider the whole of the evidence in the case.

There was an improper relationship from well before December, 1958. The appellant abused his professional position as a family doctor even though Mrs. Round herself might not have been his patient. He was using his professional position to visit the house and in the course of that to further an improper association. Further, both the improper association and the adultery following immediately upon it must be looked at as a single story, and both arise directly out of a breach of his professional position, and that is, of course, infamous conduct in a professional respect. Where there has been adultery with a patient, there must always have been an element of professional impropriety. Infamous conduct because it is adultery, and it is in a professional respect because it is being done by a doctor; it is sufficient provided that there is a professional nexus.

The evidence supports the submission that there was an improper association before December, 1958; from that date the case is absolutely conclusive—there are the statements in the confessions themselves. The doctor-patient relationship is a continuing one and what is social and what is not cannot be disentangled. A doctor must be careful in his association with the family: *General Medical Council* v. *Spackman.*[11] The phrase "in a professional respect" is very wide; what is infamous conduct in a professional respect is a question of mixed law and fact: *Felix* v. *General Dental Council.*[12] This is the first occasion

[11] [1943] A.C. 627, 634.

[12] [1960] A.C. 704, 717.

on which it has ever been suggested that a doctor's social and professional relationships are to be judged on different standards.

The sentence is essentially a matter which is in the discretion of the General Medical Council. It was said in *Spackman's* case in the Court of Appeal[13] that "if, then, in a case of a serious "nature evidence in mitigation is tendered and the council refuses "to hear it, I think they would be well within their rights and "their decision could not be challenged." Since 1951 there have been 20 cases of adultery or improper association before the General Medical Council. [Reference was made to *Fox* v. *General Medical Council.*[14]] In the proper exercise of its discretion here the committee was entitled to direct that the appellant's name be erased from the register.

Peter Boydell followed.

Rankin replied.

July 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: The Disciplinary Committee determined that the facts alleged in the *charge as amended* had been proved to their satisfaction, and in relation to those facts judged him to have been guilty of infamous conduct in a professional respect. So the date of the adultery was ascertained to be from July, 1959. But the finding does not specify any date for the improper association. And it was on this point that much of the argument turned, because on December 9, 1958, Mrs. Round ceased to be a patient of Dr. de Gregory, and there was no finding as to whether the improper association started before or after that date.

Many of the facts were not in dispute. Dr. de Gregory is now some 56 years of age. He qualified as a doctor in December, 1931. He married in 1934, and of that marriage he has two sons, both of whom are now grown up and married. Since 1946 he has practised in Rhyl. His first wife died in November, 1957.

John Round is a water engineer. In 1949 he went to live in Rhyl. He was then a single man. About June, 1950, Dr. de Gregory became his doctor. On September 9, 1950, Round married his wife, Sheila Mary Round. She is now some 31 years of age. They have three children, all boys, the first born on June 22, 1951, the second born on January 17, 1955, and the third on March 19, 1956. Dr. de Gregory became the doctor to Mrs. Round and the children.

[13] [1942] 2 K.B. 261, 273, C.A.

[14] [1960] 1 W.L.R. 1017.

In addition to being the doctor to the family, Dr. de Gregory also became a friend of the family. He called frequently at the house, and on many occasions it was in the morning when Round was at work. Mrs. Round said in evidence that he only came when she asked him to do so, and that she only asked him when she thought one of the children was not well. Two of the most illuminating answers in the Record were those given by Mrs. Round:

" Q. During the period from the beginning of 1955 to the end " of 1959, when you finally left home, Dr. de Gregory was visiting " your house two or three times a week? A. I asked him to. " Q. But is it right as a fact that he came to your house on an " average two or three times a week? A. No, that is a slight " exaggeration."

By August, 1958, Round had become very suspicious of his wife's conduct. He discovered that she used to pretend she had gone to a meeting when she had not done so. Eventually he went to Dr. de Gregory's surgery and asked him whether he was having an affair with his wife. Dr. de Gregory said: " No, he " was fond of all of us and liked the family." Dr. de Gregory did not deny this incident. He said that he could not recollect it.

After this incident Dr. de Gregory did not visit the house so frequently. But in November, 1958, Mrs. Round applied to have her name taken off Dr. de Gregory's list of patients, and it was taken off. She kept this secret from her husband but the doctor of course knew of it. The reason for her action was given by Mrs. Round herself to the inquiry agent a year later: " I did " this," she said, " without my husband's knowledge as I knew " then that I was becoming fond of Dr. de Gregory." It would appear that she was in love with him, for in her evidence she admitted that the inquiry agent in December, 1959, " asked how " long I had been in love with Dr. de Gregory and I said the last " 12 months." Although she took her name off his list, the rest of the family remained on it.

Dr. de Gregory himself seems to have attached some considerable importance to the fact that Mrs. Round took her name off his list. He himself told the inquiry agent: " Before our " association became really serious, I ceased to be Mrs. Round's " doctor," but, according to him, it was only in June, 1959, that it became " really serious." In his evidence he said it was not till June, 1959, that he fell in love with her.

In June, 1959, Round being still suspicious followed his wife and found Dr. de Gregory waiting to meet her. He told him he was not to visit the house any more. In the same month Mrs. Round went with Dr. de Gregory to a party, contrary to her husband's clear objections. Round followed and found them there, asked Dr. de Gregory to come outside, and "spoke to him "pretty forcibly outside."

In July, 1959, Dr. de Gregory and Mrs. Round started to commit adultery with one another. In October, 1959, she left her home to live with him, and, although she returned for a fortnight to her husband (who was ready to take her back for the sake of the children), nevertheless on November 28, 1959, she left finally.

Such being the facts Mr. Rankin, for Dr. de Gregory, submitted that there was no real reason for saying that any improper association existed between Dr. de Gregory and Mrs. Round before May or June, 1959. Their Lordships cannot accept this view. It depends, of course, what is meant by "improper association." The Divorce Court acts only on proof of adultery. Undue familiarities are not enough in that court to warrant a decree. But the Disciplinary Committee of the General Medical Council rightly insists on a higher standard. A doctor gains entry to the home in the trust that he will take care of the physical and mental health of the family. He must not abuse his professional position so as, by act or word, to impair in the least the confidence and security which should subsist between husband and wife. His association with the wife becomes improper when by look, touch or gesture he shows undue affection for her, when he seeks opportunities of meeting her alone, or does anything else to show that he thinks more of her than he should. Even if she sets her cap at him, he must in no way respond or encourage her. If she seeks opportunities of meeting him, which are not necessary for professional reasons, he must be on his guard. He must shun any association with her altogether rather than let it become improper. He must be above suspicion.

It was suggested that a doctor, who started as the family doctor, might be in a different position when he became a family friend; his conduct on social occasions was to be regarded differently from his conduct on professional occasions. There must, it was said, be cogent evidence to show that he abused his professional position; it was not enough to show that he abused his social friendship. This looks very like a suggestion that he might do in the drawing-room that which he might not do in the surgery. No such distinction can be permitted. A medical man who gains the entry into the family confidence by virtue of his professional position must maintain the same high standard when he becomes the family friend.

Such being the standard required of a doctor, their Lordships think that the Disciplinary Committee may well have thought an improper association existed between Dr. de Gregory and Mrs. Round before she took her name off his list. His frequent visits to the house when the husband was not there, coupled with the fact that Mrs. Round became fond of him and for that very reason took her name off his list—which must have been to the doctor's knowledge but it was not to the husband's knowledge—is quite sufficient evidence, without more, from which an improper association may be inferred between them whilst she was his patient. That would by itself be ground on which the Disciplinary Committee could hold him guilty of infamous conduct in a professional respect. But inasmuch as the findings of the Disciplinary Committee do not specify the date when the improper association started, their Lordships will approach the case on the footing that it only started after December, 1958, when she took her name off the list. This does not excuse him. He gained his access to the home in the first place by virtue of his professional position. Afterwards, although the wife ceased to be on his list, he still had access to the home so as to attend Round and the children, if called upon. It was an abuse of his professional relationship with the husband and father for him to enter upon an improper association with the wife and mother of the family. It was infamous conduct in a professional respect, even though she herself had ceased to be his patient.

It was said that Mrs. Round set her cap at Dr. de Gregory and that he was caught in a spider's web. Mrs. Round indeed admitted that she deliberately set out to seduce Dr. de Gregory and succeeded in her efforts. Assuming this to be true, it could afford him no answer. It takes two to make and maintain an improper association of this kind, and it ill becomes the man to blame the woman for it. The doctor must resist temptation, not succumb to it.

Their Lordships are of opinion that there was ample evidence on which the Disciplinary Committee could find that Dr. de Gregory was guilty of infamous conduct in a professional respect and they see no reason to interfere with the sentence that his name should be erased from the register. It was suggested that erasure was too severe a sentence. Their Lordships do not think so. Dr. de Gregory has been guilty of a grave breach of trust and, despite the very high testimonials that were submitted as

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to his character and reputation, the General Medical Council were fully justified in marking their disapproval by directing his name to be erased.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed with costs.

Solicitors: *Jaques & Co. for Gamlin, Kelly & Beattie, Prestatyn; Waterhouse & Co.*

C. C.

[HOUSE OF LORDS.]

THOMSON (INSPECTOR OF TAXES) . . APPELLANT;

AND

MOYSE . . . . RESPONDENT.

H. L. (E.)*

1960
May 30, 31;
June 1;
Oct. 5, 6, 10;
Nov. 22.

Revenue—Income tax—Foreign income—Remittances to United Kingdom—Cheques drawn in dollars on foreign bank—Purchase by English bankers—Sterling equivalent credited in England—Foreign currency transferred by purchasers to Bank of England—Whether income from foreign securities or possessions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D,* 1 (*a*) (i), *Cases IV, r.* 2, *and V, r.* 2.

Debt — Discharge — Payment by cheque — Acceptance by creditor — Conditional discharge (post, p. 1004).

A taxpayer domiciled in the United States of America, but at all material times a British subject resident in the United Kingdom, was entitled to income from the estates of his mother and his father, both estates being situate in the United States. Payments of income from the estates were made by the trustees into an account in the taxpayer's name in the Bank of New York in New York.

The taxpayer carried out the following transactions: (a) he drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in the United Kingdom and requested them to purchase the cheques; (b) his English bankers, as authorised dealers under the Exchange Control Act, 1947, then sold the amount of dollars specified in the respective cheques to the Bank of England and credited to his account in England an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques; (c) his bankers then, by registered mail, presented his cheques to the Bank of New York, which honoured the cheques and, on the instructions of his English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD COHEN and LORD DENNING.

The taxpayer appealed against assessments to income tax under Cases IV, rule 2, and V, rule 2, of Schedule D to the Income Tax Act, 1918,[1] in respect of these transactions:—

Held, that the sterling credits were sums received by the taxpayer in the United Kingdom out of his American income, which had pro tanto been used to acquire them, and that in this sense he had "brought over" his American income to the United Kingdom (post, p. 992). That for the purposes of rules 2 of Case IV and Case V of Schedule D, the "bringing in" of a person's income meant nothing more than the effecting of its transmission from one country to the other by whatever means the agencies of commerce or finance might make available for that purpose. If that transmission took place, it was immaterial whether anything, items of property or instrument of transfer, had actually been brought into the country or not. Nor was it relevant to ascertain what had happened to the taxpayer's money in the country where the income arose (post, p. 994). Accordingly, the sterling sums so received were properly computed in assessing the taxpayer's tax under Case IV and Case V of Schedule D.

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[1] Income Tax Act, 1918, Sch. D: "1. Tax under this Schedule "shall be charged in respect of—(*a*) "the annual profits or gains arising "or accruing—(i) to any person "residing in the United Kingdom "from any kind of property whatever, "whether situate in the United King- "dom or elsewhere. . . ."

"Case IV.—Tax in respect of in- "come arising from securities out of "the United Kingdom. . . . Case V. "—Tax in respect of income arising "from possessions out of the United "Kingdom. . . ."

"*Rules applicable to Case IV*: 1. "The tax in respect of income arising "from securities in any place out of "the United Kingdom shall be com- "puted on the full amount thereof "arising in the year of assessment, "whether the income has been or will "be received in the United Kingdom "or not. . . .

"2. The foregoing rule shall not "apply—(*a*) to any person who satis- "fies the Commissioners of Inland "Revenue that he is not domiciled in "the United Kingdom, or that, being "a British subject, he is not ordi- "narily resident in the United "Kingdom. . . ."

"The tax in any such case shall "be computed on the full amount, so "far as the same can be computed, "of the sums which have been, or "will be, received in the United "Kingdom in the year of assessment "without any deduction or abate- "ment."

"*Rules applicable to Case V*: . . . "2. The tax in respect of income "arising from possessions out of the "United Kingdom, other than income "to which rule 1 applies, shall be "computed on the full amount of the "actual sums annually received in "the United Kingdom from remit- "tances payable in the United King- "dom, or from property imported, or "from money or value arising from "property not imported, or from "money or value so received on credit "or on account in respect of any such "remittances, property, money, or "value brought or to be brought into "the United Kingdom, on an average "of the three preceding years as "directed in Case I, without any "deduction or abatement other than "is therein allowed."

"3. Rule 1 of the foregoing rules "shall not apply—(*a*) to a person "who satisfies the Commissioners of "Inland Revenue that he is not domi- "ciled in the United Kingdom, or "that, being a British subject, he is "not ordinarily resident in the United "Kingdom . . . and in such cases the "computation shall be made in "accordance with rule 2."

Per Lord Denning. I prefer to regard the dollar cheque received in England by the bank as the "sum received" (post, p. 1005).

Hall v. *Marians* (*No. 2*) (1935) 19 T.C. 582, C.A. and *Inland Revenue Commissioners* v. *Gordon* [1952] A.C. 552; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 234, H.L. distinguished.

Scottish Mortgage Company of New Mexico v. *McElvie* (1886) 2 T.C. 165; *Gresham Life Assurance Society Ltd.* v. *Bishop* [1902] A.C. 287; 18 T.L.R. 626; 4 T.C. 464, H.L.; *Foulsham* v. *Pickles* [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 285, H.L. considered.

Dictum of Lord Cohen in *Inland Revenue Commissioners* v. *Gordon* [1952] A.C. 552, 564 questioned.

Decision of the Court of Appeal [1959] Ch. 464; [1959] 2 W.L.R. 577; [1959] 1 All E.R. 660 reversed.

APPEAL from the Court of Appeal (Jenkins, Romer and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 9, 1959, dismissing an appeal by the appellant, Andrew Thomson (Inspector of Taxes), from an order of the High Court (Wynn-Parry J.) dated July 22, 1958, which affirmed upon a case stated a determination by the Special Commissioners for Income Tax in favour of the respondent, Stephen Dickson Moyse, on his appeal against assessments to income tax made upon him under Cases IV and V of Schedule D to the Income Tax Act, 1918, for the years 1949–50, 1950–51 and 1951–52.

The issue raised by this appeal was whether the respondent, who was of American domicile, was assessable to income tax under Case IV or Case V of Schedule D upon sums obtained by him in the United Kingdom as the sale price of cheques upon a foreign bank which held income arising abroad to his account.

The case stated by the Commissioners for Special Purposes of the Income Tax Acts, so far as material, provided:

1. At meetings of the commissioners held on January 23 and 24 and February 1, 1957, Stephen Dickson Moyse (the respondent) appealed against the following assessments to income tax made upon him under Cases IV and V of Schedule D of the Income Tax Act, 1918: (a) Under Case IV for the year 1949–50 in the sum of £2,335 and for the years 1950–51 and 1951–52 in the sum of £2,500 for each year. (b) Under Case V for the year 1949–50 in the sum of £3,457 and for the years 1950–51 and 1951–52 in the sum of £3,500 each year.

The question for determination was whether the respondent was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country.

3. The following facts were admitted or proved:

(a) The respondent was born an American citizen and was and remained domiciled in the United States. At all material times he was a British subject resident in the United Kingdom.

(b) At all material times the respondent was entitled to a life interest in a trust in the United States of America under the will of his father the late Leon Moyse. He was also entitled to a life interest in the residuary estate of his mother, the late Mrs. A. D. Schmucker (widow of the said Leon Moyse) also in the United States of America. This estate was in course of administration from August 19, 1943, until April 18, 1951. The income from those two life interests was paid in dollars by the executors and trustees into the respondent's account at the Wall Street, New York, branch of the Bank of New York.

It was common ground that this income, in so far as it arose in the course of the administration of the Schmucker estate, was income arising from securities out of the United Kingdom [section 30, Finance Act, 1938] and that, in so far as it arose from that estate after the completion of the administration and from the Leon Moyse trust, it was income arising from possessions out of the United Kingdom.

(c) Under section 1 (1) of the Exchange Control Act, 1947, the respondent was prohibited from selling, without Treasury permission, the said dollars to any person other than an authorised dealer as defined by section 42 of the Act. By section 2 (1) of the Act, in default of Treasury permission to retain them, he was compelled to offer the said dollars for sale to such a dealer. At no time during the material period did the respondent have permission to sell (otherwise than to an authorised dealer) or to retain the said dollar income the subject of these appeals. Both Seligman Brothers, Merchant Bankers of Austin Friars in the City of London, and the Midland Bank Ltd., were authorised dealers.

(d) Between 1924 and 1926 the respondent trained as a volunteer with Seligman Bros. From his experience in banking the respondent was aware that a practice existed whereby a banker, provided he knew the particular customer, might be willing to purchase outright cheques in foreign currencies drawn on foreign banks. This practice of buying and selling cheques drawn in foreign currencies was a very old established one in the City of London and was part of the normal banking business of Seligman Bros. A banker might be willing to act as a principal in this manner even though he had no knowledge of the state of the customer's account at the foreign bank, provided that he was satisfied as to the customer's integrity. Otherwise he would follow the normal method, used, for example, in the case of cheques drawn in this country on banks in the United Kingdom, and collect the money from the drawer's foreign bank as an agent and credit the customer's account in due course.

(e) Nothing, except as shown in sub-paragraph (i) below, was paid into the respondent's New York bank account other than his income from the aforesaid life interests. For the period relevant to the assessments in question the respondent drew certain cheques in dollars on his New York bank account in favour of either Seligman Bros. or Midland Bank Ltd. (of London).

(f) With each of the four cheques drawn in favour of Seligman Bros. in June, August and December, 1948, and February, 1949, the respondent sent Seligman Bros. a letter asking them to purchase the cheque and to credit his account with the proceeds in sterling and subsequently to transfer part of the proceeds to the credit of his bank account with Midland Bank Ltd., Kingsway. The letter sent to Seligman Bros. on August 24, 1948 (for example), stated as follows: "I enclose " herewith my cheque on New York in the amount of $6,144.04. " Would you kindly purchase this and credit my sterling account " correspondingly, under the usual advice. Upon completion " of the above, kindly arrange to credit my account with the " Midland Bank Ltd., Kingsway Branch, with the amount of " £1,750 0s. 0d., debiting my account with your goodselves " correspondingly. . . ." The cheque dated February 16, 1949, was enclosed with the following letter to Seligman Bros.: "I " enclose herewith my cheque on New York in the amount of " $7,266.29. Would you kindly purchase this and credit my " sterling account correspondingly, u.u.a. On completion of the " transaction would you kindly arrange to credit my account " at the Midland Bank Ltd., Kingsway Branch, with £1,600 " (Sixteen hundred pounds) u.u.a."

(g) Seligman Bros. purchased the aforementioned four

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cheques. On receipt of each cheque Seligman Bros. wrote to the respondent using the following form of letter: "We con-"firm having sold for your account today:

" $7,266.29 at 4.03½ producing	£1,800	16s.	4d.
" for which amount, less ⅛% Exchange Commission & stamp and other charges	2	5s.	2d.
i.e.	£1,798	11s.	2d.

" We credit your account val. 18th inst. u.u.r. We have " received the above foreign currency by cheque on New York." The phrase " sold for your account " was used by Seligman Bros. in these letters because during this period Seligman Bros. believed that owing to the exchange control which was introduced under the defence regulations they were not permitted to deal in foreign currency on their own account, but that they were required to act as agents of the Bank of England and to sell either to the Bank of England or to persons holding a permit from the Bank of England. Consequently, the pre-war form of confirmation used by Seligman Bros.: " We confirm that we " have bought from you a cheque for . . . " was altered to " We " confirm we have sold for your account." The dollars so purchased were either sold to the Bank of England or to a customer with a permit to purchase dollars from the Bank of England or to a person to whom Seligman Bros. were entitled to deal within the limits set by the Bank of England. The words " We credit your account val. 18th inst." were employed by Seligman Bros. in the above letter in accordance with their usual practice whenever they purchased cheques in foreign currency. The foreign currency was valued in sterling on the day following, which in fact would be the actual day upon which the currency would normally be sold by Seligman Bros. on the market or to the Bank of England. The letters " U.U.R.," meaning " under " usual reserve," were always put in any statement by Seligman Bros. whenever they bought or negotiated cheques or bills of exchange. " U.U.R." in no way altered the customer's legal obligation under the contract under the Bills of Exchange Act, 1882, but drew his attention, in case he was not conversant with the legal position, to the fact that recourse could be had to him should any defect be found in the cheque when it ultimately was presented for payment. Seligman Bros. viewed the transactions with the respondent as purchases and sales of currency. They considered that the contracts were for dollars implemented by the respondent handing them a cheque in that currency.

(h) Seligman Bros. employed correspondents in New York to whom they sent all New York cheques acquired by them by registered mail every day. The New York correspondents were instructed by Seligman Bros. to carry out the following transactions in relation to each one of the respondent's cheques: (a) to have the cheque cleared on the respondent's bank in New York; (b) to credit the dollars to Seligman Bros.' bank account in New York; and (c) to pay out of Seligman Bros.' New York bank account so many dollars (as had been sold to the Bank of England) to the Federal Reserve Bank in New York for the credit of the account of the Bank of England. The procedure of the Midland Bank Ltd. was similar to that of Seligman Bros.

(i) A cheque drawn in favour of the respondent by the United States Treasury representing a refund of United States Federal Tax in the sum of $908.19 was received by the respondent through the post from the United States Treasury and forwarded by him to Seligman Bros. on December 8, 1948, with instructions "to convert this into sterling." This particular item was quite distinct from all the other transactions with which this appeal was concerned as the cheque was not drawn on the respondent's bank account in New York. Nevertheless, Seligman Bros. adopted the same practice and purchased this cheque crediting the respondent with the sterling equivalent.

(j) On June 16, 1949, the respondent drew a cheque on his New York bank account in favour of the Midland Bank Ltd., in the same manner as previously he drew cheques in favour of Seligman Bros. From and after this date the respondent used the Midland Bank Ltd., for 12 of these transactions during the relevant period from June 16, 1949, to January 29, 1952. No copies of the respondent's letters which accompanied these cheques to the Midland Bank were available except a letter dated January 29, 1952, from the respondent to the Midland Bank as follows: "I am enclosing herewith my cheque on New York in "the amount of $5,700 and shall be glad if you will credit my "account with the sterling equivalent."

On January 30, 1952, the Midland Bank wrote to the respondent as follows: "We are in receipt of your letter of the 29th "inst. enclosing your cheque on New York for $5,700, and your "account has today been credited with the proceeds, amounting "to £2,045 9s. 10d. This is made up as follows:

"$5,700 at 22.785/16ths	£2,048 1s. 1d.
"*Less* Commission	2 11s. 3d.
	£2,045 9s. 10d."

(k) Neither Seligman Bros. nor Midland Bank Ltd. was aware of the source of the respondent's funds lying in his New York bank account nor did either of the two English banks make any inquiry as to the extent of his resources in the United States. The respondent had been acquainted with the general manager of Seligman Bros. for some 30 years. Seligman Bros. would not purchase a cheque drawn on a foreign bank if the person desiring to sell the cheque was not well known to them as a person of integrity.

(l) Seligman Bros. never made returns to the Exchange Control Committee of the Bank of England showing individual items relating to the respondent. The cheques purchased from the respondent were included with other cheques in the periodical returns which Seligman Bros. as an "authorised bank" were required to make to the Bank of England. Such returns were in a global sum and did not show individual items. A similar practice was followed by the Midland Bank Ltd.

(m) Midland Bank Ltd. bought cheques drawn on New York and in such cases would credit the account of the customer the same day, whereas in cases where they were clearing a cheque (which did not arise in the case of the respondent) it would be a matter of some days before the customer got the credit.

4. It was contended on behalf of the respondent:

(a) that the sums received by the respondent in the United Kingdom arose from contracts concluded in the United Kingdom between the respondent and the respective bank, and that these sums were not remittances of United States income;

(b) that the respondent's United States income was not property received by him in the United Kingdom within the meaning of Case IV and rule 2 of Case V;

(c) that the source of the sterling credited to the respondent's London bank accounts was the sale and purchase as between the respondent and the particular one of the two United Kingdom banks in each transaction.

5. It was contended on behalf of the Crown:

(a) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the estate of the respondent's mother during the period of administration were sums received in the United Kingdom, within the meaning of Case IV, rule 2, of Schedule D;

(b) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the income from the estate of the respondent's mother after the period of adminstration or to the income from the estate of the respondent's father were sums received in the United Kingdom within the meaning of Case V, rule 2, of Schedule D.

7. The commissioners gave their decision in the following terms: "The question we had to answer was whether on the " facts of the present case—and we had heard evidence not only " from the respondent but also from eminent bankers—the " respondent was liable to tax under Case IV and Case V of " Schedule D in respect of income from foreign securities and " foreign possessions. The respondent had a bank account in " New York and into that bank account there was credited the " whole of his American income. The respondent gave no " instructions to his New York bank to remit sums of money to " him in the United Kingdom. From time to time the respon- " dent drew cheques in dollars on his New York bank account " in favour of Seligman Bros. or Midland Bank Ltd., which he " asked those banks to purchase from him. At the time of each " such request the respondent instructed the purchasing bank to " place the proceeds in sterling to the credit of his United " Kingdom account. The respondent's requests and instructions " were in every case duly complied with. It seems clear to us " that neither Seligman Bros. nor the Midland Bank Ltd. were " acting as a collecting agent on the respondent's behalf but in " every case acted as a principal, and we so found.

" Evidence had also been given of the transactions which took " place between the purchasing banks and the Bank of England " and the correspondents in the United States. Having regard to " that evidence (which we accepted) and the arguments that had " been addressed to us, we held that no remittances of American " income had been brought into the United Kingdom. Further- " more, on the reasoning employed by Lord Cohen in . . . *Inland* " *Revenue Commissioners* v. *Gordon*,[2] we did not accept the view " that there had been a constructive remittance. Our decision " applied equally to the Case IV assessments as to the Case V

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[2] [1952] A.C. 552; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 234, H.L.

"assessments. Accordingly, we held that the appeal succeeded in "principle and we left figures to be agreed between the parties."

On appeal by the Crown from that decision the question was whether on the facts as found by the commissioners there was evidence on which they could properly arrive at their decision, and whether on the facts so found their determination was correct in law.

Wynn-Parry J. dismissed the appeal holding that the income did not fall within either Case IV, rule 2, or Case V, rule 2.

On appeal, the Court of Appeal (Jenkins and Romer L.JJ., Pearce L.J. dissenting) affirmed his decision.

The Crown appealed.

John Foster Q.C. and *Alan S. Orr* for the Crown. The question is whether the respondent has been properly assessed under Cases IV and V of Schedule D in respect of the income in question upon what is commonly called a "remittance" basis by reason of the transactions which took place. The fallacy in the respondent's case is that it presupposes that by reason of these transactions there was no transmission of dollars or of a sterling balance to the United Kingdom; it is said that under the relevant rules of the respective Cases there is no room for a constructive receipt of income. But that cannot be right, for if an actual receipt was required to make the respondent liable it would mean that the dollars in question would have had to be physically delivered in the United Kingdom. The word "receipt" in this connection must mean receipt according to the usual commercial practice for the transaction in question. Accordingly, the words "transmission," "receipt" and "remittance" can be used in this sense as synonymous with "actual transmission," receipt, remittance.

As to Case V: rule 2 provides that the tax shall be computed on the full amount of the actual sums annually received in the United Kingdom under four specified heads. The present heads (*b*) and (*c*) of rule 2 are the successors of the corresponding provisions in the 5th Case of the Income Tax Act, 1803. "Property "not imported" in rule 2 (*c*) means "income not imported." In *Scottish Mortgage Co. of New Mexico* v. *McElvie* [3] no money was received in the strict sense in the United Kingdom by the taxpayer, nevertheless the transaction in question was held to come within Case IV. That decision [3] was cited with approval in *Forbes* v. *Scottish Provident Institution*[4] and *Standard Life Assurance Co.* v. *Allan*.[5] It illustrates the proposition that to incur liability it is not necessary to have an actual transmission of the income to this country. See also *per* Lord Lindley in *Gresham Life Assurance Society* v. *Bishop*.[6] [Reference was made to *Norwich Union Fire Insurance Co.* v. *Magee*.[7]] *Denver Hotel Co.* v. *Andrews*[8] indicates what constitutes a "remittance" or a "receipt." Lord Dunedin's statement in *Scottish Widows' Fund Life Assurance Society* v. *Farmer*[9] that an "actual receipt" . . . can only be effected in one of two ways" there set out is obiter, for the point of that case[9] was that no money was in fact received here. The mere fact that the income may alter in form does not prevent it from retaining the quality of income: see *Scottish Provident Institution* v. *Inland Revenue* (*Farmer*).[10] If the respondent's contention be sound, that case[10] would not have been decided in favour of the Crown. In *Hall* v. *Marians* (*No. 2*)[11] it was held that there was no receipt of income here, and in *Kneen* v. *Martin*[12] the sums remitted did not represent income.

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[3] (1886) 2 T.C. 165.

The Crown attach great importance to the observations of Lord Wright M.R. in *Timpson's Executors* v. *Yerbury*[13] as to the nature of a receipt for the purposes of rule 2 of Case V. Applying those observations here, the respondent *either* applied his income for the purchase of sterling—a remittance payable in this country falling under rule 2 (*a*), or, if a physical view is taken of the transaction, it comes under rule 2 (*b*)—*or* he assigned his chose in action, which was his income, in return for sterling, which, when credited to his account, was a sum received in respect of his income. This is money or value received arising in respect of property not imported, that is, it comes within rule 2 (*c*).

Paget v. *Inland Revenue Commissioners*[14] is plainly distinguishable, for there it was held that the right to *future* income was not taxable. Here it is income which had already been

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[4] (1895) 3 T.C. 443, 445, 449, 456.

[5] (1901) 4 T.C. 446.

[6] [1902] A.C. 287, 296; 18 T.L.R. 626; 4 T.C. 464, H.L.

[7] (1896) 12 T.L.R. 137; 3 T.C. 457, D.C.

[8] (1894) 43 W.R. 109, 110; 11 T.L.R. 85, D.C.

[9] (1909) 5 T.C. 502, 508.

[10] 1912 S.C. 452; 6 T.C. 34.

[11] (1935) 19 T.C. 582, C.A.

[12] [1935] 1 K.B. 499; 19 T.C. 33, C.A.

[13] [1936] 1 K.B. 645, 661; [1936] 1 All E.R. 186; 20 T.C. 155, C.A.

[14] [1938] 2 K.B. 25; 54 T.L.R. 404; [1938] 1 All E.R. 392; 21 T.C. 677, C.A.

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received which is the subject of taxation. *Carter* v. *Sharon* [15] is also distinguishable, for there the income brought to the United Kingdom was not income to which, in the circumstances, the taxpayer was entitled when it reached the United Kingdom. [Reference was also made to *Walsh* v. *Randall*.[16]] In *Inland Revenue Commissioners* v. *Gordon* [17] the issue was not whether income had been received or transmitted, but whether the transactions came within any of the heads of rule 2 of Case V, and it was held that they did not.

The actual transaction here was merely a debit and credit transaction in the books of account of the banks in question. The specific dollars representing the respondent's income would not be imported into the United Kingdom. The requisite number of dollars would be debited in the books of account in the United States bank and the equivalent amount of sterling would be credited in the books of account of the United Kingdom bank pursuant to telephonic or telegraphic advice or letters of advice.

As to Case IV: there is no relevant difference on the facts here between Case IV and Case V—a cheque satisfies both cases. But in the case of a commodity Case V may be more apt to cover it. Further, it is conceded that the ambit of rule 2 of Case V may be narrower than that of rule 2 of Case IV. As to the construction to be placed on rule 2 (*c*) of Case V, the judgment of Pearce L.J.[18] is adopted. [Reference was also made to *Foulsham* v. *Pickles* [19] and *Hall* v. *Marians* (*No. 1*).[20]]

F. N. Bucher Q.C., *P. J. Brennan* and *Mervyn Heald* for the respondent taxpayer. The statutory provision in issue is a relief granted (since 1914) in respect of the foreign income of persons who work in the United Kingdom but whose home is abroad. If the Crown succeed, foreigners who work here will no longer be able to know with exactitude their immunity to United Kingdom income tax in respect of their foreign income. It is important to remember that the respondent was compelled to offer the dollars for sale to an authorised dealer, and, accordingly, as this is a relieving provision for persons not domiciled in the United Kingdom, it should not be used to extend the liability to tax unless the statutory provision plainly applies. The Crown have submitted that the fallacy in the respondent's case is that it presupposes that there was no transmission of dollars to the United Kingdom. But the Crown's case presupposes a transmission of dollars to the United Kingdom because they find a sum of sterling in the United Kingdom equivalent to the amount of dollars in question. The respondent refuses to accept the hypothesis of such a transmission of dollars in the absence of any evidence of it. If the Crown's analysis of rule 2 of Case V be correct, then it is conceded that the respondent might be liable to United Kingdom income tax under Case I of Schedule D, but there would be no liability in respect of income from possessions outside the United Kingdom.

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[15] (1936) 20 T.C. 229; [1936] 1 All E.R. 720.

[16] (1940) 23 T.C. 55.

[17] [1952] A.C. 552.

[18] [1959] Ch. 464, 519 et seq.

[19] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 285, H.L.

[20] (1933) 18 T.C. 148.

It is submitted: (1) That the sums in question were solely derived from contracts made in the United Kingdom and, therefore, they did not " arise " from the respondent's foreign income within the meaning of the statute. (2) Even if the respondent's income did reach the United Kingdom, as to which there is no evidence, it did not reach this country as the *respondent's* income and, therefore, it did not arise *to* him within the charging provision of Schedule D.

There are four prerequisites for liability under Cases IV and V: (i) A sum of money must be brought into the United Kingdom from abroad—rules 2 of Case IV and Case V. (ii) The sum must be directly referable to, that is part of, the foreign income —" arising from "—second charging provision of Schedule D. (iii) The sum must be under the control of the taxpayer when it comes into the United Kingdom—rule 1 of the miscellaneous rules of Schedule D. (iv) The sum must be received in the United Kingdom to the knowledge of the taxpayer: see the forms of return which the statute requires the taxpayer to make under Case IV and Case V. There is no evidence of any of the foregoing prerequisites in the present case. [Reference was made to sections 1, 99 (1) and 207 of the Income Tax Act, 1918.]

Form X in the Fifth Schedule to the Income Tax Act, 1918, is the prescribed form of return in which a taxpayer is required to set out the sums which have been or will be received by him in the United Kingdom. How can he properly satisfy his statutory duty unless the receipt which is to give rise to liability is within his own knowledge? It follows from the Crown's argument that the taxpayer would be unable to satisfy this statutory requirement. The same argument is applicable to Form XI. In the respondent's submission, to satisfy the statutory requirement the sums in question must be received by the taxpayer or by another with his knowledge and authority. The sums in the present instance for the purposes of Cases IV and V were the amounts of money received from Seligman Bros., but those amounts were not part of the respondent's American money, which still lay in the United States of America, and there was no nexus between the dollars in the United States and the sterling received by the respondent. The exchange rate factor is a vital one in relation to this argument, for if there was a fall in the rate of exchange after the respondent had received, say, one pound for every three dollars, and when Seligman Bros. tapped the dollars in the New York account the dollar had fallen to a minimal amount, how could it be said in those circumstances that the sum received by the taxpayer had any connection with the dollars in New York? There is a completed and independent bargain between Seligman Bros. and the respondent whereby the respondent receives sterling which has no relation to the dollars in New York. The sterling did *not arise from foreign possessions* but from *contracts entered into in the United Kingdom*. It is plain from section 29 of the Finance Act, 1926, that no distinction has been drawn between the notion of receipt in Case IV and Case V. [Reference was made to section 19 of the Finance Act, 1940.]

Decisions on Case IV.

From *Scottish Mortgage Co. of New Mexico* v. *McElvie*,[21] *Gresham Life Assurance Society* v. *Bishop*[22] and *Standard Life Assurance Co.* v. *Allan*[23] the following propositions may be deduced: (1) There must be an actual receipt of the foreign income by the taxpayer in the United Kingdom—an equivalent receipt does not satisfy the rule. Actual receipt means importation of (i) money in specie, or (ii) money which directly represents the property, for example, a diamond, or (iii) a transfer effected by banking operations which turns foreign credit or money into English credit or money. (2) *McElvie's* case[24] is only in point where the taxpayer binds himself by his accounts, for example, a bank which by its accounts is barred or estopped from setting up a different position. In *Paget* v. *Inland Revenue Commissioners*[25] it was held that the sums in question arose from exclusively British contracts and not from foreign securities, and did not, therefore, come within Case IV. Reliance is placed on the observations of Lord Dunedin in *Scottish Widows' Fund Life Assurance Society* v. *Farmer*.[26] In the present case the money was neither brought over in specie nor was there a remittance, because all the dollars in New York were still there at and after the time when the respondent received the price of the cheques in sterling in London.

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[21] 2 T.C. 165.
[22] [1902] A.C. 287.
[23] 4 T.C. 446.
[24] 2 T.C. 165.
[25] [1938] 2 K.B. 25.
[26] 5 T.C. 502, 508.

Decisions on Case V.

The sum in *Foulsham* v. *Pickles*[27] was not a remittance, and Viscount Cave L.C. said that the other heads of rule 2 of Case V "all refer to property, money or value imported or brought into "the United Kingdom, and there are no words in the rule which "can comprise money arising and payable here." Nothing has been imported in the present case. *Hall* v. *Marians* (*No. 2*)[28] is authority for the proposition that there must be a nexus between that which is brought into this country and the property abroad. There must be a remittance for the purposes of rule 2 (*b*) and the property brought in must itself be income or subsequently turned into income. *Inland Revenue Commissioners* v. *Gordon*[29] decided (i) the alleged remittance must arise from the foreign income in the sense that it must be shown to be directly referable to the foreign income; (ii) there must be an actual receipt and an equivalent will not do; (iii) the alleged remittance must belong to the taxpayer at the time of its entry into the United Kingdom. In the present case, if the respondent had gone to New York and drawn a cheque there and forwarded it to his agent in London for collection, it is conceded he would be liable to United Kingdom tax, but not if the cheque was forwarded for sale. Section 1 of the Finance Act, 1953, shows that the legislature took the same view of *Hall* v. *Marians* (*No. 2*)[30] and *Gordon's* case[31] as that contended for here.

In both *Timpson's Executors* v. *Yerbury*[32] and *Carter* v. *Sharon*[33] there were actual remittances to the United Kingdom. In the present case there is no evidence of the movement of money from the United States to the United Kingdom but only of movement from the United Kingdom to the United States.

The Crown contended, in effect, that the respondent became liable to tax under Case V when (i) he wrote out one of the cheques in London, or (ii) when he gave the cheque to Seligman Bros., or (iii) when Seligman Bros. presented the cheque in New York. As to (i), the respondent could have torn up the cheque the moment after he wrote it; there could, therefore, be no liability at that stage. As to (ii), there was no alteration of the balance standing in the respondent's New York account at that stage; therefore, here also, there could be no liability at that stage. Nor could there be liability under (iii), for although thereafter there was an alteration in the balance of the New York account, there is no evidence that as a result any money came into the United Kingdom.

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[27] [1925] A.C. 458, 464.
[28] 19 T.C. 582.
[29] [1952] A.C. 552.
[30] 19 T.C. 582.
[31] [1952] A.C. 552.
[32] [1936] 1 K.B. 645.
[33] 20 T.C. 229.

The following are illustrations of what the respondent contends would, apart from bullion or notes, constitute a "remittance" within rule 2 of Case V: A cheque or banker's draft or bill of exchange payable three months hence drawn on the Midland Bank in London signed by the New York bank and made payable to the respondent. Also, an oral instruction to the New York bank to debit the respondent's account there with, say, 1,000 dollars, and to credit the London branch of that bank with the sterling equivalent.

Jenkins and Romer L.JJ. drew the correct inferences from the authorities. Pearce L.J. adopted the wrong approach to the problem, since this is not a case of tax avoidance but of the construction of a relieving provision. There is no relevant distinction between Case IV and Case V. The more elaborate language of Case V is explained by the fact that it is dealing with property likely to yield large fluctuations in income over the years, for example, foreign plantations. The word "receipt" must have the same meaning in both Cases. To hold that the sums in question here constituted a "receipt" in the United Kingdom of income from abroad would be to enlarge the net under rule 2 of Case IV contrary to what was said by Lord Halsbury in *Gresham's* case,[34] and, consequently, under rule 2 of Case V, for it is illogical to suppose that there is any difference in the extent of the immunity afforded by the two Cases. The test is whether the language of the statute hits the taxpayer: see *per* Viscount Simonds in *St. Aubyn* v. *Attorney-General.*[35] On the facts here the respondent is entitled to the relief claimed. [Reference was also made to *In re Farrow's Bank Ltd.*[36] and *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Trinidad and Tobago Income Tax Commissioners.*[37]]

Brennan following. To incur liability under Cases IV and V the taxpayer (i) must be domiciled abroad but resident in the

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[34] [1902] A.C. 287.

[35] [1952] A.C. 15, 32; [1951] 2 All E.R. 473.

[36] [1923] 1 Ch. 41, C.A.

[37] [1945] A.C. 1; 61 T.L.R. 30; [1945] 1 All E.R. 9, P.C.

United Kingdom, (ii) have income outside the United Kingdom, and (iii) that income must be brought into the United Kingdom and, at the time of its importation, the taxpayer must be entitled to receive it. The respondent's income as such was not brought into the United Kingdom, nor, if it was, did it belong to him. Stress is laid on the words "received in" in rule 2 of Cases IV and V. That phrase means "*not payable outside*" the United Kingdom. As to the various heads of rule 2 of Case V, there is no evidence of any remittance payable here, nor was any property imported. Further, the word "value" is apt to cover such things as gold bars, which could be sold for sterling here, but not a cheque. There is no evidence whatever that any part of the respondent's income came into the United Kingdom. What the respondent obtained here was the equivalent in purchasing power of that income.

The key to the present case is the word "received." In section 24 of the Finance Act, 1956, that word is given an extended meaning. It follows that in Cases IV and V that word does not bear an extended meaning but merely its ordinary meaning. The year of receipt is of vital importance in determining liability for assessment. Suppose on the facts here that the respondent had drawn a cheque on April 4 which was transmitted to New York on April 5 and presented in New York on April 10. On April 5 the respondent is killed in a road accident in London. On the Crown's argument the respondent would be assessable to tax for a year in which he was not in existence.

Foster Q.C. in reply. *Hall* v. *Marians* (*No. 2*)[38] decided that as between borrower and lender the sum lent did not arise from the foreign income. But where, as here, there was an assignment of dollars, the income arises in the United Kingdom. *Timpson's Executors* v. *Yerbury*[39] is a fortiori the present case, which in principle is on all fours with it, for here there was no direction to trustees who drew bills of exchange in New York on London, but the respondent himself drew the cheques *in London*. It would lead to absurdity if immunity to tax were to depend on whether a cheque was written out in London or New York. The respondent has received sterling which is the equivalent of the dollars in his New York account. Under Case IV the sum "arises" on the assignment of the dollars. The effect of selling the cheque in the United Kingdom was to alter the character of the account in New York. It is conceded that for present purposes

[38] 19 T.C. 582.

[39] [1936] 1 K.B. 645.

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income cannot be "received" twice. Once the taxpayer has "received" it, it cannot be received by him again. Accordingly, if the income in question was received in New York, it cannot in strictness be received again in the United Kingdom. The word "receipt" is then being used in a secondary sense: see *Scottish Provident Institution* v. *Inland Revenue* (*Farmer*).[40] The word "income" has a dynamic content; it connotes something which passes from one person to another. The "sum" in rule 2 of Case IV must be directly referable to the foreign sum, but it is not itself the income which was received abroad. The respondent concedes that, if the subject-matter had been a collecting cheque, there would have been liability to tax. But in the Crown's submission the fact that here a cheque was sold is not a vital distinction which gives the respondent immunity. Similar considerations apply equally to Case V. The word "sums" in rule 2 of Case V means "sums representing the taxpayer's income" or the "sums attributable to the taxpayer's income." If that construction be correct, then the difficulties envisaged in relation to heads (*c*) and (*d*) of rule 2 do not arise.

Paget's case[41] does not assist the respondent, for there the income had not been paid to the taxpayer. She did not sell any income which she had received.

Their Lordships took time for consideration.

November 22. Viscount Simonds. My Lords, at the conclusion of the argument in this case I was clearly of opinion that the appeal must succeed. I wrote my opinion accordingly, but, having had the privilege of reading the opinion which my noble and learned friend, Lord Radcliffe, is about to deliver, I have decided to withdraw it. For I am in complete agreement with his reasoning and conclusions, and think it on the whole desirable in this difficult branch of the law that the same result should not be reached by the use of slightly different words.

I shall, therefore, content myself with moving that the appeal should be allowed and the assessments of the respondent to income tax restored. The order in the courts below in regard to costs will not be disturbed, and there will be no order as to costs in this House.

Lord Reid. My Lords, the respondent was born in the United States of America; he is now a British subject resident in this country but he retains his American domicile of origin. He was in receipt of income in the United States, part of which arose from "securities out of the United Kingdom" within the meaning of Case IV, and the remainder of which arose from "possessions out "of the United Kingdom" within the meaning of Case V of Schedule D to the Income Tax Act, 1918.

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[40] 1912 S.C. 452.

[41] [1938] 2 K.B. 25.

During the years 1949–50, 1950–51 and 1951–52 he held money derived from income from those sources in the Bank of New York in New York. On some 16 occasions he drew cheques on the Bank of New York and sold these cheques in London to Seligmans or the Midland Bank, whereupon he was paid immediately the sterling equivalent of the number of dollars in the cheques. Thereafter the English banks sent the cheques to New York and cashed them and collected the dollars there.

I accept the finding of the commissioners that these transactions were sales of the cheques, so that the English banks acted as principals and not as collecting agents in cashing the cheques and collecting the proceeds. But if any of the cheques had been dishonoured the banks would have had recourse against the respondent.

The final result of each transaction was that the amount of accrued income held by the respondent in New York was diminished by the number of dollars in the cheque, and that the respondent had in his hands in London a sum in sterling equivalent to that number of dollars. The question in this case is whether the sums which he received in London by these transactions come within the scope of Cases IV and V of Schedule D. If they do, there is no dispute about the allocation of these sums between the two Cases.

The respondent not having been domiciled in the United Kingdom the relevant provisions of the Income Tax Act, 1918, are rule 2 (*a*) of the rules applicable to Case IV: "The tax in any "such case shall be computed on the full amount, so far as the "same can be computed, on the sums which have been, or will "be, received in the United Kingdom in the year of assessment "without any deduction or abatement," and rule 2 of the rules applicable to Case V: "The tax in respect of income arising "from possessions out of the United Kingdom, other than income "to which rule 1 applies, shall be computed on the full amount "of the actual sums annually received in the United Kingdom "from remittances payable in the United Kingdom, or from "property imported, or from money or value arising from property not imported, or from money or value so received on "credit or on account in respect of any such remittances, property, money, or value brought into the United Kingdom, on an "average of the three preceding years as directed in Case I, "without any deduction or abatement other than is therein "allowed." By reason of section 29 of the Finance Act, 1926, the computation directed by the latter rule must be made in respect of the year preceding the year of assessment and not on a three years' average.

At first sight it would seem that the requirements of these provisions are satisfied. As regards Case IV, the respondent undoubtedly received in the United Kingdom the sums paid to him as the price of the cheques and in each case, by virtue of the contract under which he received the sum, the amount of accrued income held by him in New York was diminished by a corresponding amount. And as regards Case V again he undoubtedly received such sums and they would appear to be money arising from property not imported, that is, his accrued income in New York which he assigned in order to get these sums. But obviously this case cannot be disposed of as easily as that. There is a wealth of authority about these provisions, and on the strength of that authority the commissioners, Wynn-Parry J. and the majority of the Court of Appeal all held that the facts of this case do not satisfy the statutory provisions.

The main ground of judgment in each case was that the sums paid to the respondent had not been brought into the United Kingdom, and that there is nothing to show that any money was ever brought into the United Kingdom in connection with these transactions. That is quite true. But there is nothing in Case IV requiring that money should be brought into the United Kingdom, and this requirement is only attached to one head of Case V which does not apply to the present case. The views of these learned judges do, however, receive much support from a number of authorities if statements made in them are really of general application.

Before considering these authorities I think it well to see what the effect would be if this view were right. I take a case which no one has ever even suggested would not be within the scope of these provisions—the case of a bank acting as a collecting agent. If a customer hands to an English bank for collection a cheque drawn on a foreign bank, the English bank will send the cheque abroad for collection and, when notified that the money has been collected, it will give to the customer in this country the equivalent in sterling at the current rate of exchange. If all the money held by the foreign bank was accrued income of the customer no one would doubt that he must pay income tax on the sum which he receives in this country. But it does not in the least follow that any money will have been remitted from the foreign country or brought into the United Kingdom in connection with the transaction. If when the cheque was handed to it for collection the bank required to send say £100,000 abroad either physically by exporting cash or bullion, or by buying here a right to receive that sum in that country, the cheque when collected would provide say £10,000 worth of the foreign currency which the bank wants and now the bank would only have to send out £90,000. So collecting the cheque abroad and giving the customer sterling here would not involve bringing anything at all into the United Kingdom: it would only involve less being sent out than would otherwise have been necessary. But it would be quite absurd to suggest that the customer escapes paying income tax merely because of the accident that, in his particular case, collecting his cheque did not involve anything being brought into the United Kingdom.

With such a case in mind I turn to the authorities. The first which I need consider is *Gresham Life Assurance Society* v. *Bishop.*[1] There no sum had in fact been received by the society in the United Kingdom. The argument for the Crown was that "received in the United Kingdom" is not confined to physical receipt, and that it was enough that the society's foreign income had been used to pay foreign debts which would otherwise have had to be paid out of money here. No one appears to have had in mind a case where a sum was in fact received in this country although nothing had been brought into this country: it seems to have been assumed that if a sum being or representing foreign income is received in this country it must have been brought in, but any such assumption was quite unnecessary for the decision at which this House arrived. It is true that Lord Macnaghten said[2]: "I do not understand what is meant by constructive "receipt in such a case as this, or how any sums can be said to "have been received in the United Kingdom unless they have "been brought to the United Kingdom, or unless there has been "a remittance 'payable in the United Kingdom.'" But I cannot infer from that that, if a method had been pointed out to him by which a sum of income could be received in the United Kingdom without anything being brought in, he would have held that the sum so received was not taxable. I think that the same applies to the other noble and learned Lords whose speeches are reported. The subsequent application of what was said in the *Gresham* case [3] seems to me a good example of the danger of applying judicial pronouncements literally to situations which cannot have been in mind when they were made.

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[1] [1902] A.C. 287; 18 T.L.R. 626; 4 T.C. 464.

[2] [1902] A.C. 287, 292.

Then in *Scottish Widows' Fund Life Assurance Society* v. *Farmer* [4] Lord Dunedin, the Lord President, said that the word in the statute "is 'receipt' and nothing less than actual receipt "will do. Now, actual receipt of money, it seems to me, can "only be effected in one of two ways. Either the money itself "must be brought over in specie, or the money must be sent in "the form which, according to the ordinary usages of commerce, "is one of the known forms of remittance." I would agree that there was no remittance in the present case because the whole of the money in New York was still there at and after the time when the respondent received the price of the cheques here. But again the point in the *Scottish Widows'* case [5] was that no money was in fact received here, and Lord Dunedin's statement that there were only two ways was obiter. A third way has now appeared.

In *Foulsham* v. *Pickles* [6] the point decided by this House was that the sums received were not income from a foreign possession. What the respondent founds on is a passage from the speech of Viscount Cave L.C. in which he said [7] that the sum there in question was not a remittance, and that the other branches of rule 2 of Case V "all refer to property, money or value imported "or brought into the United Kingdom, and there are no words in "the rule which can comprise money arising and payable here." There was no question in that case of the sum received here being or representing foreign income, and again I do not think that Viscount Cave's words should be applied literally to a case so far removed as the present from the case which he was then considering.

Many other cases were cited which contain statements similar to those which I have quoted, but I do not think it would be useful to multiply citations. In all except two the facts were far removed from the facts of this case; there was no question of a sum being actually received by the taxpayer in this country with a corresponding diminution of the amount of the taxpayer's accrued income abroad. There are several cases where a sum derived from the taxpayer's income was received in this country by someone other than the taxpayer himself. I see no reason to doubt these decisions, but they do not appear to me to help in the present case because, in this case, the sums in question were actually received by the taxpayer himself.

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[3] [1902] A.C. 287.

[4] (1909) 5 T.C. 502, 508.

[5] 5 T.C. 502.

[6] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 285.

[7] [1925] A.C. 458, 464.

The two cases which I must deal with are *Hall* v. *Marians* (*No. 2*)[8] and *Inland Revenue Commissioners* v. *Gordon.*[9] The latter is a decision of this House. In it an arrangement was made whereby the taxpayer did receive money in this country with a consequential reduction of the amount of his accrued income in Ceylon. He borrowed money in this country from a bank and arranged that the bank should be repaid in Ceylon. *Hall's* case[10] was somewhat similar. These cases would have caused me considerable difficulty were it not for the fact that by reason of the provisions of the Finance Act, 1953, s. 24, they are no longer good law. They do not add much to the general statements in the earlier authorities but they do apply those statements to facts which, though distinguishable, are not very far removed from the facts of the present case. The fact that the decisions are no longer valid in my view diminishes the authority of the rationes decidendi, but if I had been sitting in a lower court I would have hesitated before reaching the decision which I think I ought now to take. First, I return to the case of a banker collecting a cheque for a customer but bringing nothing into this country.

A survey of the authorities has satisfied me that they contain nothing which precludes me from holding that in every case where a customer employs a banker to collect, by means of his foreign cheque, money abroad which is part of his income, the sum which the customer receives in this country is a "sum "received" within the meaning of Cases IV and V, and that it is immaterial that no money was in fact brought into this country in the course of or in connection with the transaction. Indeed, I think it most improbable that any of those learned judges whose judgments have been cited by the respondent would have disagreed with that view. From the point of view of the taxpayer his income has been brought into the United Kingdom. He had, but no longer has, money in a bank abroad; he now has an equivalent amount of money in his hands in this country. How that was achieved is no concern of his, and I cannot read the statutory provisions as making his liability to tax depend on the method which his banker employed.

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[8] (1935) 19 T.C. 582.

[9] [1952] A.C. 552; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 234.

[10] 19 T.C. 582.

Then I turn to see in what respect the transactions in this case differ from the case of a banker collecting a cheque for a customer. If in this case the respondent had handed each of these cheques to his bank for collection instead of selling it to the bank, everything might and probably would have happened in just the same way with one exception: the respondent would in each case have received his money in London a day or two later. For the respondent this is said to make all the difference between liability and non-liability to tax; where the bank collects the cheque the amount of his income in the New York bank is diminished before he gets his money here and so what he gets here can be regarded as being part of his income; but in the present case the whole of his accrued income was still in New York when he received the price of the cheque here, so what he got here cannot be part of his income. The flaw in this argument is in regarding the sum at his credit in New York as being still truly at his disposal during the interval between his selling the cheque here and the cheque being presented for payment in New York. By selling his cheque here he assigned his right to the money in New York. It is true that he could have defeated this assignment by stopping payment of the cheque or drawing the money out of his New York bank before the cheque which he had sold had been presented for payment. But this would have been dishonest and would have entitled the English bank to recourse against him. So I see no difficulty in regarding the sums which the respondent received in London as being received in place of corresponding sums at his credit in New York which then ceased to be at his disposal.

That is sufficient to satisfy Case IV. Case V requires further consideration; under it not only must a sum be received, it must be received in one of the four ways specified in the rule. These four ways seem to comprehend all possible methods, but if a case should ever happen in which a sum is received, but not in one of these fours ways, then Case V would not apply: to that extent it is narrower in scope than Case IV. I do not think that the first, second or fourth heads apply in the present case but, in my opinion, the third does apply—"money or value arising from "property not imported." The money arising is the price of the cheques received here by the respondent, and it arose from the respondent's property in New York—his right to the sums at his credit there which he assigned by means of the cheques.

But it was argued both on authority and on the construction of the rule itself that we must read into this third head a requirement that the "money or value" must itself have been imported or brought into the United Kingdom. With regard to authority, I think that the same considerations apply as those which I have set out in dealing with the more general question whether all "sums received" within the meaning of Cases IV and V must be brought into the United Kingdom. On the construction of the statute I would say that the words sought to be read in are not there, and they are not necessary to make the provision workable: on the contrary, if they were read in, the third head would add nothing to the other three and there would be created an obvious opportunity for avoidance of tax. The history of Case V is set out by Pearce L.J. in his judgment in this case.[11] It goes back to 1803 and is said to have been introduced to deal with profits from plantations in the West Indies. Originally it did not contain what is now the fourth head. It appears to have been based on the view that there were three ways in which an owner could enjoy his profits in this country: by a remittance of money from the colony, by bringing, say, his sugar to this country and selling it here, or by selling the sugar here for delivery in the colony and receiving the price here. If it were right to insert the words now sought to be read in, the latter method would never have been caught by the provisions of Case V, and there would always have been a rather obvious method of avoiding liability to tax.

The difficulty has been created by the addition of the fourth head which, I think, goes back to 1805. It deals with money or value received on credit or on account in respect of anything covered by the first three heads, and it is governed by the words "brought into the United Kingdom." It would be anomalous, so it is said, that these words should apply where money is received on credit or account in respect of, say, sugar sold for delivery in the colony but not to the actual proceeds of the sale. I cannot help suspecting that the original draftsman of this fourth head did not fully understand the scope of the other three heads, and if I have to choose between holding that there is this anomaly and holding that the words "brought into the United Kingdom" must be read into the third head, I feel bound to hold that the existence of this anomaly is not a sufficient reason for reading those words into the third head. I am, therefore, of opinion that the provisions of Case V do apply to this case. Accordingly, I would allow this appeal.

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[11] [1959] Ch. 464, 519, 520, 521; [1959] 2 W.L.R. 577; [1959] 1 All E.R. 660.

LORD RADCLIFFE. My Lords, I do not need to travel again over the facts of this case which have been stated already. It is a straightforward story of a resident of this country selling dollars in his bank account in New York in exchange for sterling which the bankers in London were ready to provide. The American bank account was fed only by the receipt of income arising from his American securities or possessions. I should say that in the plain meaning of language the sterling credits were sums received by him in this country out of his American income, which had pro tanto been used to acquire them, and that in this sense he had "brought over" his American income to the United Kingdom. That being so, the sums so received are, in my opinion, properly computed in assessing his tax under Case IV and Case V to Schedule D.

What has puzzled me throughout is to see how or why the banking transactions for effecting the remittance of his money from America to which the respondent resorted should be regarded as insufficient to constitute the sterling proceeds received as assessable sums for the purpose of these two cases. He did not, of course, invest his American income in bullion or commodities to be shipped over here and sold or in United States dollar bills for similar realisation: but then nobody says or supposes that assessability is confined to such transactions. Nor did he instruct his bankers or agents to use his dollar income in buying a bill on London which could have been discounted or presented here for payment. These would have been possible methods of "bringing" the money here, and, no doubt, have all been resorted to in their time. But what he did do seems to me to have been in all essentials a similar transaction and to have amounted just as much to a "bringing" in the relevant sense. He wrote out his cheques on his New York bankers directing them to hand over his dollars to or to the order of his United Kingdom purchasers and these purchasers in return acknowledged a sterling debt to him calculated at the current rate of exchange between New York and London. He parted with his dollars: he got his sterling. He emptied one pocket of dollars in order to fill another pocket with sterling. It is true that the cheques in question were written out and signed in London and, if you please, sold here, so that the instruments themselves did not cross the Atlantic until he had made this sale and even then only in the outward direction; but what importance can there be in the actual place of making the instrument or in its physical movements if the direct result of the mechanism employed was to turn the taxpayer's income in one country into money or value in the other country to which he had decided to transfer it?

Yet up to now three courts in succession have rejected the idea of the respondent being assessable in respect of these sterling sums and it is evident to me, when I study the language of the judgments given, that they all proceed on the basis that the "bringing in" which they regard as necessary to liability involves some operation that was lacking from the transactions that were here carried out. Thus the Special Commissioners (stated case, paragraph 7) rest their conclusion on the view that "no remit- "tances of American income had been brought into the United "Kingdom." I do not know whether that is supposed to be a finding of fact or a conclusion of law: the latter, I think. In either event the conclusion or finding shirks the test of liability propounded by the statute. Wynn-Parry J., in the High Court, founds himself upon the proposition that [12] "in order for Case "V to operate the dollars in question in this case must be shown "to have been brought into the United Kingdom" and dismisses the appeal of the Revenue on the ground that [13] "no dollars "representing the income of the respondent were, over the "material period, brought into the United Kingdom." In the same way, Jenkins L.J.[14] makes it his determining point that it was no part of the bargain when the respondent sold his cheques that the dollars taken over by the purchasers "should be brought "into the United Kingdom" and there is no evidence that they were so brought. The sterling credits he received "lacked the "essential character of a sum brought to the United Kingdom "from New York" [15]; and Romer L.J. proceeds upon just the same line of reasoning. He even commits himself to what is to me the startling statement that—"There is no reason to sup- "pose that Mr. Moyse ever intended that his American income "should be transmitted to him in this country at any time. . . ." [16]

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[12] [1959] Ch. 464, 477; [1958] 1 W.L.R. 1063; [1958] 3 All E.R. 225.

[13] [1959] Ch. 464, 478.

[14] Ibid. 489.

[15] Ibid. 490.

[16] Ibid. 506.

It is evident, therefore, that the judgments below have proceeded according to some conception of the meaning of these words "bringing in" which is altogether different from that which I attribute to them. As I have indicated, I am clearly of opinion that this conception is a mistaken one and served only to obscure the significance of the true statutory test, whether income arising abroad has or has not been received as sums of money in the United Kingdom. Out of respect for the contrary view I would gladly offer my comments upon it in detail, but I am in the difficulty that I have not found it possible to discover from the expressions employed what it is that is regarded as missing from the transactions under review that so prevents them being treated as remittances of foreign income. I must, therefore, confine myself to one or two observations which will, I hope, at least make clear what is my own reading of the words of the statute.

The second rules under Case IV and Case V are concerned with the turning of income which has arisen in one country into the expendable resources of its owner in another. To effect that the owner parts with the resources that represent his income in the country of origin in order to obtain in exchange resources in the country where he desires to spend them. He would spend his dollars, let us say, that is his right to be paid dollars by his bank in New York, in order to obtain through a bill payable, let us say, in London or a bank credit in London the right to sterling, that is the right to be paid sterling by his London debtor. The thing that he would not do in order to "bring" his American money into this country would be to bring his dollars here. In fact that is just the reverse of what he would or could do: firstly, because he has to part with the dollars to acquire the sterling, and secondly because, that apart, there is, generally speaking, no use for dollars in the United Kingdom, except in the very limited sense that dollars bills could be sold here for sterling to those who might wish to hold them as reserve or take them back to spend in the United States. It is plain, therefore, that the "bringing in" of a person's income in this context means nothing more than the effecting of its transmission from one country to the other by whatever means the agencies of commerce or finance may make available for that purpose. If that transmission takes place, it is neither here nor there to ask whether anything, items of property or instrument of transfer, has actually been brought into the country or not.

No more is it relevant to know what has happened to the taxpayer's money in the country where the income arises. Ex hypothesi he has transferred it, in this case the dollar credit, to the purchaser who is to provide him with sterling. What use the purchaser may make of the dollars has no bearing on the question whether the taxpayer has received sums of sterling through remittance of his American income. Subject to exchange control regulations, with which I do not deal, the purchaser may retain the dollar credit undrawn upon or he may draw upon it for expenditure in America: or he may, as was done here, transfer it against sterling to the Bank of England or an authorised purchaser of dollars. None of that is of any relevance to the present issue.

I appreciate, of course, that the views expressed by Wynn-Parry J. and the Court of Appeal were regarded by them as founded both upon the wording of Cases IV and V and upon what has been said in earlier judicial decisions dealing with other points arising under these two Cases. My opinion is that neither the words of the Income Tax Act nor these earlier decisions, properly understood, do support these views. But I have no right to dispose of the matter quite as summarily as that.

To take the Act first. There is nothing in Case IV about bringing anything in. When rule 2 is invoked, the computation in respect of income from foreign securities depends simply on the question what is the amount of sums which have been or will be received in the United Kingdom in the year of assessment. No doubt proper construction of those words requires that the sums computable must be sums " of " the income, by which I would understand " sums of money derived from the application " of the income to achieving the necessary transfer." But that is all. If sterling sums are received and are so attributable, that is enough for liability.

Case V is, in my view, similarly conceived. The formula for liability under its rule 2 is the same, the full amount of the actual sums (of the income) received in the United Kingdom. Since there seems to be no good reason for applying a different standard to income from foreign possessions from that applied to income from foreign securities, it would be strange if there were in fact a different formula. It is true that the rule then goes on to list a number of sources from which the sums to be computed may have been received; and this additional wording has, I think, been the origin of some of the mystification which has crept into this branch of the law. There has been a tendency to treat these several instances of the way in which income may be remitted as if they were limiting the generality of the phrase "actual sums "received in the United Kingdom" and it may be said in defence of such a reading that the strict grammar of the sentence does so suggest. In my view, however, it would be wrong to give any weight to this; for I cannot think that it was ever the intention of the legislature to say in effect that whereas under Case IV all sums of foreign income were to be computable, if received in the United Kingdom, under Case V only those sums of income received were to be computable which were attributable to the specified operations or sources. There could be no reason for such a distinction. I think, therefore, that these four sub-heads, as they have been called, should be treated as illustrations, no doubt intended to form a comprehensive list of illustrations, of the way in which, when foreign income is transmitted to this country, the transmission can be effected and the sterling sums obtained. These sub-heads, which are not all very clearly phrased, should accordingly be construed according to their general sense and without too much nicety of language. For instance, "remittances payable in the United Kingdom" is a phrase capable of applying to the instrument employed to effect the transfer, to the credit arising from the transfer and, I think, to the whole operation of remitting money to be paid here. I draw attention to this because one or two of our authorities have treated these and other words with more semantic scruple than is appropriate to the context: and from that have come some of our present troubles. The point is of no practical significance in the case now under review, since even if the respondent's sterling credit was not a sum received from remittances payable in the United Kingdom, as I think that it probably was, it was certainly money or value arising from property not imported, that is the dollar credit in New York which he sold.

I have searched the authorities on the meaning of the two Cases to see whether they invite us or require us to take a different view. If it is not disrespectful to say so, I cannot see what influence, apart from a few sentences which need mention, they are supposed to have on what is now before us. For instance, reliance has been placed upon the well-known decision of this House in *Gresham Life Assurance Society* v. *Bishop*[17] which settled that a taxpayer did not receive sums of money here from his foreign income merely by taking that income into account in his yearly statement of profits. Well, of course, he did not.

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[17] [1902] A.C. 287.

Drawing up an account of your income does not in itself involve any operation of transmitting money at all nor was the taxpayer, as in *Scottish Mortgage Co. of New Mexico* v. *McKelvie*[18] under what was treated as a statutory prohibition of denying that in fact he had transmitted money. The House pointed out that there was no such thing as a constructive receipt for this purpose. But then there is nothing constructive about the respondent's receipt of his sterling sums in the present case. There they were to his credit in his London bank. It is said, as if it had a bearing on our decision, that those sterling sums arose within the United Kingdom from a sale made here. In that limited sense, I have no doubt that they did. But what has that to do with liability? If, having foreign income, I invest it in property, import the property, and then sell it here, the sterling proceeds arise in the United Kingdom from a sale made here: yet the proceeds are certainly computable, see, for instance, *Scottish Provident Institution* v. *Farmer.*[19]

There is the case of *Paget* v. *Inland Revenue Commissioners*[20] the circumstances of which were that, interest payments on certain foreign bonds being in default, the taxpayer sold her coupons in this country and received the proceeds here. What she sold was not a right to take over any existing credit—she had never had her income—but "the right to receive such income in the "future" as well as the right to get what could be got from the defaulting debtors. There was in fact no income to transmit. The decision was that the sum so received by her was not her income at all for the purposes of the Income Tax Acts. I do not see what light that can throw upon the present case. Equally, I find nothing of assistance in either of the cases *Timpson's Executors* v. *Yerbury*[21] and *Carter* v. *Sharon*[22] which were deployed before us, counsel on each side finding in them comfort and support. Nor, I think, did the two members of the Court of Appeal who were in favour of the respondent. In both cases ordinary means of transmitting money from one country to another had been employed. That was not in dispute. What was in issue was whether what was received in this country had been received by the taxpayer at any stage. The decisions turned on the rules of English law as to the effectuating of voluntary dispositions of property.

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[18] 2 T.C. 165.

[19] 1912 S.C. 452; 6 T.C. 34.

[20] [1938] 2 K.B. 25; 54 T.L.R. 404; [1938] 1 All E.R. 392; 21 T.C. 677.

[21] [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155.

[22] (1936) 20 T.C. 229; [1936] 1 All E.R. 720.

Then there is *Foulsham* v. *Pickles.*[23] This again was a case, like the *Gresham Life Assurance Society* case,[24] in which no operations at all had taken place for transferring income; the income in question, the respondent's salary, had been paid into his bank account in the United Kingdom and remained there. All that was in dispute was whether it arose from a foreign possession, an oversea employment, so as to justify the assessment that had been made under Case V. What was decided was that the source of the income was not a foreign possession. That does not help us. The only difficulty is caused by some words used by Viscount Cave L.C. in his speech [25] in which he sets out his version of the language of Case V, rule 2, and says, no doubt correctly, that the word "remittances" refers to money remitted into the United Kingdom from outside. He then adds [26]: "The "other branches of the rule all refer to property, money or value "imported or brought into the United Kingdom, and there are "no words in the rule which can comprise money arising and "payable here. If so, the inference is that money so arising "and payable is outside the rule, and so is not taxable under "Case V at all."

I can attach no value to this passage as an attempted interpretation of rule 2 of Case V, and I have not been able to satisfy myself whether it has any intelligible meaning. It is not an accurate recital of the language of the various "branches": and if it really means that "money arising and payable here" cannot in any circumstances constitute a receipt under the rule it is contrary to the obvious meaning of, for instance, the second branch itself, and, for that matter, to the decision in *Scottish Provident Institution* v. *Farmer.*[27] The passage is not in any way relevant to the decision that the source of income was not a foreign possession and is not of any authority. For myself I think that all that Viscount Cave intended to say was that if money arises in the United Kingdom as the original form of someone's income, as Mr. Pickles had, so that there is never at any time any foreign income that can go through the process of transmission, there is nothing to which rule 2 of Case V can apply. I agree with that.

That leaves the two cases under the fourth "branch," *Hall* v. *Marians (No. 2)* [28] and *Inland Revenue Commissioners* v.

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[23] [1925] A.C. 458.

[24] [1902] A.C. 287.

[25] [1925] A.C. 458, 464.

[26] Ibid.

[27] 1912 S.C. 452; 6 T.C. 34.

[28] 19 T.C. 582.

Gordon.[29] They were cases of peculiar difficulty, depending on the relationship between loans made in this country and the foreign income out of which they were ultimately paid off. In essence the decisions adopted the view that you could, as it were, take the debt over to the income instead of bringing the income to the debt. Whether that is the right way to treat the facts when the creditor is a bank with London and overseas branches is not now of any importance, since the legislature has intervened after the *Gordon* case[30] to reverse the consequences of that decision and to bring such operations within rule 2 of Case V for the future. It would be a mistake in those circumstances to build any principles upon the basis of those two decisions. The courts' reasoning was, I think, conditioned by the findings of fact made by the special commissioners, and I can only say that in the *Gordon* case[31] I should have found it very difficult to treat the finding of fact as one which ought to be accepted by the court. Nor do I need to say anything about the passage in the speech of my noble and learned friend Lord Cohen[32] which has been quoted in the judgments below.[33] It was obiter and plainly formed no part of the decision of the House. It was probably an echo of what Lord Cave has said in *Foulsham* v. *Pickles*[34] and, as expressed, I would not be ready to agree with it, but, like other passages on this subject, the meaning remains uncertain until it is expanded to show in what sense those ambiguous words "brought or to be brought into the United "Kingdom" are meant to be taken.

In the result I see no difference in this case between the sterling credit which the respondent received against the cheque drawn by the United States Treasury on its dollar account, which is admitted to be computable, and the sterling credits which he received against the dollar cheque drawn by him on his own account.

I would allow the appeal.

LORD COHEN. My Lords, I agree that this appeal should be allowed for the reasons given by my noble and learned friend, Lord Radcliffe. I only desire to add a few words since the decision in the court below was based in part at least on an obiter dictum of mine in *Inland Revenue Commissioners* v. *Gordon.*[35]

[29] [1952] A.C. 552.

[30] Ibid.

[31] Ibid.

[32] Ibid. 564.

[33] [1959] Ch. 464, 477, 478, 500, 506, 507.

[34] [1925] A.C. 458, 464.

[35] [1952] A.C. 552.

The facts in that case were very different from those now before your Lordships. In that case, the taxpayer had obtained loans by way of overdraft from the head office in London of the National Bank of India Ltd. He had also an account with the Colombo branch of the bank which was fed in part by transfers of business profits from the accounts of a firm carrying on business in Ceylon in which the taxpayer was senior partner. The taxpayer never gave any security for the loans, and no part of the rupee balance to the credit of his account in Ceylon was ever remitted to London, but by arrangement with the head office in London the overdraft was transferred to Colombo whenever it reached £500. It was there converted into rupees and satisfied by periodic payments into his Colombo account from the respondent's firm. There was no doubt that those periodic payments represented income from possessions of the taxpayer out of the United Kingdom within Case V of Schedule D, and the Commissioners of Inland Revenue contended that the arrangement with the head office of the bank constituted a remittance of money to this country from Colombo within rule 2 of the rules applicable to Case V. This argument was rejected by the special commissioners and their decision was affirmed by the First Division of the Court of Session and by your Lordships' House. The ground of your Lordships' decision is, I think, clear from the penultimate paragraph of my speech on that occasion.[36] This paragraph was accepted as correct by the other noble and learned Lords then present and reads as follows:

"Applying this citation to the present case, it is attractive to "suggest that, as the respondent obtained and spent these loans "in London and was, so far as the evidence goes, able to discharge them only from moneys in Ceylon, part at any rate of "which was income, and as the loan was in fact discharged, "the money he received in England must have been received at "least in part from remittances of income from Ceylon. Attractive though this may be, it seems to me quite impossible to bring "what happened within the compass of the rule. It is plain that "the income receipts of the respondent were all received in "Ceylon. It is plain that the moneys he received in London "were advances of capital. There is no finding that those "advances were made on credit or on account in respect of "income in Ceylon which it was intended should be brought to "London. On the contrary, the parties expressly agreed that the

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[36] [1952] A.C. 552, 570.

"debt should be discharged in Ceylon, it was so discharged and "there is no evidence that the rupees which the bank received "in Ceylon were ever remitted to London."

In the course of my speech[37] I had set out the four specified sources from which the sums received in the United Kingdom must have been received to bring rule 2 of the rules applicable to Case V of Schedule D into operation. The third of these sources was "money or value arising from property not imported." In relation to an argument that the sums sought to be charged fell within that source, I said[38]: "I incline, therefore, to the view "that to succeed under the rule in respect of sums received from "the third source the Crown must establish that the money or "value had been brought or was to be brought into the United "Kingdom."

My noble and learned friend Lord Normand concurred in this dictum,[39] but the other noble and learned Lords reserved the point for consideration if and when it should arise.[40]

The actual decision in *Gordon's* case[41] is now of no importance, since the law was amended by the Finance Act, 1953, s. 24, but the dictum for which I was responsible was relied on by Wynn-Parry J., and by the majority of the Court of Appeal in the case now before your Lordships.

My Lords, I do not think the dictum does justify their conclusion. Mr. Bucher, for the respondent, relied on it as supporting the view that a sum of money must actually be brought into this country from abroad, and that as, in the present case, no dollars and no equivalent of dollars were brought into this country, the appellant must fail. I do not think the dictum justifies this conclusion. If it does it must be wrong, for it would ignore the ordinary commercial practice prevailing among business men. I think that the basis of the decision in *Gordon's* case[42] was that in that case the money or value received in England was a receipt on capital account, and that there was no nexus between it and the income receipt in Ceylon. In the present case, on the contrary, the true view of the transactions may, in my opinion, be summarised as follows:

1. The respondent received income in New York from his father's estate and from his mother's estate. This was income arising from securities out of the United Kingdom within Case IV

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[37] [1952] A.C. 552, 563.
[38] Ibid. 564.
[39] Ibid. 560.
[40] Ibid. 560, 562.
[41] [1952] A.C. 552.
[42] Ibid.

or, as the case might be, income from possessions out of the United Kingdom within Case V.

2. This income was paid into the respondent's bank account in New York. The balance to the credit of that account was property outside the United Kingdom.

3. When the respondent drew a cheque on that account and sold it for sterling to Seligmans or the Midland Bank, the sterling credited to his account was money or value in the United Kingdom arising from the property in the New York bank account and, accordingly, the appellant is entitled to tax on the full amount of it. So far as Case V is concerned, the liability arises because the sterling is, as I have said, money or value arising from property not imported. Under Case IV the sterling is a sum of income which was received by the respondent in the United Kingdom in the relevant year of assessment and it arose from securities out of the United Kingdom.

If there is anything in my dictum in *Gordon's* case[43] which conflicts with the above summary of the position in the present case, I can only express the hope that the dictum will receive from your Lordships as sudden a death as was given to the decision in *Gordon's* case[44] by section 24 of the Finance Act, 1953.

LORD DENNING. My Lords, the question in this case is what tax is payable by Mr. Moyse on his New York income. He lives in England but is domiciled in the United States. At all material times he was entitled to an income in the United States of some $17,000 a year. It was credited to his account at the Wall Street branch of the Bank of New York. Some of this income (about $7,000) arose from " securities " in the United States. The rest (about $10,000) from " possessions " in the United States. He is not liable to pay income tax here on this income except in so far as it is " received " in the United Kingdom. The United Kingdom tax payable by him is chargeable under two Cases of Schedule D: (1) In so far as the income arose from " securities," it is to be computed on the full amount of " the sums which have " been or will be received in the United Kingdom," see Case IV, rule 2; and (2) in so far as the income arose from " possessions," it is to be computed on the full amount of " the actual sums " annually received in the United Kingdom " from certain sources, see Case V, rules 2 and 3.

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[43] [1952] A.C. 552.

[44] Ibid.

Let me first consider the tax chargeable under Case IV. Clearly tax is only to be computed on the sums received in England. These sums must be directly referable to Mr. Moyse's New York income, in this sense, that they must come out of his New York income or be deductible from it or be traceable to it, so that, in the end, his New York income is seen to be the provider of the sums received in England. If Mr. Moyse receives the sums out of that income in England himself, he must, of course, pay tax on those sums. But he need not receive them himself. It is sufficient if the sums are received in England by some third person by his authority. Thus, if Mr. Moyse, instead of receiving the money himself, tells his New York banker to send a remittance direct to his butcher or baker or candlestick-maker in England, he is chargeable with tax on it: for the simple reason that he was " entitled " to the income which has been used to pay the debt, and he must pay tax on it when it is received in England, no matter by whom it is received, so long as it is received by his authority, see rule 1 of the Miscellaneous Rules applicable to Schedule D and *Timpson's Executors* v. *Yerbury*.[45] Nor is it necessary that Mr. Moyse or the third party should receive the sums in coins or dollar notes or treasury notes. It is sufficient if he or the third party receives the sums in England in any of the other forms of money recognised by commercial men, such as bills of exchange, cheques, promissory notes or cash at bank, see *Gresham Life Assurance Society* v. *Bishop*[46] by Lord Lindley. Thus if Mr. Moyse, whilst in New York, draws a cheque in dollars on his New York bank in favour of his butcher or baker or candlestick-maker in England, and brings the cheque over himself—or sends it over by post—and hands it to the tradesman in payment of the debt, then Mr. Moyse is chargeable with tax on it. So much is conceded. But the reason is not because Mr. Moyse brought the cheque over from New York, or posted it in New York. It is because the tradesman received it here in payment of his account on the authority of Mr. Moyse himself. The position would be just the same if Mr. Moyse, with Treasury permission, wrote out the same cheque in England and handed it over himself to the tradesman here. For the dollar cheque itself would be a " sum received " in England by the tradesman on the authority of Mr. Moyse: and as it was payable out of his New York income, Mr. Moyse is chargeable with tax on it.

My Lords, I have just said that the dollar cheque itself would be a "sum received" in England by the tradesman: and this is, I think, a cardinal point in the case. It is immaterial how the tradesman cashes the cheque. He may, with Treasury permission, cash the cheque in the United States and keep the dollars there: or he may sell the cheque to an authorised dealer in England and receive the proceeds in sterling: or the cheque may be stolen from him and cashed by a wrongdoer: in which case he may sue the wrongdoer in conversion. None of that concerns the man who pays by cheque: for he has got the goods and paid his debt. True it is that the payment is conditional on the cheque being met but that is only a condition subsequent. If the cheque is met, it ranks as an actual payment from the time it was given and not a conditional one. If the cheque is not met, the tradesman can have recourse to the debtor, because then there has been no payment. But subject to it being defeated by that condition subsequent, the payment is complete at the time when and the place where the cheque is accepted by the creditor.

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[45] [1936] 1 K.B. 645.

[46] [1902] A.C. 287, 296.

Now how does this all apply in the present case? The commissioners were, of course, quite right in holding that "neither "Seligman Bros. nor the Midland Bank Limited were acting as "a collecting agent on the respondent's behalf but in every case "acted as a principal." A bank acts as a collecting agent when a customer hands to the bank a cheque payable to him (the customer) and asks the bank to collect the amount and credit it to his account when received. But the cheques in this case were not made payable *to* the customer. In every case a cheque was drawn *by* the customer, Mr. Moyse, and made payable to the bank itself, Seligman Bros. or the Midland Bank Ltd., as the case may be: and the customer received sterling in exchange for it. In short the customer, Mr. Moyse, bought sterling from the bank and paid for it by a dollar cheque. It is just the same as if Mr. Moyse, instead of buying sterling, had bought anything in England, a diamond or whatever else you please, and paid for it, with Treasury permission, by a dollar cheque on his New York bank account. The bank which sold sterling was in no different position than a tradesman who sells goods. It received payment by dollar cheque. The cheques were "sums received" in England by the bank with the authority of Mr. Moyse: and, as they were payable out of his New York income, they must be brought into the computation of tax.

There is another way of reaching the same result. Instead of saying that the dollar cheque was the sum received, it can be said that the sterling which Mr. Moyse received from the bank was a "sum received" by him in the United Kingdom. And he used his New York income to produce that sum: for it was only received by means of a cheque which depleted his New York income by a corresponding amount. So it was directly referable to his New York income and must be brought into the computation of tax accordingly. But I prefer to regard the dollar cheque received by the bank as the "sum received." If Mr. Moyse gave the dollar cheque to a relative here as a gift, it would come into the computation of tax, even though he himself got nothing in return. So it is not the receipt of the sterling which is the crucial thing, but the receipt of the dollar cheque.

Let me next consider the tax chargeable under Case V. It is plain that here, as under Case IV, the tax is to be computed on such part of the income as consists of "sums . . . received in the United Kingdom." Thus far all I have said about Case IV applies to Case V also. The dollar cheques were received by the banks in England. But in addition under Case V the sums must be received—"(*a*) from remittances payable in the United King-"dom, (*b*) or from property imported, (*c*) or from money or "value arising from property not imported, (*d*) or from money "or value so received on credit or on account in respect of any "such remittances, property, money, or value brought or to be "brought into the United Kingdom."

My Lords, I do not think these four sources render Case V very different from Case IV. The four heads comprehend almost every conceivable way in which the income can be used to produce sums which are received in the United Kingdom. But if a choice has to be made, I put this case under head (*c*). The New York bank account of Mr. Moyse was "property not imported" into the United Kingdom. When Mr. Moyse drew a dollar cheque on that account and used it to pay his English banker, he brought into existence "money or value arising from property "not imported." And when the banker received in England the dollar cheque in payment of his debt, he received a sum from that source. And as he received it by the authority of Mr. Moyse, it is to be brought in computation under Case V.

Mr. Bucher conceded that if the cheques had been drawn by Mr. Moyse in New York and then brought by him into England or sent by post to England, they would have to be brought into computation to tax under Case V: but he said that, as they had been drawn in England and handed over in England, they were outside Case V. He said that the money or value must be brought *into* the United Kingdom. I cannot accept this contention. The money or value must be received in the United Kingdom but it need not be imported here. Thus in the old days, if the owner of a sugar plantation in America sold the sugar to an English buyer for delivery abroad, but received the price in England (as he might well do), he would be chargeable with tax on it, so far as it represented income, under Case V, head (*c*) of the Income Tax Act, 1803. The sugar would not be imported into England. Nor would the money or value be imported into England. But the price would be received here. And that would suffice. And there is no material difference between the wording of the 1803 Act and the 1918 Act on this point. I find myself in full agreement with what Pearce L.J. said on this point.[47]

It all comes back therefore to the question whether these dollar cheques were "sums received" in the United Kingdom. I think they were. They were sums received by the banks on the authority of Mr. Moyse and must therefore be taken into computation for tax under Case IV and Case V.

I need not say much about *Hall* v. *Marians* (*No. 2*)[48] and *Inland Revenue Commissioners* v. *Gordon*.[49] The decisions in those cases have been reversed by Parliament in section 24 of the Finance Act, 1953, and they can no longer be regarded as of binding authority; nor can the reasons on which they were based.

I would therefore allow the appeal and hold that Mr. Moyse is liable to assessment as claimed by the Crown.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Vandercom, Stanton & Co.*

J. A. G.

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[47] [1959] Ch. 464, 519, 521.

[48] 19 T.C. 582.

[49] [1952] A.C. 552.

[HOUSE OF LORDS.]

TOMKINSON AND ANOTHER . . . . . APPELLANTS;
AND
FIRST PENNSYLVANIA BANKING AND TRUST CO. . . . . RESPONDENT.

H. L. (E.)*

1960
March 14, 15, 16, 17, 21, 22, 23;
May 5.

[APPEAL IN *In re* UNITED RAILWAYS OF HAVANA AND REGLA WAREHOUSES LTD.]

Conflict of Laws—Contract—Discharge—Debt payable under contract—Whether discharged.

Conflict of Laws—Chose in action or debt—Discharge.

Conflict of Laws—Contract—Proper law—Lease of movables—Lease entered into "in accordance with the provisions of the laws" of Cuba—Whether conclusive of proper law.

Currency—Contract—Foreign debt—Conversion into sterling—Date for conversion.

Estoppel—Per rem judicatam—Company—Winding up—Summons by liquidators for leave to make interim distribution—Decision that part of proof should be rejected—Subsequent decision that creditors entitled to claim from liquidators on other grounds—Effect of previous decision.

An English court cannot give judgment for the payment of an amount in foreign currency, and for the purpose of litigation in England a debt expressed in a foreign currency must be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable.

The U. Company, a company incorporated in England in 1898, conducted a railway undertaking in Cuba. Prior to 1921 it bought or agreed to buy rolling stock worth $14,000,000 and decided to raise part of that sum in the United States of America under a scheme whereby there should be issued to the public 15-year 7½ per cent. certificates in a trust having as a trustee a trust company, which was a corporation of the Commonwealth of Pennsylvania. In February, 1921, the U. Company caused to be incorporated in the United States a subsidiary company to which on March 25, 1921, it sold the rolling stock. By a lease dated April 18, 1921, and executed in New York, the subsidiary company as lessor leased to the U. Company as lessee the rolling stock for a period of 15 years for a rental payable twice yearly. The rentals payable under the lease were to provide principal and interest reserved by the trust certificates, the principal being payable in Philadelphia, the interest in New York, the lease forming security for those payments.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

H. L. (E.)

1960

UNITED RAILWAYS OF HAVANA AND REGLA WAREHOUSES LTD., *In re.*

By an agreement executed in New York contemporaneously with the lease, the subsidiary company assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated April 27, 1922, the subsidiary company resold the rolling stock to the U. Company "subject to and with the benefit of the lease and "the agreement." From February 14, 1931, the U. Company ceased to pay the instalments due under the lease.

In 1953 the Cuban Government, acting under certain decrees enacted for the purpose, acquired without the concurrence of the respondent as successor trustee to the trust company the management and control of the U. Company's undertaking and assets by way of sale and purchase, including the rolling stock. By agreements dated September 5, 1953, it was provided that the price should be received by the U. Company free from all responsibility with regard to the trust certificates.

On March 4, 1954, the U. Company went into voluntary liquidation and the trustee for the certificate holders lodged a proof, claiming in respect of 333 (meaning 331) certificates "in the hands "of members of the public" and 1867 (meaning 1869) certificates "purchased by the company." The trustee's claim was in the first place based on the covenant for payment of the rentals in the lease, but alternative claims were made based upon allegations that the company had converted the rolling stock by selling and delivering it to the Cuban State, and had committed a breach of a covenant against assignment in the lease. The liquidators rejected the proof.

The liquidators then applied for leave to make an interim distribution in the winding up, and Roxburgh J. on December 4, 1956, held that there was sufficient ground for rejecting the proof in respect of the 1867 certificates, and directed that the remainder of the summons should stand over. There was no appeal from that order.

On the remainder of the summons:—

Held, (1) that the proper law of the lease and the contemporaneous agreement was that of Pennsylvania, since it was with that law that the transaction had its closest and most real connection (post, pp. 1035, 1050, 1068, 1081).

Observations of Viscount Simonds delivering the judgment of the Judicial Committee of the Privy Council in *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201, 219 applied.

Per Lord Radcliffe. I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania which is both the home of the trustee and the place where the capital is to be repaid is clearly the natural choice (post, p. 1058).

(2) That, since according to the law of Pennsylvania, the obligations of the U. Company under the lease were still continuing, the

trustee company was entitled to the outstanding sums due to it under the lease.

But (3) (Lord Morris of Borth-y-Gest dissenting), that by virtue of the order of Roxburgh J., the trustee was only entitled to claim 331/2,200ths parts of the debt properly due to it (post, pp. 1040, 1041, 1055, 1056, 1062, 1067).

Per Lord Morris of Borth-y-Gest. The order of Roxburgh J. never purported to relieve the U. Company of its contractual obligations or to assess them or to deal with them (post, p. 1089).

(4) That the provable sum in dollars was to be converted into sterling at the rates of exchange prevailing at the respective dates when the several sums owing by the U. Company to the trustee fell due and were not paid (post, pp. 1046, 1053, 1059, 1071, 1086).

Ward v. *Kidswin* (1626) Latch 77; *ss. Celia* v. *ss. Volturno* [1921] 2 A.C. 544; 37 T.L.R. 969, H.L., and *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [1943] A.C. 507; [1943] 2 All E.R. 406, P.C. applied.

Decision of the Court of Appeal, sub nom. *In re United Railways of Havana and Regla Warehouses Ltd.* [1960] Ch. 52; [1959] 2 W.L.R. 251; [1959] 1 All E.R. 214 reversed in part.

APPEAL from the Court of Appeal (Jenkins, Romer and Willmer L.JJ.).

This was an appeal from an order of the Court of Appeal, dated December 8, 1958, dismissing an appeal by the appellants from an order made by Wynn-Parry J. in the Chancery Division of the High Court on November 19, 1957, whereby he ordered that the proof of debt dated June 18, 1954, and lodged on behalf of the respondent (then called " The Pennsylvanian Company for Bank- " ing and Trusts ") in the liquidation of the United Railways of Havana and Regla Warehouses Ltd., be admitted for a sum (in the said order referred to as " the provable sum ") to be computed in the manner described in the said order, and that certain inquiries and computations should be made for the purpose of computing the provable sum.

The basic issue in this appeal arose as follows: In 1921 the United Railways of the Havana and Regla Warehouses Ltd. (being the company whose liquidators the appellants were and hereinafter called " the company ") desired to raise money in the United States of America for financing the purchase, in that country, of rolling stock and railway equipment (hereinafter referred to as " rolling stock "), and it did in fact raise $(U.S.) 6,000,000 on the New York market through the issue of 6,000 " equipment trust certificates " of $1,000 each. The repayment of this sum with interest was secured by a financial method known as " the Philadelphia plan " under which the rolling stock was leased to the company at rentals (which the company covenanted to pay) calculated to repay the capital by 1936, and to provide interest at 7½ per cent. per annum, and the lease was thereupon vested in trustees for the certificate holders (in fact the predecessors of the respondent).

After payment of interest up to and including August 14, 1934, and of capital instalments up to and including February 14, 1931, the company defaulted, leaving 11 instalments of capital owing amounting to $2,256,000.

On December 1, 1953, the company, without the concurrence of the respondent as trustee, which still remained the owner of the rolling stock, sold its undertaking in Cuba, including the rolling stock, to the Cuban State for $(U.S.)13,000,000, which was paid to the company in United States Treasury Bills (which were later sold by the company and the proceeds converted into sterling at $2.80 to the £).

The company thereupon, on March 4, 1954, went into a members' voluntary liquidation, being solvent as to creditors, and the respondent as trustee sought to prove against the company in respect of the certificates. The respondent's claim was in the first place based on the covenant for payment of the rentals in the lease, but alternative claims were made based upon allegations that the company had converted the rolling stock by selling and delivering it to the Cuban State, and had committed a breach of a covenant against assignment contained in the lease.

The company set up a number of defences, the most substantial of which was that the lease of the rolling stock, which contained the company's covenant to pay the rentals, was governed by Cuban law, and that under Cuban law a "novation" took place whereby the company's liability under the lease was discharged or transferred to the Cuban State.

The company also relied (again upon the basis that Cuban law applied) upon certain Cuban moratorium laws in order to reduce the respondent's claim.

On both of these matters of Cuban law (assuming that it was applicable) Wynn-Parry J. and the Court of Appeal (unanimously) decided against the company and in favour of the respondent.

The respondent, in addition to contesting the appellants' contentions as to Cuban law, also submitted, in both courts below, that in fact the lease was not governed by Cuban law but by the law of Pennsylvania. If this were the case it was not disputed that there was no novation of the company's debt, and that the moratorium laws did not apply. This contention (which involved consideration of the proper law of the lease) was upheld by Wynn-Parry J. and the Court of Appeal (Willmer L.J. dissenting).

There remained a final contention, raised by the appellants at the trial, which was in effect that, under English law, the respondent's claim should be reduced by converting it from United States dollars into sterling at the rate for the time being applicable to the payments making up the respondent's claim. This contention was also rejected by Wynn-Parry J. and by the majority of the Court of Appeal, Willmer L.J. dissenting on the point.

Prior to February, 1921, the company had purchased in the United States rolling stock and railway equipment at a total price of $(U.S.)14,000,000. In February, 1921, the company caused to be incorporated in the State of Delaware, a wholly-owned subsidiary called Cuban Rolling Stock Company (hereinafter called "the car company"). On March 25, 1921, as part of the arrangements for financing the purchase of this stock the company sold all the rolling stock which it had purchased or agreed to purchase to the car company and transferred the title in it to the car company by bill of sale.

In the early part of 1921 arrangements were completed through a firm of New York brokers for the raising of $6,000,000 on the New York market by the issue of 6,000 equipment trust certificates of $1,000 each to be secured on the rolling stock and equipment, and in due course the net proceeds of the sale of the certificates were paid to the company. The security for the repayment of this loan was effected by two documents executed in New York on April 18, 1921, namely, the lease and a trust agreement.

The parties to the lease were the car company (the then owner of the rolling stock) as lessor and the company as lessee. After a clause by which the lessor leased the stock to the company for 15 years from February 15, 1921, the lease contained the following relevant provisions, which may be summarised as follows:

(1) An unconditional covenant to pay by way of rental to the lessor or its assigns (a) Dividends (i.e., interest) at 7½ per cent. per annum payable in New York half-yearly on February 14 and August 14 in each year. (b) Instalments of principal payable in Philadelphia half-yearly on February 14 and August 14 in each year of $206,000 until February 14, 1931 (20 instalments), and thereafter of $205,000 (10 instalments) making together a total of $6,170,000 which represented the amount of the loan plus a premium. (c) A sum equal to the expenses of the lessor or its

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assigns in enforcing the covenants of the lease, and in the performance of the trust under which the certificates were issued (clause 1).

(2) An option to the lessee to satisfy any instalment of principal by delivering certificates to the trustee for cancellation and further, on any rental date subsequent to August 14, 1931, to pay to the trustee a sum sufficient to redeem all outstanding certificates at par plus a premium of 10 per cent. (clause 1).

(3) Covenants by the lessee to mark the rolling stock with the trustee's name as "owner and lessor," to keep it in repair and insured (clauses 2–4).

(4) A covenant by the lessee not to assign or transfer its rights or interest in the rolling stock without the consent of the lessor (clause 5).

(5) Power for the lessor to retake the rolling stock in default (clause 6).

(6) An agreement that the lessor might forthwith assign its interest to the trustee for the certificate holders, and that when the lessee should have fully paid the rents, the rolling stock should be reassigned to the lessor (sic) (clause 8).

Clauses 11 and 12 were important and were as follows:

"Eleventh. It is the intention of the parties to this lease "to enter into and execute this lease in accordance with the "provisions of the laws of the Republic of Cuba to the end that "this lease may be deposited or filed and/or registered there- "under, and the railway company agrees to so deposit and/or "register or file the same, and to record the same in such State "or territories of the United States as may be required by law, "and to perform any other act required by law that may be "necessary to protect the trustee's title. In case it becomes "necessary that this lease be translated into the Spanish "language in order that it may be filed and/or registered in the "proper offices in the Republic of Cuba, then and in that event "it is understood and agreed that the English text shall govern "in case of any conflict between the English and Spanish texts.

"Twelfth. The parties hereto submit themselves to the juris- "diction of the tribunals of the City of Havana, in the Republic "of Cuba, for all notifications, summonses and other judicial or "extra judicial formalities to which this lease shall give rise, with "express renunciation of their own jurisdiction if different."

The parties to the trust agreement were the car company and the Commercial Trust Company of Philadelphia as trustee, whose successor in title was the present respondent. After reciting the lease and the agreement by the car company to assign its interest in the rolling stock and the lease to the trustee, the trust agreement contained the following relevant provisions, which may be summarised as follows:

(1) The car company assigned to the trustee as trustee for the certificate holders the lease and all the interest of the car company in the rolling stock, and all rentals reserved under the lease (clause 1).

(2) The trustee agreed to deliver certificates to the car company to a total value of $6,000,000 in the form set out (clause 2).

(3) Payment of interest and principal and premium on the certificates was to be made only out of the rentals when paid as provided by the lease (clause 2).

(4) The semi-annual instalments on account of principal were to be applied by the trustee in redeeming certificates at par (plus a premium of 2½ per cent.) by drawings (clause 2).

(5) A covenant by the trustee to apply any rentals under the lease, after payment of expenses and taxes, in payment of interest on the certificates, and then in payment of the certificates when and as retired or purchased for retirement (clause 5).

(6) Power for the trustee in case of default to retake possession of the rolling stock and to sell it, and to apply the proceeds in payment of interest and principal on the certificates, and to pay any surplus to the car company (clause 6).

(7) A provision that if the company made default, and if it were thought "necessary or convenient for the purpose of "enforcing and carrying out all the terms and stipulations of the "lease and of this agreement under the laws and statutes of the "Republic of Cuba"; then under certain stipulated circumstances the trustee was to assign and to hand over to a substituted trustee authorised to act or do business in Cuba (clause 7).

(8) A provision that, on payment of the last instalment and on retirement of the certificates, any surplus money and the rolling stock should be assigned to the car company (clause 10).

Clause 11 and the second sentence of clause 12 were in similar terms to clause 11 of the lease, but the trust agreement contained no submission to the jurisdiction such as that in clause 12 of the lease.

By an agreement dated April 27, 1922 (the resale agreement), and made between the company of the one part and the car company of the other part, the car company resold the rolling stock to the company subject to and with the benefit of the lease and the trust agreement.

The car company was dissolved in 1924.

The result of the transactions referred to above was that the rolling stock became vested in the trustee (ultimately the respondent) as lessor. It was leased to the company which bound itself to pay, by way of rentals, instalments of capital and interest to the trustee. The trustee held the instalments and the interest upon trust for the certificate holders pari passu. The company (as assignee of the car company) had a right to have the rolling stock reassigned to it when it had fully complied with its obligations and (also as assignee of the car company) to have paid to it any surplus money in the hands of the trustee after the certificate holders had been paid. The certificate holders had no direct claim against the company and could only enforce their claim against the trustee to the extent of money actually received by the trustee from the company.

Prior to February 14, 1931, 3,800 certificates to the face value of $3,800,000 had been redeemed pursuant to the trust agreement, but the company failed to pay the instalment of $206,000 which fell due on that day under the terms of the lease, or any of the 10 subsequent instalments of $205,000 which fell due at half-yearly intervals thereafter. The total of the 11 unpaid instalments was $2,256,000. The company continued to pay interest until August 14, 1934, but since that date no interest had been paid. Before the sale of its undertaking in 1953 the company had acquired by purchase, mostly in 1937 under the terms of a compromise of proceedings instituted by the respondent against the company in the State of Maine, a further 1,869 certificates, which, however, were not delivered to the trustee for cancellation. That left a balance of 331 certificates in the hands of the public, which certificates were those in respect of which the trustee desired to prove.

On June 10, 1949, an interventor was appointed by the Cuban State to take over the management of the company's undertaking in Cuba. This did not affect the ownership of the undertaking or of the rolling stock.

To enable the company to carry through a sale of its undertaking, as opportunity offered, a scheme of arrangement was made by which its loan and share capital were reorganised, but this did not affect the claim of the trustee.

By a preliminary agreement dated September 5, 1953, the company, whilst still in default, agreed to sell its railway undertaking (including the rolling stock which was still vested in the respondent) to the Cuban State for the sum of $(U.S.)13,000,000. The preliminary agreement contained the following clause:

"4 (B). The price agreed upon shall be received by 'The "'Uniteds' (the company) and 'The Terminal' (a wholly-owned "subsidiary of the company) free from all responsibility with "respect to liabilities outstanding in Cuba, represented by debts, "obligations and responsibilities arising out of the operations of "the properties which are to be acquired by the State, whether "involving operations prior to June 10, 1949, on which date said "properties passed to the management of the Interventors of the "Government of Cuba, or subsequent to that date."

On the same date a separate confidential agreement (hereinafter called "the Confidential Agreement") was executed by the Cuban State, the National Bank of Cuba and the company, which contained the following provisions:

"First: That among the liabilities in respect of which the "State liberates 'The Uniteds' from all responsibility, in accord"ance with letter B of Clause Fourth of the Preliminary Agree"ment signed on this same date between the same parties, it is "understood to be included the responsibilities that may derive "from the 7½ per cent. Equipment Trust Certificates which were "issued under agreement dated February 15, 1921, between the "Cuban Rolling Stock Company and Commercial Trust Company, "as Trustees.

"Second: That what is established by this agreement does "not signify that the State or 'The Uniteds' acknowledge or "admit that there can exist legal merit in any claim, demand or "proceedings that may be established as a result of the referred "to 7½ per cent. Equipment Trust Certificates, but that it is "exclusively established what is mentioned in this agreement in "respect thereof for the supposed case that a sentence may be "handed down as a result of any claim, demand or proceedings "derived from said 7½ per cent. Equipment Trust Certificates, "whether it be before courts of justice of the Republic or in "foreign courts."

The preliminary agreement was completed by a deed of sale dated December 1, 1953, and thereupon the Cuban State paid the $13,000,000 to the company in United States Treasury Bills. The Cuban State, on the same day, transferred the company's undertaking, but not all the assets transferred to the State by the company, to a newly-formed railway company in Cuba Ferrocariles Occidentales de Cuba S.A. Under a provision of the deed of sale the company delivered to the Cuban State the 1,869 certificates purchased by the company.

The company went into members' voluntary liquidation on March 4, 1954.

On June 18, 1954, the respondent lodged a proof of debt for the following sums set out in paragraph 2 of the proof under the following heads:

(a) £264,076 0s. 1d. (being the sterling equivalent on the winding-up date at $2.80 to the £ of $739,412.81) due and payable to the respondent in respect of $333,000 in face value of the certificates then outstanding in the hands of members of the public as follows, namely, a sum equal to:

Face value	$333,000.00
Premium of 2½ per cent. on the said face value	8,325.00
Carried forward	$341,325.00
Brought forward	$341,325.00
Interest at the rate of 7½ per cent. per annum on the said face value from August 15, 1934, to February 14, 1936	37,462.50
Interest at the rate of 6 per cent. per annum on the said face value from February 15, 1936, to March 4, 1954	360,625.31
	$739,412.81

(b) £11,177 6s. 9d. (being the sterling equivalent at the rate of $2.80 to the £) for the amount of the reasonable expenses incurred by the respondent down to the winding-up date in the performance of the trust.

(c) £20,000 for the estimated value of its future or contingent claim in respect of expenses incurred or to be incurred by it subsequent to the winding-up date, in the performance of the said trust.

(d) Subject as hereinafter mentioned £1,480,570 5s. 7d. being the sterling equivalent on the winding-up date (at $2.80 to the £) of $4,145,596.78, due and payable to the respondent in respect of

$1,867,000 in face value of the certificates which had been purchased by the company as follows, namely, a sum equal to:

Face value	$1,867,000.00
Premium of 2½ per cent. on the said face value	46,675.00
Interest at the rate of 7½ per cent. per annum on the said face value from August 15, 1934, to February 14, 1936	210,037.50
Interest at the rate of 6 per cent. per annum on the said face value from February 15, 1936, to March 4, 1954	2,021,884.28
	$4,145,596.78

The appellants and the respondent were agreed that the inclusion under paragraph 2 (a) and (d) of $333,000 and $1,867,000 in face value of certificates was an error, due to the fact that the respondent was not aware that the company had purchased two more certificates, and they agreed that the said figures should be altered to $331,000 and $1,869,000 with consequential adjustments to the other figures. The respondent filed evidence, which was not challenged, that under the laws of the Commonwealth of Pennsylvania and the State of New York the appropriate rate of interest on unpaid debts would be 6 per cent. per annum.

(a) In the said proof of debt (paragraph 4) the respondent alleged (inter alia) that the liability of the company to it (which was the subject-matter of the proof) arose under or by virtue of a covenant by the company with the car company contained in the lease the benefit whereof, including the ownership of the rolling stock, had by the trust agreement been assigned by the car company to the respondent's predecessor as trustee.

(b) Alternatively, the respondent alleged that the said liability arose by way of damages for breach of the said covenant in the lease against assignment, or by way of damages for conversion of the rolling stock by the company.

(c) The said proof of debt also alleged two further grounds of liability, both of which were abandoned by the respondent at the hearing before Wynn-Parry J.

By a notice dated November 19, 1954, the appellants rejected the said proof of debt.

On April 25, 1955, the respondent issued a summons asking that the rejection of the proof of debt might be reversed, and that it might be ordered to be admitted in full.

On December 4, 1956, in connection with an application by the appellants for leave to make an interim distribution in the winding up, the respondent's summons came before Roxburgh J., who made an order which recited that the court was satisfied that the holders in due course of the 1,867 certificates therein referred to (being an erroneous reference to the 1,869 certificates purchased by the company) had renounced any claim to participate in the assets available for distribution in the winding up, and that such renunciation alone was a sufficient ground for rejection of that part of the respondent's proof of debt, namely, the claim in respect of the sum of £1,480,570 5s. 7d. mentioned in paragraph 2 (d) of the proof, which was based upon or measured by reference to the said 1,867 certificates. The order then proceeded to declare that the court did not think fit to reverse or vary the decision of the appellants as such liquidators rejecting the said proof of debt so far as the same related to the said sum of £1,480,570 5s. 7d. The order then stated that the court made no order on that part of the respondent's summons accordingly, and directed that the remainder of the said summons should stand over. The respondent did not appeal from such order.

On October 8, 1957, the remainder of the respondent's summons came on for hearing by Wynn-Parry J., who varied the appellants' rejection of the proof of debt except so far as the same related to the sum of £1,480,570 5s. 7d., and ordered that the proof of debt should be admitted for a sum to be computed in the manner described in the order.

The appellants appealed to the Court of Appeal. The decision of the Court of Appeal on the main issues, except for the issue stated hereafter, is summarised above.

In the Court of Appeal a further contention was advanced on behalf of the appellants, to the effect that the consequence of the order made in the proceedings by Roxburgh J. on December 4, 1956, was to reduce the maintainable claim of the respondent to a proportion of the gross fund corresponding to the proportion which the certificates held by the general public bore to the totality of the unredeemed certificates. It was accordingly contended that, since the company had purchased 1,869 certificates prior to its liquidation, leaving 331 certificates in the hands of the public, the proof of the respondent's debt should be reduced to 331/2,200ths of the total of the instalments converted into sterling at the rate contended for by the appellants. The majority of the Court of Appeal, Willmer L.J. dissenting, rejected this contention.

On appeal to the House of Lords, the appellants abandoned at the outset their contention that in English Private International Law the system of law applicable for determining the question whether or not there had been a statutory novation of a debt was the lex situs of the debt in question.

The main questions which were the subject of debate before their Lordships were: (1) the proper law of the contract; (2) the quantum of the company's liability and the effect of the order of Roxburgh J. thereon; (3) whether the exchange rate applicable to the various sums due for rentals and interest was the exchange rate ruling on the date when the particular item became due (as the respondent conceded below), or whether it was the rate prevailing at some other date, namely, the date of judgment or the date of the writ or other initiating step of the proceedings.

John Megaw Q.C., *Kenneth Mackinnon Q.C.* and *Richard Hunt* for the appellants, the liquidators. The issues are: (1) Whether the proper law of the lease is the law of Pennsylvania or of Cuba. (2) If Cuban law applies, (a) does it result in a statutory novation of the debt? (b) do the Cuban moratorium laws apply in the circumstances to reduce the debt? (3) Was the company guilty of conversion in selling the rolling stock, and, if so, what are the damages? (4) Was the company liable for breach of covenant in selling the rolling stock, and, if so, what are the damages? (5) Finally, there is the question of the quantum of the company's liability. The proof of debt was wrongly quantified at the outset because the trustee has taken the rate of exchange prevailing at the date of the winding up, March, 1954, whereas he ought to have taken the rates of exchange prevailing when the several sums owing by the company to the trustee fell due.

[Viscount Simonds stated that their Lordships would hear and determine as a preliminary point the proper law of the lease.]

Had the parties intended the proper law of the lease to be that of Pennsylvania it would have been so expressed in the document and not left to be implied, since each State of the Union has a separate jurisdiction. It follows that it cannot be the law of the United States simpliciter. Clauses 11 and 12 of the lease show that the parties intended that its provisions were to be governed by Cuban law. If there is no decisive provision in the lease determining the proper law as Cuban then it is conceded that it is necessary to consider the terms of the trust agreement as forming part of the surrounding circumstances of the transaction.

As to the judgment of Wynn-Parry J.,[1] there was no evidence as to the nature of the Philadelphia Plan. Further, the two documents that the judge collated—the lease and the trust agreement—were made between different parties and covered different subject-matters, although it is conceded that they formed part of the same transaction. Accordingly, it does not necessarily follow that both documents must have the same proper law. If the law governing the two documents were meant to be the same one would have expected the jurisdiction clause to be in both documents. If, therefore, it is held that the law of the Commonwealth of Pennsylvania is the proper law of the trust agreement that is the strongest possible indication in view of the jurisdiction clause, which appears only in the lease (clause 12), that the proper law of the lease is Cuban law. Clause 7 of the trust agreement militates for and not against Cuban law; it is wrong to consider the ambit of that clause as limited to questions of procedure.

Clause 11 emphasises that Cuban law was the law with which the contract was most closely connected. Clause 12 is a general exclusive jurisdiction clause. If it concerned only matters of form, as Wynn-Parry J. held,[2] it is pertinent to ask why was a similar clause not inserted in the trust agreement? In construing clause 12 Wynn-Parry J. has invoked the later words "other formalities" to narrow the ambit of the earlier words "notifications, summonses. . . ." But there is no authority to support such a construction, which has been described as "an inverse application of the ejusdem generis rule": see *per* Cohen L.J. in *In re Wellsted's Will Trusts.*[3] The true view is that if the earlier words in clause 12 "for all notifications, "summonses" are quite general, then the later words "and "other judicial or extra-judicial formalities" are also quite general in scope. A summons is a method of initiating legal proceedings; it is a formality essential for initiating proceedings under the lease. The word "with" towards the end of the clause relates back to the earlier words "The parties hereto "submit themselves to the jurisdiction of the tribunals of the

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[1] [1958] Ch. 724, 757 et seq.

[2] [1958] Ch. 724, 758.

[3] [1949] Ch. 296, 318; [1949] 1 All E.R. 577, C.A.

"City of Havana." It is plain that the proper law of the lease was meant to be Cuban: qui elegit judicem elegit jus.

The four factors which are set out in the judgment of the majority of the Court of Appeal[4] (Jenkins and Romer L.JJ.) as relevant in determining the proper law of a contract, namely, the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject-matter of the contract, all point away from Pennsylvanian law being the proper law of the lease. The place of contracting was New York, the place of performance as to the essence of the contract was Cuba, neither the place of residence nor business of either party was Pennsylvania, and the nature and subject-matter of the contract was referable to Cuba. Further, the weight attached by the Court of Appeal[5] to the reference in clause 7 of the lease to the remedy of "specific performance" as being indicative of American law is of little significance in view of the fact that there is no evidence that it is a doctrine unknown to Cuban law.

This head of the appeal raises three questions: (i) What is the test to be applied to determine the proper law of a contract? (ii) In what circumstances is it legitimate to apply different systems of law to different parts of the same contract? (iii) What is the effect in English private international law of an exclusive jurisdiction clause?

As to (i), the correct test is that propounded by Viscount Simonds in *Bonython* v. *Commonwealth of Australia*[6]: "the "system of law by reference to which the contract was made "or that with which the transaction has its closest and most "real connection." Further, that decision[7] is of assistance in the distinction drawn between the law of the mode of performance of the obligation and the proper law of the contract. It also shows that where the debtor is given an option as to the places of payment that does not affect the proper law. So here, the fact that payments under the lease were to be made to the trustee in either Philadelphia or New York does not assist in determining the proper law to be that of Pennsylvania.

(ii) There is no authority for the proposition that there can be different proper laws for different parts of a contract, although it is conceded that certain parts of a contract may be governed by a law which is not the proper law of the contract as a whole:

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[4] [1960] Ch. 52, 91 et seq.

[5] Ibid. 96.

[6] [1951] A.C. 201, 219; 66 T.L.R. (Pt. 2) 969, P.C.

[7] [1951] A.C. 201.

Hamlyn & Co. v. *Talisker Distillery.*[8] The fact that the majority of the obligations under a contract fall to be performed pursuant to the law of " B " and not " A " is a most important element in determining the proper law. It is another way of propounding the test of the proper law as being that with which the contract has its closest and most real connection.

(iii) Where the parties agree on a specific jurisdiction, whether by means of an arbitration clause or an exclusive jurisdiction clause, that is the underlying law of the contract and is the proper law: *Hamlyn & Co.* v. *Talisker Distillery*[9]; *Vita Food Products Inc.* v. *Unus Shipping Co.*[10]; *N. V. Kwik Hoo Tong Handel Maatschappij* v. *J. Finlay & Co. Ltd.*[11]; *Maritime Insurance Co. Ltd.* v. *Assecuranz-Union Von 1865.*[12] The statement in Cheshire's Private International Law, 5th ed., p. 215, as to the significance of the arbitration cases is adopted as part of the argument.

It is plain from the provisions of the lease that Cuban law was to govern the contract. The fact that the English text was to prevail in the case of ambiguity carries little weight since English was the native language of both parties to the lease.

[Reference was also made to *Owners of the " P. Caland " and Freight* v. *Glamorgan Steamship Co.*[13]; *Montgomerie & Co. Ltd.* v. *Wallace-James,*[14] and *Mendip Range* (*Owners of ss.*) v. *Radcliffe.*[15]]

R. O. Wilberforce Q.C. and *R. B. S. Instone* for the respondent, the trustee for the certificate holders. The first issue raises the question of the proper law of two agreements, the lease and the trust agreement. Its primary relevance relates to two further questions both of which touch the substance of the obligation: (i) Whether the original contractual debt was capable of being discharged by Cuban legislation; (ii) Whether the obligation to pay the debt could be affected by the Cuban moratorium laws.

The question always is: how is a particular problem to be related to the proper law? In ascertaining the proper law the court has to weigh various factors. In the present case there are two alternatives: (a) the proper law of the lease is Cuban law with the consequence that the parties must be taken to have intended Cuban law to govern such questions as the discharge of the contract, its novation and the manner in which the gold clause was to operate; or (b) what the respondent submits is the right approach, the lease is to be regarded as a security for the repayment of a loan, the lease differing from a lease of land in being a means of securing repayment.

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[8] [1894] A.C. 202, 213; 10 T.L.R. 479, H.L.

[9] Ibid.

[10] [1939] A.C. 277, 290; 55 T.L.R. 402; [1939] 1 All E.R. 513, P.C.

[11] [1927] A.C. 604, 606–609, H.L.

[12] (1935) 52 Ll.L.Rep. 16, 19, 20.

[13] [1893] A.C. 207, 215, 216; 9 T.L.R. 309, H.L.

[14] [1904] A.C. 73, 75, 82, 83, 92, H.L.

[15] [1921] 1 A.C. 556, 563, 569, 575, 576; 37 T.L.R. 474, H.L.

The respondent does not contend that any question arises as to there being more than one proper law of the lease. The proper law of both the lease and the trust agreement is the law of Pennsylvania. The fact that the two documents are very closely connected is of great weight in determining that both have the same proper law. As to the absence in the trust agreement of a clause comparable to clause 12 of the lease, the reason is that the company was not a party to the trust agreement. It might well have been necessary to take action against the company in Havana under the lease, in which case it is conceded that such matters would be governed by the local law of Cuba, but as regards the trust agreement it is difficult to see what action in Cuba could have been taken against the car company. It is to be noted that the lease does not relate to the title of property in Cuba; the trustee had already obtained title under other documents before the lease was executed.

As to the problem of American law, the law of Delaware can be disregarded since the car company was only a " cog " in the transaction and subsequently dropped out of it. As to the lease, the lex loci contractus was New York, and the lex loci solutionis was, in respect of capital, Pennsylvania, in respect of interest, New York. Further, the obligation was to pay in United States currency. It is a factor to be taken into consideration that the intended trustee was a Pennsylvanian company. Both the lease and the trust agreement were executed in New York and were expressed in the English (American) language. As to the various elements to be taken into consideration in determining the proper law, see *per* Cozens-Hardy M.R. in *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[16]

Clause 11 of the lease is of little assistance in determining the proper law. Clause 12, on which the appellants placed great reliance, is not an exclusive jurisdiction clause for it does not provide that the parties will submit *all* disputes arising out of the contract to the jurisdiction named. It is a submission by either party, who should be made a defendant, to the jurisdiction in question, but there is nothing in this clause which would prevent a party *suing* in another jurisdiction. Moreover, the jurisdiction is limited to the courts of the *City of Havana.* Clause 7 is in the respondent's favour, for it points to the availability of alternative jurisdictions rather than to an exclusive jurisdiction. Clause 7 of the trust agreement is optional in character; it contemplates that action *might* have to be taken under the lease in Cuba in order effectively to enforce the security, but it extends no further than that.

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[16] [1910] 2 Ch. 502, 512–515; 26 T.L.R. 591, C.A.; reversed (on different grounds) sub nom. *De Beers Consolidated Mines Ltd.* v. *British South Africa Co.* [1912] A.C. 52; 28 T.L.R. 114, H.L.

As to the difference between an arbitration clause and a jurisdiction clause: see Wolff's Private International Law, 2nd ed., para. 419, p. 437, in preference to Cheshire's Private International Law, 5th ed., p. 215: see also *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd.*[17] [Reference was also made to *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co.*[18] and *Hamlyn & Co.* v. *Talisker Distillery.*[19]]

In conclusion, the entire transaction, of which the lease formed an ingredient, was an essentially American (Pennsylvanian) transaction with a Cuban element in it; and while it is conceded that Cuban law was intended to be applicable to certain aspects of the lease and the trust agreement, for example, to protect the trustee's title in Cuba, nevertheless the proper law of both these contractual documents was that of Pennsylvania: see *per* Jenkins and Romer L.JJ.[20] [Reference was also made to *In re Claim by Helbert Wagg & Co. Ltd.*[21]; *Commercial Investment Trust Co.* v. *Minon.*[22]]

Megaw Q.C. in reply. *In re Claim by Helbert Wagg & Co. Ltd.*[23] shows that the mere fact that the English text of the contract is to prevail in the event of any ambiguity is not of itself sufficient to oust Cuban law as the proper law of the contract.

It is plain from a perusal of the form of the lease and the trust agreement that they have all the appearance of being civil law contracts and are not in the form of American contracts. In any event, it is not sufficient for the respondent to contend that the documents are in American form and then to opt for the law of Pennsylvania as the proper law. For an American jurisdiction to apply the parties must have specified in the documents the law of the particular State of the Union intended since in the field of contract there are considerable differences in the law of the various States: see, for example, Williston on Contracts, 2nd ed., section 149. [Reference was also made to Dicey's Conflict of Laws, 7th ed., pp. 734, 735; *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[24]; *Commercial Investment Trust Co.* v. *Minon*[25]; *N. V. Kwik Hoo Tong Handel Maatschappij* v. *J. Finlay & Co. Ltd.*[26]]

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[17] [1903] 1 K.B. 249; 19 T.L.R. 155, C.A.

[18] [1927] A.C. 604.

[19] [1894] A.C. 202.

[20] [1960] Ch. 52, 95, 96.

[21] [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.

[22] (1939) 104 Fed. (2nd Series) 765 (U.S.A.).

[23] [1956] Ch. 323.

[Viscount Simonds stated that their Lordships were unanimously of the opinion that the appeal failed on the issue of the proper law.]

Megaw Q.C. In view of the failure of the appeal on the first issue the issues relating to Cuban law do not arise and it is proposed therefore to pass to the fifth issue.

(5) *Quantum of company's liability.* This issue was provoked by the unusual circumstance that the holders in due course of the 1,869 certificates handed over to the Cuban State renounced any claim to participate in the winding up. The question arises over the exchange rate applicable to the amounts due to the certificate holders for face value premium and interest to the winding-up date. At that date the exchange rate was $2.80 to the £1. At various dates when rentals became due under the lease the exchange rate was considerably more favourable to sterling.

By paragraph 2 (a) of its proof of debt the respondent has claimed a sum of £264,076 0s. 1d. (being the sterling equivalent at $2.80 to the £ of $739,412.81). If these sums are adjusted for 331 certificates (as both parties agree) the sums would be respectively £262,489 19s. 2d. and $734,971.89. The appellants claim that on the true construction of the proof of debt this sum of dollars represents a proportion of the total sum of dollars due under or by virtue of the lease, and should therefore not have been converted to sterling at $2.80 to the £, but must take into account the various rates of exchange current at the dates on which the unpaid instalments of rent and interest became due. If this contention is correct the amount of the respondent's proof under paragraph 2 (a) would be approximately £180,724 5s. 1d.

It is not in dispute that if the company is under a liability it is to the respondent and not to the holders of the outstanding 331 certificates, who are not themselves entitled to claim against the company, there being no privity of contract between them and the company. The respondent has contended, however: (a) the certificate holders are limited to a right to be paid their face value, premium and interest from the moneys recovered by the respondent as their trustee. It is necessary, therefore, to calculate the amount due to the respondent according to the terms of the lease, or to ascertain the amount of damages for conversion or breach of covenant, as if the respondent was beneficially entitled to the amount so due. The exchange rate applicable (subject as hereinafter mentioned) is the rate in force when each particular sum fell due for payment, or in the case of damages for conversion or breach of covenant at $2.80 to the £, being the rate current at the date of the conversion or the breach.

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[24] [1910] 2 Ch. 502.

[25] 104 Fed. (2nd Series) 765.

[26] [1927] A.C. 604.

(b) The respondent cannot, however, prove for the full amount so calculated since, being a trustee, it is limited to proving for the amount required to meet in full the claims of the outstanding certificate holders, and its own claim for expenses. It is therefore necessary to calculate what is due to those holders for face value, premium and interest or, in other words, what they would be entitled to receive out of the fund calculated as in (a) above if that fund had actually been in the hands of the respondent and available for distribution at the winding-up date. For the purpose of this calculation the amount in dollars found due to the holders of the outstanding certificates must be converted into sterling as at the winding-up date, and the same applies to the respondent's claim for expenses against the fund.

(c) The respondent is thus entitled to prove for the sterling equivalent of the amount in dollars representing the face value, premium and interest due on the outstanding certificates, and its own expenses at the rate of exchange on the winding-up date.

The appellants' first contention is: (a) At the date of the winding up each certificate represented no more than a right to share in the trust fund held by the respondent as trustee regardless of the constituents of that trust fund, that is, whether rentals recovered under the lease or damages for conversion or damages for breach of covenant. There were originally 6,000 certificates and therefore 6,000 shares, subsequently reduced by a retirement of certificates to 2,200. The right of a holder of one of the 331 certificates is thus no more than 1/2,200th of that trust fund. (b) The fact that the holders in due course of the 1,869 certificates purchased by the company and handed to the

Cuban State had renounced their claims did not make available their proportion of the trust fund for the holders of the 331 certificates. (c) The respondent's argument would, however, result in the holders of the 331 certificates receiving more than 1/2,200th part of the total fund in respect of each certificate; for the amount of sterling £262,489 19s. 2d. necessary to purchase $734,971.89 dollars at $2.80 to the £ is substantially more than £180,724 5s. 1d. being 331/2,200ths of the total sum of sterling recoverable under or by virtue of the lease.

The appellants contend secondly that in any event, and whatever may have been the position before the order of Roxburgh J. on December 4, 1956, the matter was concluded against the respondent by that order for the following reasons: (a) In the proof of debt the respondent's claim in respect of the whole of the 2,200 certificates is set out under two separate heads: paragraph 2 (a) the 333 (331) certificates, and paragraph 2 (d) the 1,867 (1,869) certificates. (b) The sterling sums thus proved for are calculated in each case at the rate of exchange of $2.80 to the £ in force on the winding-up date and thus exceed the total amount of the sums due for rentals and interest calculated by applying the rate of exchange in force at the date when each sum fell due. Each head of proof should therefore properly be interpreted as representing the proof in respect of the particular group of certificates to which it referred and therefore as a proof for the appropriate proportion of the said total amount. (c) The order of Roxburgh J. rejected the claim in respect of the sterling sum under the second head, namely, in respect of the 1,867 (1,869) certificates. This order finally disposed of any right on the part of the respondent to prove in respect of 1,869/2,200ths of the trust fund attributable to those certificate holders, and the fortuitous circumstance that the respondent had under the first head erroneously over-calculated in sterling the claim of the 331 certificate holders does not in face of the clear terms of Roxburgh J.'s order entitle them to prove for more than 331/2,200ths of the trust fund. In the circumstances *In re Chesterman's Trusts* [27] is inapplicable. The majority of the Court of Appeal was wrong on this issue and Willmer L.J. was right.

As to the respondent's proposal to contest the hitherto prevailing rule that the date for conversion into sterling is the date of the payment of the debt, it is submitted that to take any other date "only adds the uncertainty of exchange to the

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[27] [1923] 2 Ch. 466, C.A.

"uncertainty of the law's delays": see *per* Lord Sumner in *ss. Celia* v. *ss. Volturno.*[28]

R. O. Wilberforce Q.C. The respondent is claiming the exact amount which was originally put forward in the proof of debt, neither more nor less, save for the adjustment from 333 to 331 certificates. Equally, the respondent does not seek to make any profit out of any alteration in the rate of exchange.

As to the conversion of the company's liability to the respondent into sterling, the appellants did not in their rejection of proof of the respondent's debt contend that it had been overstated by reason of its conversion into sterling at $2.80 to the £, but they contended before Wynn-Parry J. that the claim of the respondent ought to be converted at the rates of exchange prevailing on the respective dates when the instalments of rent fell due. The effect of this contention, to the extent that it requires conversion at a rate of exchange less favourable to the dollar than the rate of exchange obtained by the company itself when it converted the dollar proceeds of the sale of its railway undertaking into sterling, is to create a fortuitous profit for the company of about £80,000 at the respondent's expense, which the company would not have earned if, as should have happened, an appropriate part of these proceeds of sale had been paid to the trustee.

Wynn-Parry J. and the majority of the Court of Appeal were correct in law in holding that the proper principle to apply in ascertaining the net amount for which the respondent can prove as a creditor is to ascertain the amount of sterling which would have been required at the commencement of the winding up of the company to purchase the aggregate amount of dollars constituting the claim of the respondent. The basis of this submission is as follows:

(a) The purpose and effect of the lease is to provide a fund in the hands of the respondent as trustee which is applicable on the trusts of the trust instrument. The certificate holders have no rights against this fund until it is actually received by the trustee. Equally the company has no right to the balance of the fund until the certificate holders have been paid. Consequently, the amount due to the certificate holders cannot be ascertained until the trustee is in possession of the fund, and it is at that date that the amount payable to the certificate holders matures and its non-payment constitutes the breach for the purpose of the rules as to conversion.

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[28] [1921] 2 A.C. 544; 37 T.L.R. 969, H.L.

(b) The company is not entitled to any balance of the fund until the certificate holders have been paid in full by providing each holder of a $1,000 certificate with $1,000 on account of principal. The effect of the liquidators' contention would be to provide them on account of principal with $635 approximately.

(c) The company, as debtor of the respondent as trustee, owes the respondent $2,256,000 plus interest. Any surplus after payment of the certificates belonged, according to the trust agreement, to the car company, and the car company could have no claim until the certificate holders were paid in full. The company's only claim to any surplus is as successor in title to, or assignee of, the car company, and it can be in no better position than the car company.

(d) As regards the claims for conversion or breach of covenant in the lease, they fall to be converted into sterling as at the date of the conversion or breach of covenant, namely, December 1, 1953, and there is no basis for applying any other conversion rate as regards the amount required to satisfy the certificate holders.

The appellants' contention as to the effect of Roxburgh J.'s order is based on two fallacies: (a) It treats the 1,869 certificates as if they ranked for purposes of proof in the liquidation pari passu with those held by the public, whereas that order was made on the basis that the holders of these certificates had renounced their rights and, in effect, directed that the 1,869 certificates should be disregarded in computing the respondent's proof. (b) It presupposes that the holder of each certificate is entitled to a pro rata part of the security, whereas in fact the whole security (namely, the rent due under the lease) is held in trust for the holders of the aggregate of certificates ranking for payment. The effect of the order was not, as the appellants' argument involves, to reduce the amount applicable for redemption of the certificates by 1,869/2,200ths, but to leave the whole fund, consisting of the unpaid instalments ($2,256,000) solely available for redemption of the 331 certificates, that is, to improve the security for the latter. It is to be noted that the amount which Roxburgh J. authorised the appellants to distribute was calculated on the basis that the appellants should retain the full amount (namely, £295,253) claimed by the respondent in respect of the certificates held by the public and for expenses.

Date of conversion into sterling of foreign debt: If the above submissions are accepted, it is immaterial at what date the individual instalments of rent are to be converted into sterling for the purpose of constituting the fund to be provided under the company's obligation in the lease, since on the basis least favourable to the respondent (namely, that conversion is to be made as at the date when each instalment fell due) there would be sufficient money in the hands of the respondent to enable it to satisfy the claims of the certificate holders in full. If necessary, however, it is contended in the alternative that the existing rule of English law, which rests on the authority of the Court of Appeal but not of the House of Lords, that a debt owed in a foreign currency must be converted into sterling at the date when it fell due, is not of universal application and ought not to be applied in a case such as the present where the debtor, after its default, has itself received a payment in the currency of account which is available to meet the claims of the creditor and which had, at the date of its receipt, an increased value in terms of sterling. In such a case the proper date to take is the date of judgment.

It is conceded that the "breach date" rule for conversion cannot be attacked in relation to breach of contract or tort (see *Di Ferdinando* v. *Simon, Smits & Co. Ltd.*[29] and *ss. Celia* v. *ss. Volturno*[30]), and the respondent is only concerned to question its applicability to cases of debt. Here there is a liquidated debt expressed in foreign currency due under a contract whose proper law is not English law and payable in the United States of America. Rule 165 and the commentary thereon in Dicey's Conflict of Laws, 6th ed., pp. 744 et seq., is adopted as part of the argument.

As to the authorities, *ss. Celia* v. *ss. Volturno*[31] is of little assistance since there is no reference to the case of a debt and the argument based on commodity contracts is unhelpful in this connection. Reliance is placed on *Manners* v. *Pearson & Son*[32]; the dissenting judgment of Vaughan Williams L.J. gives no reasons for equating commodity cases with debt cases. Further, he misstates the principle of *Scott* v. *Bevan*,[33] for that case did not turn on the *date* for fixing the rate of exchange but on whether the rate of exchange should be the official rate or the actual rate. The decisions of the Court of Appeal in *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.*[34] and in *Madeleine*

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[29] [1920] 3 K.B. 409; 36 T.L.R. 797, C.A.

[30] [1921] 2 A.C. 544; 37 T.L.R. 969, H.L.

[31] Ibid.

[32] [1898] 1 Ch. 581; 14 T.L.R. 312, C.A.

[33] (1831) 2 B. & Ad. 78.

[34] (1927) 27 Ll.L.Rep. 288, C.A.

Vionnet et Cie v. *Wills* [35] are in conflict with that in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings*.[36] The *Cummings* case [37] is sound in principle and should be applied here, namely, that the date for conversion is the date of judgment. It is an assertion of the principle of nominalism which was adopted by the majority judgment of the Supreme Court of the United States in *Deutsche Bank Filiale Nürnberg* v. *Humphrey*.[38] The minority view put their judgment on the fluctuating nature of the amount recoverable if the judgment-date rule is adopted. But that view is based on a fallacy. It assumes that what is relevant is the currency of the place of judgment, but that is nihil ad rem when the debt is payable in a foreign currency. Further, the maturity-date rule leads to different amounts being recovered according to the place where the creditor sues. The rule for which the respondent contends should not be abrogated simply because under the English law of procedure the creditor cannot obtain a judgment in dollars but only in sterling.

[Reference was also made to Dicey's Conflict of Laws, 7th ed., pp. 914–916; article headed "Money" in (1952) 29 British Year Book of International Law, pp. 482–484; *In re British American Continental Bank Ltd., Goldzieher and Penso's Claim* [39]; *In re British American Continental Bank Ltd., Crédit Général Liègeois' Claim* [40]; *In re British American Continental Bank Ltd., Lisser and Rosenkranz's Claim* [41]; *The Baarn (No. 1)* [42]; *Peyrae* v. *Wilkinson* [43]; *In re Russian Commercial and Industrial Bank* [44]; *Lebeaupin* v. *Crispin* [45]; *Cummings* v. *London Bullion Co. Ltd.*[46]]

Megaw Q.C. in reply. *Quantum of company's liability.* Paragraph 2 of the proof of debt is a statement of the amount owed by the company and nothing more. As to the ordinary form of proof: see Buckley on the Companies Acts, 13th ed., p. 1121. Even if the respondent's construction of the proof of debt be correct, nevertheless (1) the amount claimed is too large; (2) it is ambiguous and, therefore, it must be construed contra proferentem, that is, the trustee. It means that the Cuban

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[35] [1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136, C.A.

[36] [1922] 1 K.B. 451; 38 T.L.R. 221, C.A.

[37] Ibid.

[38] (1926) 272 U.S. 517.

[39] [1922] 2 Ch. 575; 38 T.L.R. 465, 785, C.A.

[40] [1922] 2 Ch. 589; 38 T.L.R. 461.

[41] [1923] 1 Ch. 276.

[42] [1933] P. 251; 49 T.L.R. 554, C.A.

[43] [1924] 2 K.B. 166.

[44] [1955] Ch. 148; [1955] 2 W.L.R. 62; [1955] 1 All E.R. 75.

[45] [1920] 2 K.B. 714; 36 T.L.R. 739.

[46] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.

Government is liable for an extra £80,000. The Cuban Government would not have acted as it did if the proof had not been unambiguous. Suppose that a trust fund of £15,000 is held for three persons in equal shares. A disclaims his interest. In those circumstances can it be said that B and C are therefore ipso facto entitled to £7,500 each instead of £5,000 when that might never have been A's intention? Similarly, here, it is necessary to ascertain whether the Cuban Government, who disclaimed any benefit for itself, intended to benefit the other certificate holders or the company by its disclaimer of the 1,869 certificates. It cannot be *assumed* that the intention was solely to benefit the remaining certificate holders. Indeed, it is plain from the evidence that the renunciation by the Cuban Government of its rights in respect of the 1,869 certificates impliedly amounted to an intention to benefit no one other than the company.

This argument applies equally to the claim for damages for conversion and breach of covenant. Accordingly, the proportion of any damages received under these heads by the trustee should be 331/2,200ths of the amounts awarded.

Date of conversion into sterling of foreign debt: There are four different rules which might be adopted for determining the date at which the rate of exchange must be calculated, namely, the date at which payment was due, the date of actual payment, the date of the commencement of proceedings to enforce payment, or the date of judgment. The date contended for by the respondent is untenable, and English law is now committed to the maturity-date rule. In *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [47] it was held that *ss. Celia* v. *ss. Volturno* [48] covered the case of a debt payable in foreign currency. The majority of the Lords in that latter case [49] expressly approved of the decision of the Court of Appeal in *Di Ferdinando* v. *Simon, Smits & Co. Ltd.*,[50] and in *Di Ferdinando* [50] itself Bankes L.J. and Eve J. expressly approved of the dissenting judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son*,[51] as did Lord Buckmaster and Lord Parmoor in *ss. Celia* v. *ss. Volturno*.[52] In these circumstances the appellants pray in aid the doctrine of stare decisis.

In any event, the question is implicitly concluded by the authorities because an action brought in England for a debt in foreign currency is and can only be an action for damages for breach of contract—it cannot be an action for debt at all. It is, therefore, in all respects parallel with the case of a contract governed by a foreign law for delivery of a chattel. The plaintiff who brings his action in England cannot obtain specific performance of that contract but only damages assessed in relation to the value of the chattel. Reliance is placed on the observations of Bankes L.J. in *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.*[53] See also *Ward* v. *Kidswin.*[54] The question is not merely procedural. There is no distinction in substance in respect of damages between a contract to deliver a chattel and a contract to deliver foreign currency.

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[47] [1943] A.C. 507; [1943] 2 All E.R. 406, P.C.

[48] [1921] 2 A.C. 544.

[49] Ibid. 551, 552, 561, 564.

[50] [1920] 3 K.B. 409, 413, 416.

[51] [1898] 1 Ch. 581.

[52] [1921] 2 A.C. 544, 551, 561.

A number of difficulties would arise if the date of judgment rule were adopted. [Reference was made to *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property.*[55]] The minority judgment in the *Deutsche Bank* case[56] is to be preferred, for it is plain that the Supreme Court treated the action in dispute as one for damages. If that be so, then it is manifest that under English law the relevant date for fixing the rate of exchange must have been the date of breach. In fine, for present purposes there is no valid distinction between an action on a debt in foreign currency and an action for damages for breach of a foreign contract. As to any objections raised to the adoption of the maturity-date rule, it may be said in answer that it is often said that the market value rule in sale of goods leads to injustice, but it is the only workable rule. The observations contained in the minority judgment in the *Deutsche Bank* case[57] as to the procedural difficulties and absurdities arising under the judgment-date rule are adopted. By adhering to the maturity-date rule certainty is bought at the expense of certain injustices which might arise from time to time.

[Reference was also made to rule 181 of Dicey's Conflict of Laws, 3rd ed., p. 659; Cheshire's Private International Law, 5th ed., pp. 675, 676; *Cockerell* v. *Barber*[58]; *Scott* v. *Bevan.*[59]]

Wilberforce Q.C. in reply on the date rule question. The appellants' contention that this question is concluded by existing authorities is fallacious. The House of Lords in *ss. Celia* v. *ss.*

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[53] 27 Ll.L.Rep. 288, 291.

[54] (1626) Latch 77.

[55] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

[56] 272 U.S. 517.

[57] Ibid.

[58] (1810) 16 Ves. 461.

[59] 2 B. & Ad. 78.

Volturno[60] were applying *Di Ferdinando* v. *Simon, Smits & Co. Ltd.*[61] as a *contract* case and no more. As to that case[62] itself, it is true that two of the judges approved of the dissenting judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son,*[63] but only in a context applicable to the case before them. A perusal of the cases shows that the courts have recognised the logic of the respondent's contention, but they have been overwhelmed by the contract cases.

The respondent relies on *Cummings* case.[64] *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*[65] is distinguishable for there it was a debt expressed in the currency of one country and payable in that of another. The question thereupon arose: In what currency can the debtor pay?: see rule 176 of Dicey's Conflict of Laws, 7th ed., pp. 909–911, which clarifies the position. As to the special rule relating to bills of exchange: see rule 165 (4) of Dicey's Conflict of Laws, 7th ed., p. 861. If, as here, the document is not a bill of exchange, then an express provision that payment is to be in dollars makes it a dollar debt. It is relevant to observe that the argument in the *Syndic* case[66] makes no reference to the debt cases: compare *Marrache* v. *Ashton,*[67] which concerned a " commodity " contract.

It was further contended that the question was covered by the authorities by necessary implication because the action can only be an action for damages. But the mere fact that in relation to the recovery of a foreign debt in England the plaintiff can only bring an action for damages does not mean that it is to be treated as a matter of substance as an action for damages for breach of contract. If that were so one would be using a rule of procedure for a wrong purpose. It is necessary not to lose sight of the distinction between the substantive right of the plaintiff which can only be governed by the proper law, and the procedural question that the action to recover the debt can only be brought in a particular form.

The difficulties envisaged by the appellants if the judgment-date rule is adopted are met by considering the proper law in each case. [Reference was made to Dicey's Conflict of Laws, 7th ed., pp. 796, 837.] The House is invited to follow the *Deutsche Bank* case[68] which strongly supports the respondent's contention. [Reference was also made to Mann's Legal Aspect of Money, 2nd ed., p. 311; *Cockerell* v. *Barber*[69] and *Scott* v. *Bevan*.[70]]

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[60] [1921] 2 A.C. 544.
[61] [1920] 3 K.B. 409.
[62] Ibid.
[63] [1898] 1 Ch. 581.
[64] [1922] 1 K.B. 451.
[65] [1943] A.C. 507.
[66] Ibid. 509, 510.
[67] [1943] A.C. 311.
[68] 272 U.S. 517.

Their Lordships took time for consideration.

May 5, 1960. Viscount Simonds. My Lords, I propose to state in summary form the facts of this long and complicated case. They are fully stated in the opinion of my noble and learned friend, Lord Morris of Borth-y-Gest, which I have had the privilege of reading. It was necessary to do so in order to determine the question what is the law determining the liability of the appellants to the respondent in respect of certain agreements to which I shall briefly refer. I could add nothing to his exposition of the facts and I am wholly in agreement with his conclusions of law upon this question. I proceed upon the footing that the relevant law is that of the Commonwealth of Pennsylvania and shall examine the questions, which then arise, what is the sum in dollars owed by the appellants to the respondent, and at what rate that sum must be converted into sterling.

The appellants are the liquidators in the voluntary winding up of an English company called the United Railways of the Havana and Regla Warehouses Ltd., which I will call "the company." The company for many years carried on a railway undertaking in the Island of Cuba. Before or during the year 1921 the company had purchased or contracted to purchase in the United States of America rolling stock and other railway equipment to an aggregate amount of over $14,000,000, and for the purpose of financing part of this amount decided to raise the sum of $6,000,000 in the United States of America.

The finance was arranged in what appears to be a somewhat elaborate way. It no doubt had its own purpose. In February, 1921, the company caused to be incorporated in the State of Delaware a subsidiary company, the Cuban Rolling Stock Company, which has generally been referred to as "the car company," and to this company sold all the rolling stock and equipment already delivered and assigned the contracts for future delivery of the balance. Notwithstanding this sale, the company continued to use the rolling stock as part of its railway undertaking as it had before the sale. In April, 1921, the car company leased to the company the rolling stock and equipment already delivered, and agreed to lease the remainder when delivered for a period of 15 years expiring on February 14, 1936. The company agreed to pay as rental for the rolling stock and equipment (all of which I will call " the rolling stock ") first, half-yearly on February 14 and August 14 in each year, the first payment to be made on August 14, 1921, (a) a sum equal to 3¾ per cent. of the par value of certain certificates therein mentioned outstanding and unpaid on the same dates in each year during the term of the lease together with certain other sums which need not be particularised, and (b) a sum equal to the expenses incurred by the car company or its assigns in enforcing the covenants and terms of the lease and performance of the trust under which the said certificates were issued, and (c) a sum equal to certain taxes, duties and other charges therein mentioned: secondly, half-yearly on the same dates in each year beginning with August 14, 1921, a sum of $206,000 for the first 20 payments and of $205,000 for the last 10 payments. There were provisos for payment of these semi-annual sums in trust certificates as therein mentioned, and also for the retirement of such certificates, but they are not relevant to the question that I am considering. The lease also contained covenants by the company for maintenance, replacement and insurance of the rolling stock, and that there should be no assignment, transfer, or underletting of the rolling stock without the consent of the car company or its assigns. Further, there was provision in the event of default by the company in payment of rental or performance of its other obligations for the car company or its assigns to declare the lease terminated, and to enter upon the company's railroad and retake the rolling stock. Finally, the lease provided that the car company might forthwith assign to the Commercial Trust Company of Philadelphia as trustee all its right, title and interest in the rolling stock, and all its claims, demands and remedies accruing or to accrue under the lease.

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[69] 16 Ves. 461.

[70] 2 B. & Ad. 78.

Your Lordships will have observed that the lease refers to trust certificates and to an intended assignment to a trustee. These references require a brief explanation, if only because much of the confusion that has arisen in this case is due to them.

The transfer contemplated by the last provision of the lease to which I have referred was in fact effected by a so-called trust agreement of the same date, the parties to which were the car company and the Commercial Trust Company of Philadelphia as trustee, whose successors in title are the respondents to this appeal. The car company thereby assigned to the trustee as trustee for the certificate holders thereinafter mentioned the lease and all its interest in the rolling stock and all rentals reserved under the lease. I venture to repeat and emphasise that the lease did not, nor did the trust agreement impose any contractual liability to the certificate holders upon the company. I therefore think it sufficient to say that the certificates were 6,000 "equipment trust certificates" of $1,000 each, and that it was to secure the repayment of them by 1936 together with certain premiums, interest and other sums that the company entered into the lease containing the several covenants that I have already described.

The next step was that by an agreement dated April 27, 1922, the car company resold the rolling stock to the company subject to and with the benefit of the lease and of the trust agreement. Shortly afterwards the car company was dissolved.

In due course 3,800 certificates were retired in accordance with provisions in the trust agreement and were cancelled. The company did not pay the last instalment of $206,000 which became due under the lease on February 14, 1931, or any of the 10 instalments of $205,000 which subsequently became due. The total of these unpaid instalments is $2,256,000. The company kept up the other payments which were included in the "rentals" payable under the lease down to and including those due on February 14, 1935, but made no further payment. A large sum was due under these heads.

In 1937 proceedings were instituted by the respondents against the company in the State of Maine. They were compromised on the terms (inter alia) of an offer by the company to purchase outstanding certificates at a price of $147.50 per certificate. This offer was accepted by holders of 1,869 certificates which, accordingly, came into the possession of the company. The certificates have not been cancelled. Thus, there were only 331 certificates left in the hands of the public. The number is sometimes given as 333 but the difference is immaterial.

I need not refer to the subsequent Cuban legislation which would be relevant only if Cuban law governed the contract. It is sufficient to say that in consequence of it the company on December 1, 1953, sold the whole of its undertaking to the Cuban State which, on the same day, resold it to a Cuban company formed for the purpose called the Ferrocariles Occidentales de Cuba S.A. As a term of such sale to the Cuban State the purchase price was to be received by the company free from all responsibility with respect to liabilities outstanding in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties acquired by the Cuban State. Under a further term the company delivered to the Cuban State the 1,869 certificates which, as already stated, it had purchased.

This was the state of affairs when on March 4, 1954, the company passed a special resolution for winding up and appointed the appellants as liquidators. I am conscious that, though I have been able to omit much that is relevant only to the question of the proper law of the contract, yet I have troubled your Lordships by a recital of many facts which can have no bearing upon the only question which is before the court in the winding up of the company, viz., what is the debt owed by the company to the respondents under the lease. I have done so only because not otherwise is the form of proof put in by the respondents explicable. That does not mean that it is in any way justifiable. Upon the question that now arises I come to a different conclusion from that reached by Wynn-Parry J., and the majority of the Court of Appeal.

On June 18, 1954, the respondents lodged their proof of debt in the winding up.

In order to simplify the issue I will in the first place deal solely with the claim which is based on the failure of the company to fulfill its contractual obligations under the lease and reserve for later consideration certain alternative claims. I will also ignore for the present two heads of claim relating to certain expenses incurred by the respondents which the company have contracted to pay, and will confine my attention to two claims which appear to relate to the failure of the company to pay to the respondents 11 instalments of principal, the first of $206,000 and the others of $205,000, and certain premiums and interest. I say " appear " to relate " for, though I never before saw so confused and confusing a document as this proof, it is clear from its fourth paragraph that the liability of the company in the sums claimed in paragraph 2 is assigned in the first place to its covenants under the lease. I can only do justice to these claims by setting them out verbatim. They are as follows:

"2 (a) The sum of £264,076 0s. 1d. being the sterling " equivalent on the said date [viz., the commencement of the " winding up], calculated at the rate of $2.80 to the £, of " 739,412.81 United States dollars due and payable to the

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" claimant in respect of $333,000 in face value of United Railways of Havana 15-year 7½ per cent. equipment trust certificates then outstanding in the hands of members of the public as follows, namely, a sum equal to

" Face value	$333,000.00
" Premium of 2½ per cent. on the said face " value	$8,325.00
" Interest at the rate of 7½ per cent. per " annum on the said face value from " August 15, 1934, to February 14, 1936	$37,462.50
" Interest at the rate of 6 per cent. per " annum on the said face value from " February 15, 1936, to March 4, 1954	$360,625.31
	$739,412.81

" (d) In addition thereto (subject as hereinafter mentioned) " £1,480,470 5s. 7d., being the sterling equivalent on March 4, " 1954 (calculated at the rate of $2.80 to the £) of United States " $4,145,506.78 due and payable to the claimant in respect of " $1,867,000 in face value of United Railways of Havana 15-year " 7½ per cent. equipment trust certificates which had been purchased by the company as follows, namely, a sum equal to

" Face value	$1,867,000.00
" Premium of 2½ per cent. on the said face " value	$46,675.00
" Interest at the rate of 7½ per cent. per " annum on the said face value from " August 15, 1934, to February 14, 1936	$210,037.50
" Interest at the rate of 6 per cent. per " annum on the said face value from " February 15, 1936, to March 4, 1954	$2,021,884.28
	$4,145,596.78 "

Your Lordships will observe that ex facie these claims are quantified not by the amount by which the company has fallen short of its obligations under the lease, but by the amount which the respondents allege to be necessary to satisfy the certificate holders whose certificates have not been cancelled. But, since the certificate holders do not stand in any contractual relation to the company, it is at once clear that the form of proof is wrong and misleading, and I think that the proper course would have been to reject it in toto with liberty to the respondents to recast

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it if they thought fit. It is too late to do that now. All that we can do is to take these two claims amounting together to $4,885,009.59, to assume that they are referable, as appears from paragraph 4 of the proof, to the company's failure to fulfil its obligations under the lease, and ask, first, at what rate of exchange the dollars are convertible into sterling, and, secondly, what is the result of the order made by Roxburgh J. on December 4, 1956, to which I will refer later. I emphasise that at this stage the two sums must be aggregated, for the liability of the company to the respondents, though divided in the proof, arises from a single source, namely, its breach of its obligations to them.

Upon this footing I entertain no doubt that the proper rate of exchange is that which prevailed at the date when the several sums owing by the company to the respondents fell due and were not paid. The sum of $739,412.81 being thus converted would (after a slight adjustment of the figures which has been agreed) represent £180,724 5s. 1d., and this is the sum which the appellants say is due to the respondents. It is, as they rightly contend, wholly irrelevant that the respondents might, if they had to satisfy the dollar claims of the certificate holders, have to convert into sterling at the rate of $2.80 to the £. That is not a question which arises in the liquidation and is no concern of the company. What is true of the sum claimed under 2 (a) is equally true of that claimed under 2 (d), but for the reason that I shall presently state this need not be further considered. Here, then, are two sums the result of an artificial division, for which the respondents alone are responsible, both of them stemming from the company's liability to the respondents, both of them convertible into sterling not at $2.80 to the £, but at the several rates prevailing when the several sums fell due and were not paid.

Two sums there were and, if there had continued to be two sums, a situation would have arisen of which I cannot guess the solution. It may be that if the respondents had persisted in their claim for the whole $4,885,009 the Cuban State or their successors as holders of the 1,867 or 1,869 certificates would have had something to say about the distribution of the fund in the hands of the respondents. I should by no means assume that they would assent to a course which would benefit the 331 (333) certificate holders. I will not make that or any other assumption. For the event did not happen. What did happen was, in my view, fatal to the respondents' contention.

The respondents' claim having been duly presented in the winding up was rejected by the liquidators on November 19, 1954.

On April 25, 1955, they took out a summons asking that the liquidators' decision rejecting their proof for (inter alia) the several sums of £264,076 0s. 1d. and £1,480,570 5s. 7d. might be reversed, and that the proof might be ordered to be admitted in full. At an earlier date, namely, on November 14, 1955, the liquidators had themselves taken out a summons asking that they might be at liberty to apply certain sums in making a first interim return of capital to the holders of the Consolidated Stock of the company and towards redemption of its Second Income Loan Stock. These summonses appear to have come before Roxburgh J. on the same day, and that learned judge made two orders on December 4, 1956. By the first of them, which related to the rejection of proof, it was recited that it appeared that the holders in due course of 1,867 certificates whereof the denoting numbers were set forth in the schedules to the order had renounced any claim to participate in the assets available for distribution in the winding up, and that such renunciation alone was a sufficient ground for the rejection of that part of the respondents' proof of debt (namely, the claim in respect of the sum £1,480,570 5s. 7d. claimed in subparagraph (d) of paragraph 2 of the proof, which was based upon or measured by reference to the said 1,867 certificates) and the court did not think fit to reverse or vary the decision of the liquidators rejecting the said proof so far as it related to the said sum of £1,480,570 5s. 7d. and made no order on that part of the summons. The remainder of the summons was ordered to stand over, the costs so far incurred being reserved. The respondents applied for leave to appeal from this order: it was refused and they carried the matter no further. The second order made on the same day has no immediate relevance to the matter now under appeal, but it may be noted that the learned judge in fact authorised the liquidators to distribute out of the assets of the company a sum of £496,066 and a sum not exceeding £1,371,889 for the purposes mentioned in their summons. The respondents asked for leave to appeal from this order also: it was refused and the respondents carried the matter no further.

I return to the first order. How is it possible, my Lords, to regard it as anything but a final and now irrevocable rejection of the proof to the extent of £1,480,570? It may be that the reason for rejection was wrong. I think it was. But it was due to nothing else than the manner in which the proof was framed. For that the respondents alone were responsible. It is possible that too late they saw the folly of it, but they did not appeal. In the result all that remains is the claim under 2 (a). That is a sum of dollars which is not now challenged except that the appellants contend that it has been converted into sterling at the wrong rate of exchange. When the respondents receive this sum, they must deal with it as the terms of their trust demand. With that the court has no concern in the winding up of the company. It may be the failure to realise this fact that led Wynn-Parry J. and the majority of the Court of Appeal to a conclusion for which I see no justification. All that remains of the proof is the sum originally claimed less that part which has been rejected.

So far I have dealt with the case upon the footing that the proof of debt is based upon the failure by the company to perform its obligations under the lease. That accords with paragraph 4 of the proof. But counsel for the respondents has urged that if this claim fails in the respect that I have mentioned, they have an alternative claim for damages for conversion by the company of the equipment, which cannot suffer the same fate, inasmuch as the conversion took place in 1953 and at that date the rate of exchange was already $2.80 to the £. I find it impossible to accept this contention. I will assume, though there are probably many difficulties in the way, that the claim in damages for conversion is valid, and further, that such damages can, as Wynn-Parry J. held, be quantified at such a sum in sterling as when converted into dollars at the rate of exchange obtaining on December 1, 1953, that is, $2.80 to the £, would produce $2,000,000. It is to be remembered that this claim is strictly alternative to the claim with which I have already dealt. But though the ground of claim, the cause of action, is different, no other particulars are given than those in paragraph 2 (a), (c) and (d). They are, of course, irreconcilable with the new claim. But the claims new and old are subject to the order of December 4, 1956. The proof of debt is rejected to the extent of £1,480,570. It is plain that nothing is left if a claim in damages for conversion is substituted for the original claim. It is not, in my opinion, possible to construe the order as a rejection pro tanto of the proof of debt if, and only if, it is founded on one of the causes of action indicated in paragraph 4, and that it is to be disregarded if another cause of action is substituted.

I have so far deliberately ignored the claims under paragraph 2 (b) and (c). These are claims which appear to be well founded subject to such inquiry as to quantum as may be necessary. Moreover, I do not think that the rate of exchange of $2.80 to the £ can be successfully challenged, for the rate must be determined not at the date when the respondents incurred the several expenses which constitute the claim, but at the date when demand was made upon the company for payment. There was no evidence that demand was made before the 2.80 rate obtained.

Once more, then, I return to the claim under paragraph 2 (a), and the single question that remains is whether the $739,412 therein mentioned should be converted, as the respondents contend, at the 2.80 rate or, as the appellants contend, at the rates prevailing when the several sums payable by the company in respect of principal, premium and interest, fell due and were not paid. This was said to be an important question of principle upon which this House has not hitherto pronounced. The question, summarily stated, is what sum in sterling is recoverable by a plaintiff suing in the courts of this country, for a sum of money payable in foreign currency in a foreign country under an instrument of which the proper law is a foreign law. Admittedly, the claim must be for a sterling sum and the judgment must be in sterling. It is established by authority binding on this House that a claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortious act: see, for example, *ss. Celia* v. *ss. Volturno.*[1] But, it was said, doubts had been expressed whether the same rule applied where the claim arose from a failure to pay a debt expressed in terms of foreign currency, and it was urged that on principle the plaintiff should recover sterling at the rate prevailing at the date of judgment or, alternatively, at the date of the writ or other initiating step of the proceedings. To this it was answered that without undue refinement the two cases, damages and foreign debt (as I will call a debt in foreign currency) could not be distinguished, that an action to recover a foreign debt was upon a sound analysis nothing else than an action for recovery of damages for breach of a contract to deliver foreign currency, that there was ample authority, ancient and modern, for this proposition, and that in any case convenience demanded that the same rule should obtain.

My Lords, I have no doubt what your Lordships' decision on this point should be. In the course of the argument it occurred to me to ask learned counsel what in old days was the form of action where the claim was for a foreign debt. The answer was found after some research. It was extremely enlightening if not decisive. In the case of *Ward* v. *Kidswin,*[2] decided as long ago as the second year of the reign of King Charles I, the exact point appears to have been decided. In that case (which is reported in Norman-French) the plaintiff brought an action in detinet against the defendant declaring that on such and such a day the defendant in London bound himself to the plaintiff by bond that he would repay "such and such a sum of Hamburg money which "is such and such English money." Among other exceptions it was excepted that "the debt for Hamburg money was in detinet "alone whereas money ought to be in debet and detinet." Upon this point it was held: "There is express authority in 34 H.6.12 "where the action brought in detinet is held to be good," and the report goes on: "And it was agreed by all (the judges) "that in the case of foreign coin, such as Flemish, one must "declare the value in English. Note that one can be charged "for money as a receiver and bailee for goods or for Hamburg "money, provided it is not current here: and the action is quite "the same as for a box or a horse, etc. And in such case the "action will be in detinet only unless it is for money made "English coin . . . Justice Jones (held) that the action is properly "brought in detinet alone for Hamburg money which is of no "value and as if the action were brought for a piece of plate." The money was in this case apparently contracted to be paid in London, and the bond was an instrument governed by English law. The result could not have been different if it had been payable in Hamburg under a Hamburg bond.

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[1] [1921] 2 A.C. 544; 37 T.L.R. 969.

[2] (1626) Latch 77.

I have spoken of authority ancient and modern, and have given your Lordships an example of ancient authority. Let me pass over more than 300 years and come at once to a case decided in 1943. In *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [3] the material question was at what rate according to the law of Palestine, which was conceded for this purpose to be the same as English law, should a sum of 2,000 gold Turkish pounds, payable at Haifa be converted into local (that is, Palestine) currency. I venture to quote extensively from a judgment of the Judicial Committee of the Privy Council which was delivered by Lord Wright.[4] "At what dates," he asked, "must the rate of "exchange be calculated? There can, their Lordships apprehend, be now no doubt as to the English law on this point. It "is true that different views have been taken at different times "and by different systems of law. Indeed, there are at least four

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[3] [1943] A.C. 507; [1943] 2 All E.R. 406.

[4] [1943] A.C. 507, 512.

" different rules which might be adopted. The rate of exchange " might be determined as at the date at which payment was due, " or at the date of actual payment, or at the date of the com- " mencement of proceedings to enforce payment, or at the date " of judgment. English law has adopted the first rule, not only " in regard to obligations to pay a sum certain at a particular " date, but also in regard to obligations the breach of which " sounds in damages, as for an ordinary breach of contract, and " also in regard to the satisfaction of damages, for a wrongful act " or tort." Then, after citing the following words of Lord Sumner from the *Celia*[5]: " The agreed numbers of lire are only part of " the foreign language in which the court is informed of the " damage sustained, and, like the rest of the foreign evidence, " must be translated into English. Being a part of the description " and definition of the damage, this evidence as to lire must be " understood with reference to the time when the damage accrues, " which it is used to describe," the judgment proceeds[6]: " This " can be applied directly to a case where the damage claimed " arises from failure to pay a sum in foreign currency, like the " Turkish gold pounds here. It is true that Lord Sumner does not " deal specifically with, and seems to reserve the question of what " is the rule where there is a contractual obligation for the payment " of fixed or calculable sums in a foreign place and [their Lord- " ships would prefer ' or '] in a local currency. He does, however, " observe that: ' waiting to convert the currency till the date of " ' judgment only adds the uncertainty of exchange to the uncer- " ' tainty of the law's delays.'[7] Lord Buckmaster rejects sum- " marily the idea that the date of the writ or of the commence- " ment of the action is the proper date.[8] His view, in their Lord- " ships' opinion, is summed up by his statement that in regard " to damages which have been ' assessed in a foreign currency " ' the judgment here, which must be expressed in sterling, must " ' be based on the amount required to convert this currency into " ' sterling at the date when the measure was properly made, " ' and the subsequent fluctuation of exchange, one way or the " ' other, ought not to be taken into account.' "[9] Then, after a felicitous reference to section 72 (4) of the Bills of Exchange Act, 1882, which enacts that in the case of bills of exchange the amount of the foreign currency is to be translated into the United Kingdom currency according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable, their Lordships adopted that date as the proper date for the exchange rate of the Turkish gold pounds. In this case, which, if not strictly binding on this House, is of the highest persuasive authority, two lines of thought which end in the same conclusion appear to be blended, the first that the breach of an obligation to pay a sum in foreign currency sounds in damages, and therefore the rule of the *Celia* [10] applies, the second that as an independent rule of law the proper rate of exchange for failure to pay a debt in foreign currency is that obtaining on the date when payment should have been made. Both propositions find ample support. I do not propose to detain your Lordships by the citation of a large number of authorities. I am content to accept as a correct statement of law, whichever way the conclusion is reached, the propositions in rule 177 at p. 914 of the seventh edition of Dicey's Conflict of Laws as follows: "(1) An English court cannot give "judgment for the payment of an amount in foreign currency . . . "(2) For the purpose of litigation in England (a) a debt expressed "in a foreign currency must be converted into sterling with "reference to the rate of exchange prevailing on the day when "the debt was payable."

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[5] [1921] 2 A.C. 544, 555.
[6] [1943] A.C. 507, 513.
[7] [1921] 2 A.C. 544, 558.
[8] Ibid. 548.
[9] Ibid. 549.

There are, however, certain landmarks in the case law on this subject which I cannot ignore.

First, I must mention *Scott* v. *Bevan*,[11] and I do so largely because it has from time to time been suggested, and was strenuously urged by counsel, that it does not decide a point which it obviously does. There an action was brought in the King's Bench to recover the value of a given sum of Jamaican currency upon a judgment obtained in that island. The facts are somewhat complicated. But it clearly emerges that it was argued on the one side that a conventional rate of exchange should be taken, on the other that the rate should be that actually prevailing at the date of the judgment in Jamaica, that at the trial Lord Tenterden directed the jury to find in favour of the former view, that a rule nisi for a new trial was obtained upon the ground that only that sum was recoverable in sterling which would equal the value of the sum payable under the Jamaican judgment in Jamaican currency at the rate of exchange prevailing at the date of that judgment, and that the rule was made absolute. It is true that Lord Tenterden himself continued to express some doubt,

[10] [1921] 2 A.C. 544.

[11] (1831) 2 B. & Ad. 78.

but this may be forgotten in the judgment of a court consisting besides himself of Littledale, Parke, Taunton and Patteson JJ.

Next I would refer to *Manners* v. *Pearson & Son*,[12] a case frequently cited for the judgment of Vaughan Williams L.J., though I doubt whether on the question now in issue a different view was taken by Lindley M.R. and Rigby L.J. The question was as to the proper mode of taking an account ordered in an action brought in this country by a creditor to have an account taken of moneys payable abroad by the defendant in a foreign currency, that is, whether it should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as of the dates when the debts became payable, or as of some other and what date or dates. Ignoring at first the particular form of action, that is, an action for an account, Vaughan Williams L.J. said [13]: "It seems clear that, in an action in whatever form in "the English courts for the recovery of a debt payable in foreign "currency, the amount of the English judgment or order must be "expressed in English currency, and that, unless the relative "values of the respective currencies are fixed by statute or some "authority binding the English courts or by the agreement of "the litigants, the amount of the English judgment or order must "be based on the quantity of English sterling which one would "have to pay here to obtain in the market the amount of the "debt payable in foreign currency delivered at the appointed place "of payment—i.e., the amount payable according to the rate of "exchange." The learned Lord Justice goes on to explain that the rule is based upon what I may call the commodity theory of a debt in foreign currency, echoing the judges in *Ward* v. *Kidswin*[14] 300 years ago. He then stated that he saw no reason why the rule should not apply in an action for an account—the only point, I think, upon which he differed from his brethren. His judgment, and in particular the passage that I have cited, has been frequently approved, particularly in *Di Ferdinando* v. *Simon, Smits & Co. Ltd.*[15] which was itself approved in *The Celia.*[16]

I should not pass over *Madeleine Vionnet et Cie* v. *Wills*,[17] for in that case Clauson L.J. states the law in words upon which I cannot improve [18]: "If this be the position," he says, "the

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[12] [1898] 1 Ch. 581; 14 T.L.R. 312, C.A.

[13] [1898] 1 Ch. 581, 592.

[14] Latch 77.

[15] [1920] 3 K.B. 409; 36 T.L.R. 797, C.A.

[16] [1921] 2 A.C. 544.

[17] [1940] 1 K.B. 72; 56 T.L.R. 15, C.A.

[18] [1940] 1 K.B. 72, 78, C.A.

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" only question open in this court would seem to be whether any " distinction can in principle be drawn between the case of a " claim in respect of breach of contract which results in relief by " way of damages, and a like claim which results in relief by way " of a judgment for a fixed sum. We can find no logical " ground for such a distinction either in reason or in any principle " which can be deduced from the decided cases; indeed counsel " supporting the judgment below was not able to formulate any " such principle, still less to point to any decided cases from " which any such principle could be deduced." I may without disrespect say that learned counsel for the respondents on the present appeal, greatly though he assisted the House, suffered in this respect from the same infirmity.

I could refer to many other cases, particularly to a group which arose in the liquidation of the British American Continental Bank in 1922 and 1923,[19] in which it was held that a claim in debt is on the same footing for the purpose of determining the rate of exchange as a claim for damages for breach of contract. But I do not think that any useful purpose would be served by doing so. I am satisfied that nothing is to be found in them which could lead one to a different judgment. Reliance was also placed on the judgment of the Supreme Court of the United States in *Deutsche Bank* v. *Humphrey.*[20] Any judgment of that court will be regarded with respect in this House, nor will anyone doubt that the conclusion to which the majority of the court, including Holmes J., came can be supported by weighty argument. It was that the date when the suit is brought, not the date when the debt is payable nor the date of judgment, is the date at which the rate of exchange must be fixed. But I do not find in the judgment persuasive authority which would justify your Lordships in adopting a rule which has so long been rejected in the courts of this country. This leads me to some final observations in this too long opinion.

We are engaged in settling the law upon a question in which any rule is artificial and to some extent arbitrary. In other systems of law different rules have been adopted, and there is no doubt that one system may benefit one creditor and another another. No rule can do perfect justice in every case. In this country the rule is settled so as to bind all courts that where the claim is in damages for breach of contract, or for a tortious act, the date of conversion is the date of that breach or that act. It would, in my opinion, introduce the sort of refinement into the law, against which I have striven and shall ever strive, if a different rule were adopted in the case of a foreign debt. In the one case a contract for delivery of goods, in another for delivery of foreign currency, in another for payment of a foreign debt, in all alike precisely the same damage suffered by a plaintiff who sues on the failure of the defendant to fulfil his obligation. It would be little credit to our law if a different measure of relief was meted out in these several cases.

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[19] *Goldzieher and Penso's Claim* [1922] 2 Ch. 575; 38 T.L.R. 465, 785, C.A.; *Crédit Générale Liègeois' Claim* [1922] 2 Ch. 589; 38 T.L.R. 464; *Lisser and Rosenkranz's Claim* [1923] 1 Ch. 276.

[20] (1926) 272 U.S. 517.

I come to the conclusion that the claim in paragraph 2 (a) of the proof can be admitted for no more than £180,724 5s. 6d., being the sterling equivalent for the dollar sums therein mentioned at the rate of exchange prevailing when they severally fell due. I have already intimated that the claims in 2 (b) and (c) must subject to inquiry as to quantum be admitted, and the claim under 2 (d) must be rejected.

To sum up, the appeal, in my opinion, fails upon the major question what is the proper law of the contract, but succeeds in so far as it seeks to reduce the proof of debt under paragraph 2 (a) of the proof to £180,724 5s. 1d. It fails in the attempt which was not seriously pressed to reduce the claim under 2 (b). The claim under 2 (c) has not been challenged and the claim under 2 (d) is rejected.

The question of costs remains. The appellants have so far been ordered in the Winding-up Court and the Court of Appeal to pay substantially all the costs of the respondents. Taking this into account, and the fact that they have succeeded in a considerable degree in this House and should have succeeded similarly in the courts below, their Lordships propose not to vary the orders already made in regard to costs, but to make no order as to the costs of the present appeal, except that the costs of the appellants be their costs in the winding up.

LORD REID. My Lords, the United Railways of the Havana and Regla Warehouses is an English company which went into voluntary liquidation on March 4, 1954. The appellants are the liquidators and this case arises out of a proof of debt lodged on behalf of the respondents. The only debt owed by the company to the respondents is the unpaid part of the rentals due under a lease of rolling stock in Cuba to which I shall have to refer later. The appellants seek to avoid liability for that debt by maintaining first that the proper law of the contract of lease is the law of Cuba, and secondly, that the law of Cuba discharges them in whole or in part of that liability. In my opinion the proper law of the contract is not the law of Cuba: it is the law of the Commonwealth of Pennsylvania. I have had an opportunity of reading the speeches about to be delivered by my noble and learned friends, Lord Denning and Lord Morris of Borth-y-Gest, and I agree with the reasons which they give for this. Accordingly, the only remaining question is the amount for which the respondents are entitled to prove.

The company's debt is in United States dollars, and this must be converted into sterling. The question is, at what rate or rates of exchange must this conversion be made. The sums due by the company ought to have been paid half-yearly between 1931 and 1936. At that time the rate of exchange was over $4 to the £, at the date of liquidation it was only $2.80 to the £. The appellants say that the date for conversion should be the dates of the breaches, that is, the dates at which the debtor ought to have paid his debt. The respondents say that the date should be at the earliest the date of liquidation, and we were informed that if the earlier dates are taken the appellants would have to pay about £80,000 less than if the later date is taken.

For many years it has been generally accepted that conversion should be made at the rate of exchange current at the date when the debtor broke his contract by failing to make due payment. But I do not think that this House is bound by authority in this matter, although the weight of authority in favour of taking the date of breach is very great. So I think it more satisfactory to re-examine the whole matter.

I take first a contract of which the proper law is the law of England, under which one party is bound to deliver to the other in England either goods or a sum in a foreign currency. If I buy a cow (to take Lord Wrenbury's illustration in *ss. Celia* v. *ss. Volturno*[21]) and the seller fails to deliver it at the stipulated date, I must, if I still want a cow, go into the market and buy one at the market price at the date of breach. I ought then to recover as damages for that breach of contract the cost of that cow, and it is well settled that the proper measure of damages is the market price of the goods at the date when the seller broke his contract. In the same way, if a party fails to pay or deliver a sum of dollars or francs at the stipulated date, I must if I still want that

[21] [1921] 2 A.C. 544.

currency go into the market and acquire it at the rate of exchange current at the date of breach, and I can see no reason why the measure of damages should not again be the market price of that currency at the date of breach. If in either case I do not choose to go and buy elsewhere the cow or the foreign currency which the seller failed to deliver that cannot alter the measure of damages. I know at the date of breach what sum I shall ultimately be entitled to recover as damages, and a subsequent alteration of the market price of cows or francs will not affect my rights. I do not have to take the risk of the price falling, and I ought not to gain if the price rises. I do have to take the risk that the pound sterling may be of less value when the damages are ultimately paid than at the date of the breach, for that is a general risk against which the law cannot protect any of us. And if the person who contracted to deliver the cow or the foreign currency is a foreigner, that is no reason why the measure of damages should be different. If a foreigner chooses to enter into an English contract he cannot expect special treatment.

But in theory it might seem that the rule should be different if the contract is a foreign contract. If a person in Pennsylvania buys a cow or buys francs for a price in dollars by a contract of which the proper law is the law of Pennsylvania, and the seller fails to deliver, the buyer will, if he sues in the United States, and assuming that the law there is the same as it is here, recover damages in dollars based on the market price in dollars of the cow or the foreign currency at the date of breach. But he may have to sue in England: in that case, why should he not recover in England sufficient sterling to give him as many dollars as he would have got if he had sued at home?

The case against the existing rule may seem even stronger where the action is for repayment of money lent. If in America one person lends dollars to another and the loan is not duly repaid, the creditor simply sues there for the money and no question can arise about the date at which damages are to be assessed, though interest may be due from the date of breach. But, if the creditor has to come to England to sue, the dollars will be converted into sterling as at the date of breach, although at that time neither party had any connection with England. The original reason for the rule has no application in such a case. When dealing with an English contract it may be right to treat foreign currency as a commodity, but dollars lent in America are not a commodity, and if they are not repaid at the due date there can be no question of an American going into the market and buying dollars to replace those which the debtor failed to deliver. Why, then, should the American creditor, if he has to come to England to sue, have his debt converted into sterling as at the date of the original breach? That seems the more anomalous because, if the creditor had been able to obtain judgment in America for his debt, and had brought the judgment here to enforce it, the debt would have been converted to sterling as at the date of the American judgment.

The reason for the existing rule is, I think, primarily procedural. A plaintiff cannot sue in England for payment of dollars, and he cannot get specific performance of a contract to pay dollars—it would not be right that he should. So at best he could only have the dollars converted to sterling at the date of judgment. Owing to appeals or difficulties of enforcement a long time may elapse between judgment and getting his money, and the rate of exchange may have altered substantially during that time. Indeed, fluctuations in the rate of exchange might result in the rate of exchange at the date of payment being nearer to the rate at the date of breach than to the rate at the date of judgment, though, no doubt, the probability is the other way. And there are practical difficulties in taking the date of judgment. The rate of exchange for United States dollars might perhaps be held to be common knowledge, but that is not so with regard to all foreign currencies. Evidence would have to be led and the conversion would really have to take place as at the date when evidence was led. And there are other practical difficulties which I need not specify.

Really the only practicable choice would seem to be between converting at the date of breach and converting at the date of raising the action in England. The latter alternative might perhaps be preferable, and it was in fact adopted by the United States Supreme Court in 1926 in *Deutsche Bank* v. *Humphrey*.[22] But the rate at the date of raising the action might be very different from the rate at the date of payment. Indeed, the objections to taking it are not very much less than the objections to taking the rate at the date of breach. Moreover, I doubt whether, in view of the great intricacy of some commercial transactions, it would be practicable to have two possible dates for conversion according to the nature of the contract. It would, I think, be wrong to take the date of raising the action in every case: to my mind, the date of breach is much better in the simple case of an English contract where the parties are in England and one fails to deliver foreign currency which he has contracted to deliver.

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[22] 272 U.S. 517.

So even if this were still an open question, I would have to come to the conclusion that in every case where a plaintiff sues for a debt due in a foreign currency, that debt should be converted into sterling at the rate of exchange current when the debt fell due. That rule may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain, and no other rule could be relied on to produce a more just result: indeed, no other rule is really practicable. So the judgment which the respondents hold could not be supported on general principles.

But the respondents maintain that, accepting the general rule, there are special reasons in this case why they are entitled to take the rate of exchange at the date of liquidation. Those reasons arise from unusual features in this litigation, and largely turn on the proper interpretation of their proof of debt. To understand them one must have in mind the nature of the transactions which give rise to the debt, and I shall state as briefly as I can the essential facts. In or before 1921 the company purchased rolling stock for their railway and they sought to raise $6,000,000 in the United States. Apparently it was desired to give the lenders security over the rolling stock, and with this object an elaborate scheme was adopted. The company set up a subsidiary (the car company) and purported to sell the rolling stock to them and then to take it back on lease. The rentals under this lease were the sums necessary to pay interest and redemption of the $6,000,000. Then the car company's rights as owner of the rolling stock, including the right to receive the rentals, were assigned to predecessors of the respondents as trustees for the lenders of the $6,000,000 which was divided into 6,000 certificates each for $1,000. The trustees were bound to pay to the certificate holders the interest and redemption money out of the money which they received from the company under the lease, but there was no direct obligation of the company to the certificate holders.

All went well from 1921 to 1930, but the company failed to pay to the trustees the sums due in 1931 and subsequent years. No attempt was made to enforce the security over the rolling stock, perhaps because under the law of Cuba that was difficult or impossible, and matters were at a standstill until in 1953 the company sold their railway system, including the rolling stock, to the Cuban Government for $13,000,000. By that time 3,800 of the certificates had been redeemed, and of the remaining 2,200 the company had acquired 1,869 which passed into the hands of the Cuban Government as part of the sale of the undertaking. The other 331 certificates remained in the hands of members of the public. After the company went into liquidation the Cuban Government intimated that they did not desire to claim in respect of their certificates. They were in any case bound to indemnify the company, so it would seem that they would have had to pay back to the company any sums which the respondents might pay to them out of money which the respondents received in the liquidation. But the 1,869 certificates were still in existence, and this seems to have put the respondents in some difficulty in framing their proof of debt.

In their proof of debt the respondents ought to have given particulars of the company's debt to them, that is, the unpaid rentals under the lease, but they did not do so. Instead they gave particulars of their debt to the certificate holders. But no objection was taken on this ground. So we must do the best we can with the proof as it stands. In fact, the sums claimed under paragraph 2 (a) and (d) are together almost exactly the same as the sums which ought to have been claimed, that is, the rentals due by the company with interest. (There is a discrepancy of the order of $1,000 but that can be regarded as negligible.) And, of course, the sums due by the company to the respondents were only payable for the purpose of enabling the respondents to pay to the certificate holders the sums set out in paragraph 2. So I think we can properly regard paragraph 2 as setting out, substantially correctly but in wrong form, particulars of the company's debt to the respondents. Unless we can so regard it, there are no particulars at all and the proof would be bad for that reason.

But the respondents seek to put quite a different interpretation on paragraph 2. I find their argument difficult to appreciate, and I hope that I do it justice. As I understand it, they say that paragraph 2 has nothing to do with particulars of the company's debt to them: it is a statement of how they will use any money which is paid to them. That means that the proof contains no particulars at all of money owed by the company to the respondents beyond the reference in paragraph 4 to covenants in the lease. But the respondents say that no further particulars were necessary, or at least, that it is too late now to object to their absence.

I am unable to accept this interpretation. Paragraph 2 begins by stating that the company was at the commencement of the winding up " and still is justly and truly indebted to the claimant " in the following sums " which include heads (a) and (d). So I do not see how the respondents can now say that heads (a) and (d) are intended to be something other than particulars of the company's debt to them. Paragraph 2 (a) is a claim for a sum "due and payable to the claimant in respect of $333,000 [it "should be $331,000] in face value of . . . certificates then out- "standing in the hands of members of the public." And paragraph 2 (d) is a claim for a sum "due and payable to the "claimant in respect of $1,867,000 [it should be $1,869,000] in "face value of . . . certificates which had been purchased by the "company." Again the emphasis is properly on what was "due "and payable to the claimant," and, strictly speaking, what was due and payable to the claimant was not due in respect of outstanding certificates, it was due under the lease. But in a sense it was due in respect of the certificates because the respondents could only use any money they received to pay the certificate holders—any surplus would have been repayable to the company. In view of the probability that the Cuban Government would make no claim it may well have seemed convenient to divide the respondents' claim against the company in this way. The respondents could, I suppose, have drafted their proof of debt in the form of, first, a claim for the money due to them with particulars, and then a statement of why they required the money or what they were going to do with it. But I cannot spell that out of the proof of debt which is before us. So I think that paragraph 2 must be interpreted as meaning that the respondents divided into two parts their claim to the money due to them: in paragraph 2 (a) they claimed 333/2,200 parts of that money, and in paragraph 2 (*d*) they claimed the remaining 1,867/2,200 parts of that money.

I can now come to the crucial point in this branch of the case. The appellants as liquidators had rejected the whole of the respondents' proof of debt and the respondents appealed. In 1956, before this appeal was heard, the appellants sought to make an interim distribution to the stockholders of the company of cash in their hands. Their summons came before Roxburgh J. and he was satisfied that the Cuban Government as holders in due course of the 1,867 certificates had renounced any claim to participate in the assets available for distribution in the winding up. To put matters in order it was then agreed by the parties to treat the appeal of the respondents against the rejection of their proof as being before Roxburgh J., and on December 4, 1956, he made an order in which the court, being satisfied that that renunciation was a sufficient ground for the rejection of that part of the proof of debt (paragraph 2 (d)) "which is based upon or measured by "reference to the said 1,867 equipment trust certificates, doth "not think fit to reverse or vary the decision of [the present "appellants] as such liquidators rejecting the said proof of debt "so far as the same relates to the said sum" claimed in paragraph 2 (d). The question is what is the effect of that order, against which there has been no appeal.

The appellants say that order discharges the respondents' claim against them to the extent of 1,867/2,200 parts of the sums which were due to the respondents. The respondents deny that. They say, as I understand it, that their claim to the whole of the unpaid rentals still survives intact, that the order of Roxburgh J. did not touch that claim, but that it merely recognised that the Cuban Government's claim against the respondents had been abandoned. The respondents are therefore entitled to take as much out of the sums ultimately payable to them in the liquidation as is necessary to meet in full the claims of the holders of the other 331 certificates, and, as those claims are in dollars, they can take as much sterling as is now necessary to produce the necessary sum in dollars, or at least as much as would have been necessary at the date of liquidation. They could not, of course, take more than that because if they did they would simply have to pay it back again. That would mean, in effect, that the certificate holders' claims must now be converted into sterling as at the date of liquidation and not as at the dates when they ought to have been paid. The complicated order against which this appeal is taken appears to give effect to these contentions of the respondents.

It appears to me that this order can only be supported on the view that paragraph 2 (d) is not a claim to any part of the debt due by the company, the claim being found elsewhere, and that, therefore, its rejection by Roxburgh J. did not touch or in any way cut down the respondents' claim. I have already given my reasons for rejecting this view of the meaning and effect of the proof of debt, and so, in my judgment, the result of the order of Roxburgh J. is that the respondents are now only entitled to claim 333/2,200 parts of the debt due to them.

Finally, the respondents relied on their claim in tort. Paragraph 4 of the proof of debt states that "The liability of the company to the claimant which is the subject-matter of this proof arises under or by virtue of a covenant [in the lease] . . . Alternatively the said liability arises by way of damages for breach of a covenant . . . or by way of damages for the conversion by the company of the said railway equipment." Accepting the view that the sale of the company's undertaking to the Cuban Government involved the tort of conversion as regards the rolling stock, that the damages amounted to $2,000,000, and that such damages must be converted into sterling at the date of the tort when the rate of exchange was $2.80, I do not think that this helps the respondents. Again, it is necessary to consider the effect of the order of Roxburgh J. Either that order affects the claim in tort or it does not. If it does not we would have to deal with this part of the case as if the order had never been made. But that has never been argued. The respondents seek to use the order as excluding the Cuban Government from any right to participate in the distribution of the damages which they receive, but to deny that the order is effective to cut down their right to receive the whole of the damages. If the order is effective to cut down their right to damages in the same way as it cuts down their right to the rentals, then the claim in tort is of no value to the respondents because 333/2,200 parts of the $2,000,000 damages is much less than 333/2,200 parts of the unpaid rentals even allowing for the fact that they would have a more favourable rate of exchange for the damages. And, of course, the respondents cannot get both.

Their argument is that they are entitled to receive the whole $2,000,000 damages, that by reason of the order of Roxburgh J. the Cuban Government's right to participate in that sum is gone, and that therefore they can apply it to meeting in full the claims in paragraph 2 (a), (b) and (c). It is amply sufficient to meet those claims and so the respondents can use the same argument as before for taking $2.80 as the rate of exchange for the dollars necessary to meet the claims set out in paragraph 2 (a).

But it appears to me that that argument is inconsistent with what I have held to be the proper construction of paragraph 2 of the proof of debt. I could understand an argument that paragraph 2 has nothing to do with the claim in tort—though I might not agree with it. But that would mean that the order of Roxburgh J. has nothing to do with this claim. And, as I have said, that has not been argued and it would not suit the respondents so to argue. So it is admitted that paragraph 2 affects this claim. But if so, it must have the same meaning as it had before, and I have stated my opinion that its meaning is that it divides the respondents' claim into two parts, and one of those parts has been finally rejected. I am, therefore, unable to agree that the respondents are still entitled, notwithstanding the order of Roxburgh J., to claim the whole of the damages of $2,000,000.

Accordingly, I would allow the appeal in part. The respondents are entitled to claim the sums in dollars set out in

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paragraph 2 (a), but each item must be converted to sterling at the rate of exchange current when it became due.

LORD RADCLIFFE. My Lords, I had the privilege of being able to study the opinions of my colleagues before I came to prepare my own. I am so much in agreement with the conclusions come to, except on one minor point, not itself of any general importance, and the reasons given for those conclusions, that I do not wish to contribute anything myself except one or two comments on the issues that have been debated before us.

The first and major question, no doubt, is that relating to the proper law of the contract to pay interest on the $6,000,000 loan and to repay the principal with the stipulated premium. As to this, I agree that in the end one is bound to accept the law of the Commonwealth of Pennsylvania as the governing law for this purpose. I share the view of Wynn-Parry J. and the Court of Appeal that, although the obligations take the form of promises to pay " rent " in the " lease " of the rolling stock, the transaction must be looked at as a whole for the purpose of determining its proper law. So regarded, this is a case where a company whose head office is in London but whose business is that of running a public utility in Cuba comes to the New York capital market to borrow money to further its business operations. Once the money is raised the creditors have done their part. The complex of transactions which make up or are attendant upon the trust agreement and the lease is directed entirely to seeing that the money loaned is secured and in due course returned. When this is done by the company promising payment of interest and repayment of principal and premium in United States dollars, in New York and Philadelphia, and the watch-dog chosen for the protection of the lenders is a Pennsylvanian trust company, I have no doubt myself that the general inference from such a pattern ought to be that the proper law of the obligation is not that of the United Kingdom, where the debtor has his head office, nor that of Cuba, where the business is conducted and the rolling stock would be found, but either that of New York or of Pennsylvania. I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania which is both the home of the trustee and the place where the capital is to be repaid seems to me clearly the natural choice.

I should arrive at a different conclusion if I thought that the parties had by their own choice subjected the obligation to the rules of the law of Cuba. I am satisfied, however, after reading the opinion prepared by my noble and learned friend, Lord Morris of Borth-y-Gest, that the clauses in the lease which are relied upon in support of such a conclusion cannot be read as having that effect.

There are several points of argument which arise out of the proof itself. The one which is of general importance is the question at what date or dates should the dollars due under the unfulfilled covenants in the lease be converted into sterling for the purposes of the respondents' claim. On this point I agree with the reasoning adopted in the opinion of my noble and learned friend, Viscount Simonds, and I am satisfied by his citation of the previous authorities that the course of English decisions (and, I should add, English legislation—see Bills of Exchange Act, 1882, section 72 (4)) has led us fairly directly to the conclusion that conversion should be made at the rate of exchange ruling at the date when each covenanted payment fell due to be, but was not, made.

One of the difficulties of discussing this particular question is that English law has not got a well-settled nomenclature for its terms. I take it myself that any contract to settle a debt in the currency of the country in which the settlement is to be made is a contract for the payment of money in the eyes of our law, and this notwithstanding the fact that, if action is taken in England for breach of the contract, the remedy sought must be damages, not debt, and those damages expressed in sterling for the purposes of judgment. To speak of such contracts as being in English law contracts for delivery of a commodity seems to me merely to confuse the issue, and needlessly to suggest that for some reason best known to itself our law regards a contract for the payment of debt in foreign money as if it were of a nature different from that which it obviously possessed. Also, again, I think, needlessly, such a description suggests that we admit of no distinction between a contract to pay money abroad in satisfaction of a debt on the one hand and a contract to deliver foreign currency in this country or abroad or a true exchange contract, which is a contract to exchange the currency of one country for the currency of another, on the other. Each of these transactions has some difference from the other and may for some purposes have

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different consequences: but the important point for the present purpose is that each of them has the common characteristic that, if sued upon in England, it must be sued for in damages expressed in sterling as upon a breach of contract. The damages, I should say, are for failure to tender or deliver, as may be, objects of value which at the date of failure had a sterling equivalent in international exchange.

If, then, we already have a settled rule that damages for tort and for breach of contract other than for payment of a foreign debt must be converted into sterling at the date of breach, I agree that there is no sufficient peculiarity in the obligation to pay money as distinct from other forms of contract that could justify the adoption of a different rule for the calculation of damages arising from its breach. Nor do I see how in this connection it would be possible to base any distinction upon the test whether the proper law of the contract is English or foreign, for there is no necessary correlation between the proper law that governs an obligation and the country or the currency in which the obligation is to be discharged.

I share the theoretical objection to applying this rule to debts due in foreign currency. The effect of it is to express the creditor's rights in terms of sterling at a date earlier than that at which, assuming default, he has any means of obtaining the sterling and reconverting it into the currency which was due. If we treat currencies as inherently variable inter se—it exaggerates the difficulty to call them fluctuating—he may suffer in the process of obtaining his rights. It is true that this possibility of risk from currency variation is not confined to contracts stipulating for payments of money: but it probably strikes one with greater force when money itself is the subject of the obligation. One looks for a rule by which the creditor takes what risk there is, at any rate as long as possible, in terms of the currency for which he has stipulated by his contract. This argues for a date of conversion later than the date of breach. But neither the date of execution nor the date of judgment offers itself as a practical proposition in litigation, and the only real alternative to the date of breach is the date at which legal proceedings are begun in this country. The acceptance of this date has a certain attractiveness because it is the date which marks the creditor's decision to convert his claim in foreign money into a sterling judgment.

I do not, however, think that this consideration takes one nearly far enough to justify maintaining a separate rule for money payments. Even if one chose the date of suit as the date of conversion, that in its turn might fail to give a creditor what he ought to have had if the exchange value of the stipulated currency was reduced in the meantime. As I see it, there is no infallible system which can eliminate the fact that a debtor has by the nature of the contract an option at the expense of his creditor. He can pay on the due date, if he thinks it suits him, or delay payment if he thinks that owing to the anticipated movement of the exchanges that will suit him better. The creditor has no corresponding option: he cannot secure the money at the due date, if the debtor does not pay, and then he can only get what is due to him through the time process of legal proceedings. It would, I think, be some protection to him and would be a workable arrangement to give a creditor an option, if he sues his debtor here, to take either the date of breach or the date of the commencement of legal proceedings, as he chooses. But the fact is that there is no general reason why there should be any significant interval between breach and suit; and in any event the difficulties, though real enough in this case, are mainly theoretical. Under the procedure of most countries, I imagine, it would be possible to sue the debtor in the country of payment, obtain judgment there for the currency stipulated, and convert the judgment sum into sterling only when it is registered here for execution.

So far, therefore, as the respondents' proof claims under paragraph 2 (a) for $331,000 with attendant interest and premium converted into sterling at the rate of $2.80 to the £, I think that the wrong rate of exchange has been taken for the conversion, and that the rate or rates ruling at the dates of breach must be substituted. This provides the figure of £180,724 5s. 2d. which, as I understand, commends itself to the majority of your Lordships as the correct figure for head (a) of this paragraph of the proof.

But the respondents' right to prove did not depend only on the covenants in the lease: it was founded alternatively, as paragraph 4 made at any rate sufficiently clear, upon the wrongful conversion of their property involved in the December, 1953, sale of the rolling stock to the Government of Cuba. The damages for this wrong were assessed by Wynn-Parry J. at $2,000,000: applying, as one must, the $2.80 rate of exchange ruling at that date, there is therefore a sum due to the respondents which exceeds the sums for which they claim to prove under paragraph 2 (a) of the proof, even if the dollars mentioned in that item are converted at that rate and not at the earlier rates which have to be taken when the basis of proof is breach of covenant. What I have not been able to see is what has happened in the course of these tangled proceedings which prevents the respondents' proof being good for this amount.

I do not want to take up much time on this, since the majority of your Lordships are satisfied, though perhaps by rather different processes of reasoning, that even in respect of a claim in conversion paragraph 2 (a) cannot stand at a higher sterling figure than £180,724. The proof does raise great difficulties of interpretation by the form in which it was cast, and there are further difficulties caused by the order made in the proceedings before Roxburgh J.; and no doubt it is possible to put varying constructions upon the outcome of what had to be done before everything could finally be brought to the judgment of the court. On the other hand, the respondents' position when they came to make their proof was an unusual one in two respects: they did not know, and could not find out, what responsibilities they were supposed to have towards the holders of 1,867 (or 1,869) of their certificates, and they also knew that any surplus of their security over what their beneficiaries could require from them would be due to the debtor itself. I do not feel it right, therefore, to read their proof more strictly against them than I am bound to, or to deduce more from the order of Roxburgh J. than it actually says. So approached, the order does no more than confirm the elimination from the proof of paragraph 2 (d) and so that part of the total claim that related to $1,869,000, interest and premium: it left untouched paragraph 2 (a) consisting of the claim for $331,000 and the attendant interest and premium. If the latter claim arises in respect of a wrong for which the damages are convertible at the rate of $2.80 to the £, I should have thought that it was a valid claim for the purposes of proof, and I have not found it possible to see how its quantum can be in some way reduced by the rejection of paragraph 2 (d) or, as one of your Lordships holds, excluded because the claim in conversion has become barred by the course of proceedings.

Lord Denning. My Lords, I have tried to cut a way through the jungle of facts in this case. If we leave out subsidiary companies, successor companies, and the like, it can be reduced to two separate transactions.

First, there was the transaction whereby the railway company in 1921 raised $6,000,000 from the trust company. This was, in effect, a hire-purchase transaction. The railway company was rather like a man who wants to buy a motor-car but has not the means to pay for it. Just as he raises the necessary money from a finance company, so the railway company raised this $6,000,000 from the trust company. It assigned the rolling stock to the trust company for $6,000,000 (who paid it to the suppliers) and the trust company then let the rolling stock on a lease to the railway company for 15 years. The rentals were so fixed that the whole $6,000,000 would be repaid within 15 years together with interest at 7½ per cent. per annum. When all the instalments were fully paid, the railway company was to become the owner of the rolling stock.

Secondly, there was the transaction whereby the trust company in 1921 raised the $6,000,000 from the public. It issued 6,000 equipment trust certificates of $1,000 each. These were repayable over a period of 15 years together with interest at 7½ per cent. per annum. But they were repayable " only from and " out of the rentals when paid as provided in the lease." The trust company was to hold the rentals " for the benefit of the " certificate holders ": in short, on trust for the certificate holders. If the railway company made default in paying the rentals, the trust company were entitled to retake possession of the rolling stock and sell it; and in that event the proceeds were to be used to pay off the certificate holders, and the " surplus, " if any," was to go back to the railway company.

The important thing to notice is that the rentals payable under the lease coincided with the sums payable to the certificate holders. The rentals were so fixed as to enable the trust company to meet the following outgoings, no more and no less, over the 15-year term: (1) To pay the dividends to the certificate holders at the rate of 7½ per cent. (2) To pay the expenses of the trust company. (3) To redeem the 6,000 certificates at the rate of 400 a year.

During the first 9½ years all went according to plan. The rentals were duly paid to the trust company, who duly paid the certificate holders their dividends and also redeemed 3,800 certificates, leaving 2,200 outstanding. During the next three years the railway company could not pay the rentals in full. It paid enough to cover the dividends on the certificates but nothing more. Thereafter the railway company paid nothing at all. The result was that when the 15-year term expired in 1936, the railway company owed the trust company rentals made up as follows: (1) A sum equal to the dividends unpaid on the outstanding 2,200 certificates. This came to $247,500. (2) The expenses of the trust company. (3) A sum equal to the amount necessary to redeem the outstanding 2,200 certificates, that is, $1,000 apiece plus the appropriate premiums. This came to $2,256,000.

It might be thought that, when the railway company made default, the trust company would take steps to enforce payment of the rentals, by taking possession, but it was unable to do so because the Cuban State declared a moratorium. But the default in payment naturally struck down the value of the certificates. One of the significant facts in the case is that the railway company itself bought 1,869 certificates at $147.50 a certificate and held on to them, leaving only 331 in the hands of the public.

So things remained for many years, with the railway company running the railway and paying nothing on the certificates. Ultimately in 1953 the Cuban State bought the whole of the railway undertaking (including the 1,869 certificates) for $13,000,000. The Cuban State then transferred the railway undertaking, certificates and all, to a new nationalised company. The railway company received the price of $13,000,000 in United States Treasury Bills and brought it back to England, converting it to sterling at the rate of $2.80 to the £ sterling. On March 4, 1954, the railway company went into voluntary liquidation. The trust company now seeks to prove in the liquidation.

Much discussion has taken place on the form of the proof, but once the facts are properly understood its meaning becomes clear. The principal ground of the claim, as I read it, was because the railway company had not paid the rentals due under the lease. The trust company claimed to be entitled to recover these rentals together with interest at 6 per cent. from the dates they became due. The complication in the claim arose because the trust company was a trustee for the certificate holders. The rentals, once received, had to be applied (1) in paying the certificate holders the sums due on their certificates, and (2) in paying the reasonable expenses of the trust company. The rentals receivable were equal to the sums payable to the certificate holders, plus expenses. But as a trustee, the trust company was in this difficulty: It knew there were 2,200 certificates outstanding, but 1,869 of these had been bought in by the railway company itself: and the trust company did not know whether these 1,869 certificates were effective or not. So, in order to cover itself in case they were effective, the trust company divided its proof into four parts, which can be summarised as follows:

2. (a) The proportion of rentals payable in respect of 331 certificates, plus interest at 6 per cent. from the dates the rentals became due.

(b) Expenses already incurred by the trust company.

(c) Expenses to be incurred by the trust company.

(d) The proportion of rentals payable in respect of 1,869 certificates, plus interest at 6 per cent. from the dates the rentals became due.

Although the proof of debt was divided into those four parts, nevertheless the liability of the railway company was clearly stated to arise " under or by virtue of a covenant " in the lease: and this was, no doubt, the covenant to pay rentals. Claims 2 (b) and 2 (c) were maintainable only under the covenant to pay rentals, and under no other head whatsoever. Indeed, the wording of item 2 (b) followed the very wording of the covenant in the lease, namely, " reasonable expenses incurred . . . in the performance " of the trust under which the said certificates were issued."

Alternatively, the liability of the railway company was also stated to arise under other heads, none of which needs special mention except the claim in conversion. The trust company alleged that " the said liability arises . . . by way of damages for " the conversion by the company of the said railway equipment." This claim was necessarily made in the alternative. If the trust company succeeded in its claim for rentals, it could not possibly claim damages for conversion: for, as soon as the claim for rentals was satisfied, the railway company would be entitled to the railway equipment because it would then have paid for it. But I go further. The claim for rentals proceeded on the footing that the property in the railway equipment had passed to the railway company: whereas the claim for conversion proceeded on the footing that the property had never passed to the railway company. These were inconsistent rights; and once the trust company committed itself unequivocally to the one, it could not afterwards resort to the other: see *Evans* v. *Davis* [23] and *United Australia Ltd.* v. *Barclays Bank Ltd.*[24] by Lord Atkin.

In the events that happened, I think that the trust company did commit itself unequivocally to the claim for rentals. It did it by the form of its proof. Items 2 (a), (b), (c) and (d) were consistent, and consistent only, with a claim for rentals, and not with a claim for conversion. I can see that the railway company would be liable for those items as rentals; but I do not see how it can be said there was any liability for them in conversion. How could the amounts due under the trust certificates ever come

[23] (1878) 10 Ch.D. 747, 762, 763.

[24] [1941] A.C. 1, 30; 57 T.L.R. 13; [1940] 4 All E.R. 20, H.L.

into the calculation of damages for conversion? And how could the trust company ever claim its expenses under that head? The only possible damages in conversion would be for the value of the railway equipment, or rather of the trust company's interest in it, at the time of conversion. But no such sum was claimed in the proof at all.

Likewise the order made by Roxburgh J., which your Lordships have described, is applicable, and applicable only, to the claim for rentals and not to the claim for conversion. There is no difficulty in applying that order to the claim for rentals. The trust company claimed rentals divided into four items: 2 (a), (b), (c) and (d). All that the order did was to strike out item 2 (d) and to leave items 2 (a), (b) and (c) intact. But there is great difficulty in applying the order to the claim for damages for conversion. On the one hand, if that claim is confined (as I think it must be confined) to the sums claimed in 2 (a), (b), (c) and (d) of the proof, the claim is unintelligible, because there can be no possible claim in conversion on those heads, as I have already pointed out. On the other hand, if the trust company had put in its claim differently, as, for instance, if it had claimed $2,000,000 as being the value of the goods at the time of the conversion, Roxburgh J. might well have made a different order. He would, indeed, have had to do so: for such a claim could not be divided into items 2 (a), (b), (c) and (d) as the claim for rentals was. No part of it could be said to be "based upon or measured by "reference to the" 1,869 certificates.

In the result, I think it is impossible now to allow the trust company to claim in conversion for the value of the goods. It has committed itself to a claim divided into four specific items 2 (a), (b), (c) and (d). Those items are intelligible in regard to a claim for rentals but not in regard to a claim for conversion. It was on the faith of that itemised division that Roxburgh J. made his order. The trust company cannot now go back and resort to a lump sum claim for conversion divorced from any such items. It would need an amendment of the proof which it is much too late to permit. I am far from saying that the trust company did wrong in framing the proof as it did. It was a trustee for the certificate holders; and the certificates were in terms payable "only from and out of the rentals." They were not payable out of any damages for conversion. So it was the duty of the trust company to claim the rentals and recover them, if it could, rather than seek damages for conversion. And that is what I hold the trust company has done.

Likewise with the alternative claim for damages for breach of covenant not to assign. It must be rejected just as the claim in conversion.

But if these alternative claims are to be considered as still available, then some attempt must be made to apply the order of Roxburgh J. to them; and the only way of doing it that I can see is to reduce them in the same proportions as the claim for rentals. Thus, taking the total damages of conversion at $2,000,000, the effect of Roxburgh J.'s order would be to reduce them to $302,727. That sum is so small that it would not suit the trust company at all to claim it.

I propose, therefore, to confine my remarks to the claim for rentals under the lease. The railway company has no answer to this claim except to say that under the laws of Cuba this liability has been transferred from the railway company to the new nationalised company which has taken over the railway: and that by Cuban legislation the railway company has been discharged from liability. But this answer is of no avail to the railway company unless it can show that the lease itself is governed by the law of Cuba. It is a well settled rule of private international law that the validity of a discharge by legislation depends on what is the proper law of the contract; and this is the case, no matter whether the debt has already accrued due at the time of the legislation or is still a future debt. A discharge in accordance with the proper law is valid; but a discharge which is not in accordance with the proper law is invalid.

What, then, is the proper law of the contract here? It is agreed on all hands that it is either the law of the Commonwealth of Pennsylvania or the law of the Republic of Cuba; but it is said that Pennsylvania must stand on its ground without any help from the State of New York. I do not think this is the correct approach. The real choice is, I think, between the law of one of the United States of America and the law of the Republic of Cuba. The reason is because for all practical purposes there is no material distinction between the laws of the several states of the United States as between themselves, whereas there is a great distinction between the law of Cuba and of the states. So approaching the problem, it seems to me clear that the lease here was part and parcel of a composite transaction of which the primary aim was the raising of money in the United States on the security of railway equipment in Cuba. The contract was made in the United States, the money was raised there and was paid out there; and it was to be repaid there both as to principal and interest. The security alone was in Cuba. On these facts, as in the case of a mortgage, it can fairly be said that the debt "is considered to be the principal, and the securities are considered as adjuncts, depending, for their existence, on the "existence of the debt": see *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[25] So considered, it seems to me that, in the absence of any express clause determining the proper law, the transaction should be governed by the law of the country of the lender. A borrower who comes from a foreign country seeking a loan must expect to conform to the laws of the country to which he comes: for otherwise he is unlikely to get the loan. The fact that the security is situate abroad is only material as necessitating the observance of the foreign law in the pledging and enforcement of the security.

I do not regard clauses 11 and 12 of the lease as clauses which determine the proper law. They are concerned only with special incidents relating to the security. Clause 11 deals with the formalities of registration and the like such as may be necessary to protect the trustee's title. Clause 12 means that if there is occasion to resort to the courts in Cuba (as, for instance, to enforce the security), the parties must go to the tribunals of the City of Havana rather than those in any other part of the island. The parties do not by this clause, or any other clause, agree that the lease itself is to be governed by the laws of Cuba; and in the absence of an express clause to this effect, the test is simply with what country has the transaction the closest and most real connection: see *Bonython* v. *Commonwealth of Australia.*[26] Applying this test, I think the proper law of the transaction, including the lease, is the law of one of the United States, and out of those states the choice should fall on the Commonwealth of Pennsylvania because it has on balance the closest connection with the transaction.

This being so, it is plain that the legislation in Cuba could not take away the right of the trust company to receive payment in the United States of the rentals due under the lease; and the railway company was at all material times under an obligation to pay the rentals to the trust company in full in dollars in the United States of America, together with interest at 6 per cent. from the time they became due.

Now the trust company comes to the courts in England to recover the sums in arrear and unpaid. And if there is one thing

[25] [1910] 2 Ch. 502, 516.

[26] [1951] A.C. 201, 219.

clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgments in dollars any more than the United States courts give judgments in sterling. But the question is, at what date is the rate of exchange to be taken? Is it to be the date when the rentals fell due, or the date of the winding up?

If the trust company had sought to recover judgment in the United States, it would, I presume, have been able to sue there for a *debt* in dollars. But it cannot sue here in *debt*. There is no sterling debt. Its claim must be in *damages*. It must claim damages for breach of contract because of the non-payment of dollars in the United States. As such, the claim is indistinguishable in principle from any claim for breach of contract. The rate of exchange is to be taken at the time when the breach took place. This is, I think, a rule of positive law established by decisions of this House and of the Judicial Committee of the Privy Council; but as it has been subject to some criticism, I would like to attempt some explanation of it.

The origin of the rule, as I understand it, lies in the fact that for long years sterling was regarded as a stable currency "of "whose true-fixed and resting quality there is no fellow in the "firmament." Sterling is the constant unit of value by which, in the eye of the law, everything else is measured. So long as sterling is regarded as stable whilst other currencies go up and down, it would seem that justice is best done by taking the rate of exchange at the date of the breach. The creditor is entitled to be put into as good a position as if the debtor had done his duty and paid the debt on the due date; and he is only truly put into such a position if the debt is converted into sterling at that date; rather than at a later date when the foreign currency has depreciated or appreciated.

The question is whether the rule is still to apply when sterling loses the value which it once had. We have seen in recent years how it has depreciated. It has departed from the gold standard: the pound has been devalued; and there has been much inflation. It may be said that in these conditions the rule is apt to produce an injustice to a creditor in the United States who is owed money in dollars: because, if he comes to our courts after devaluation, he does not recover sufficient sterling to compensate him for his loss. But I am afraid that, if he chooses to sue in our courts instead of his own, he must put up with the consequences. Our courts here must still treat sterling as if it were of the same value as before: for it is the basis on which all our monetary transactions are founded. Thus, within this country itself, a man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Just as an English creditor in this country suffers from the depreciation of the pound, so also does a foreign creditor who comes to this country seeking payment in sterling. He must take it that in England we have always looked upon a pound as a pound whatever its value in other countries: and if we award him damages calculated in sterling at the time of the breach, we are awarding him what in the eye of the law is full compensation for the breach.

It is worth noticing that, as we look upon sterling, so also do the courts of the State of New York look upon the dollar. They have, I believe, the rule that a claim for debt or damages in foreign money must be converted into dollars at the rate of exchange prevailing at the date of the breach. In this respect the New York courts follow their own course rather than the decision of the Supreme Court of the United States of America, and I think we should do likewise. It is better suited to a commercial community. Any other rule would mean that the sum payable would depend on the delays of parties or of courts. That cannot be right. And I would point out that it is often open to creditor or debtor to safeguard himself from any adverse consequences of the rule. Take the case where sterling depreciates. For instance, a debt is payable in dollars in the United States, it is unpaid, and afterwards sterling depreciates. The creditor can, after devaluation, bring an action in the United States and recover judgment in dollars. He can then sue in England on that United States judgment and the rate of exchange will be taken not at the date of the original contract debt, but at the date of the United States judgment: see *Scott* v. *Bevan*,[27] and section 2 (3) of Foreign Judgments (Reciprocal Enforcement) Act, 1933.

Take next the case where the foreign currency depreciates: for instance, when a debt is payable in francs in France, it is unpaid, and afterwards francs depreciate. The creditor may bring an action in England but the debtor can forestall it by paying the debt in France in depreciated francs; and then, when the debtor is sued in England, he can claim that he has discharged the debt by the proper law of the contract: see *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings*.[28]

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[27] (1831) 2 B. & Ad. 78.

[28] [1922] 1 K.B. 451; 38 T.L.R. 221, C.A.

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In this case the trust company did not take any steps in Cuba or the United States to get judgment for rentals in dollars. I take it there were good reasons for this: so that this is the only country in which it can get redress. But coming here, it must accept the rule of our law that we can only give judgment in sterling, and at sterling calculated at the rate of exchange when the rentals should have been paid. If the proof had remained intact for the full rentals payable in respect of the 2,200 certificates, that would clearly be true. It is no less true when the proportion payable in respect of 1,869 is struck out, leaving only the proportion in respect of 331 payable. The rates of exchange for this proportion must be the rates ruling when the rentals accrued due. When the trust company receives the amount so calculated, it will have received a sum which in the eye of our law is full satisfaction of the claim for rentals and interest; and it should receive no more, no matter how the claim is framed. It is true that, when the trust company wishes to turn the sum back into dollars, it may find that it has not enough dollars to pay the certificate holders in full: but that cannot be helped. There are always risks incident to foreign investment. One of the risks is that the lender may have to go to another country to recover his money; and when he does so he must recover in the currency of that country, and not in that of his own. It is for risks such as these that he stipulates for a high rate of interest; and his disappointment at the rate of exchange will, I hope, be mitigated by the substantial interest which he will receive.

I would allow the appeal on the question of quantum but dismiss it on the question of liability.

LORD MORRIS OF BORTH-Y-GEST. My Lords, in the voluntary liquidation of United Railways of the Havana and Regla Warehouses Ltd., which may conveniently be referred to as "the "company," a proof of debt was lodged on June 18, 1954, by the respondent. The proof was rejected by the liquidators. The resultant litigation, embracing many issues of law, has been concerned with two main questions: first, whether any proof of debt ought to be admitted, and secondly, if so, for what amount.

The company, which was incorporated in England in 1898, operated for many years a railway undertaking in the Island of Cuba. For the purposes of its operations the company, in and prior to the year 1921, purchased rolling stock and equipment in the United States of America. The purchases were of an amount which in total exceeded $14,000,000. For the purpose of financing part of this amount the company desired to raise $6,000,000 in the United States.

Certain elaborate arrangements were made which were said to follow in the main the pattern of what was described as "the "Philadelphia Plan." There was an issue of certificates which were called "United Railways of the Havana 15-year 7½ per cent. "equipment trust certificates." The respondent is the present trustee of such issue. The certificates were of $1,000 each. Six thousand certificates were issued.

By a certain agreement dated February 15, 1921, the nature of which calls for careful examination, and which I will later call "the lease," the company contracted to make money payments which were calculated in amounts so that the sums borrowed and represented by the certificates would be repaid by the year 1936, and so that there should be provision for interest payments. The benefit of that agreement became vested in the original trustee for the certificate holders. There came a time when the company defaulted, and in regard to capital instalments there was owing by the company the sum of $2,256,000. At a much later date (that is, on December 1, 1953) the company sold the whole of the railway undertaking, including all the rolling stock, to the Cuban State for the sum of $(U.S.)13,000,000. That amount was paid to the company in United States Treasury Bills. There was a provision in the deed of sale that the price was received by the vendors free of all responsibility as regards liabilities existing in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties which the Cuban State had bought. It was following upon the sale to the Cuban State that the company, on March 4, 1954, went into voluntary liquidation. The proof of debt to which I have referred was then lodged. The proof was lodged by the trustee for certificate holders and included sums representing the face value of outstanding certificates, together with sums said to be due by way of interest and sums representing the trustee's expenses. One way in which the liability of the company was said to arise was under and by virtue of a covenant contained in the agreement of February 15, 1921. Among the reasons assigned by the liquidators for the rejection of the proof was that the agreement of February 15, 1921, was governed by Cuban law, and that under Cuban law a novation had taken place, as a result of which the company's liability to the trustee was discharged or was transferred to the Cuban State. It was alternatively contended that the effect of Cuban law, as the proper law of the contract, was to reduce the liability of the company to the respondent by reason of the effect of Cuban moratorium laws. In the courts below it was also contended by the liquidators that the agreement of February 15, 1921, was governed by Cuban law because the situs of the debt was in Cuba. That contention was not advanced in your Lordships' House. If, however, the proper law of the agreement was the law of Cuba, then it was submitted that the effect of the deed of sale of December 1, 1953, was to bring about a novation, with the result that the trustee could not thereafter look to the company but would be obliged to look only to the Cuban State. On the other hand, if the proper law of the agreement was not the law of Cuba, then on the undisputed facts there could be no doubt that the company was to some extent indebted to the trustee at the commencement of the winding up. On that footing there are important questions as to the extent of the indebtedness, and as to the amounts for which the trustee can properly prove.

It therefore becomes necessary to decide whether the law of Cuba was the proper law of the agreement of February 15, 1921. If it was, then questions arise as to the resultant effect of the application of Cuban law.

My Lords, the agreement of February 15, 1921, was one of the agreements into which the company entered as part of the arrangements for raising money. The company needed to raise money for the purpose of financing the extensive purchases that they were making. The money was not raised in Cuba but in the United States of America. It followed that provision had to be made so that the American lenders should receive interest and, in due course, the return of their money. The procedure which was adopted was of no little complication. In the first instance the company brought into being a subsidiary company, which for convenience may be called "the car company." It was incorporated in the State of Delaware. Then on March 25, 1921, the company sold its rolling stock and railway equipment to the car company. Prior to the sale most of the rolling stock and equipment which the company was purchasing from manufacturers in the United States of America had been delivered, but there were contracts outstanding for the future delivery of further rolling stock and railway equipment, and these contracts were assigned and transferred to the car company. By way of confirming the sale and carrying the same into effect the two companies executed what was called a bill of sale before a notary public in New York on April 11, 1921. There then followed two agreements which were actually executed on April 18, 1921, but which were made to bear date February 15, 1921. They were executed in New York before the same notary public. One agreement was between the car company and the company. This was the agreement which may, for convenience, be called "the lease." The other agreement was between the car company and the Commercial Trust Company of Philadelphia, then the trustee for the certificate holders. That agreement may conveniently be called "the trust agreement."

By the lease the company leased from the car company the rolling stock and railway equipment which it had sold to the car company. The car company agreed to lease to the company the further new rolling stock and railway equipment which were to be delivered by United States manufacturers under contracts assigned by the company to the car company. The lease was for a period of 15 years expiring on February 14, 1936. By way of rentals the company agreed to pay various sums which, in fact, represented the interest payments and capital instalments in respect of the equipment trust certificates.

By the trust agreement the car company assigned to the trustee, as trustee for the certificate holders, all the right, title and interest of the car company in and to the railroad equipment and rolling stock, and assigned the indenture of lease and all the rentals reserved under it, and all the rights and remedies of the car company. It was provided that the trustee would deliver trust certificates to the car company or upon its order in par value of $6,000,000.

The certificates were then issued through underwriters. The car company agreed that the proceeds resulting from the sales of them would be utilised in payment of indebtedness incurred in connection with the purchase of the equipment covered by the sale by the company to the car company, and the subsequent lease from the car company to the company.

There was a later agreement, dated April 27, 1922, made between the car company and the company, a resale agreement, under which the car company resold the rolling stock and railway equipment to the company: the resale was subject to and with the benefit of the lease and the trust agreement. In 1924 the car company was dissolved.

The result of these rather elaborate arrangements was that 6,000 certificates were issued and the company became obliged to make stipulated payments to the trustee. Furthermore, the lease, which recited that the car company proposed to assign its interests to the trustee, contained provisions designed to give security for the benefit of certificate holders.

The rights of the certificate holders were recorded in the certificates. They recorded that each bearer or registered holder was entitled to one share of $1,000 par value in United Railways of Havana 15-year 7½ per cent. equipment trust in accordance with the provisions of the trust agreement. The certificates also recorded the terms upon which, at particular dates, the certificates were subject to retirement. The certificates then provided as follows:

"Unless retired as above, this certificate will be retired by "payment of the par value hereof and a premium of 2½ per cent. "hereon on the Fifteenth day of February, A.D. 1936, upon the "surrender hereof at the office of Commercial Trust Company, "in the City of Philadelphia, and in the meantime dividends "hereon will be payable at the office of Central Union Trust Com-"pany of New York, in the City of New York upon surrender of "the dividend warrants attached hereto. Par value, premium "and dividends are payable in gold coin of the United States of "America of the 1921 standard of weight and fineness, but only "from and out of the rentals when paid as provided for in the "Lease of certain railroad equipment and/or rolling stock made "by Cuban Rolling Stock Company to United Railways of the "Havana and Regla Warehouses, Ltd., bearing date the Fifteenth "day of February, 1921, and assigned by Cuban Rolling Stock "Company by assignment bearing date the Fifteenth day of "February, 1921, to the Trustee; which rentals are payable to "the Trustee for the benefit of the holders of this and other "certificates amounting at par to Six million Dollars ($6,000,000); "to which Agreement and Lease reference is hereby made for a "statement of the rights of the holders of such certificates and "the terms and conditions of the issue thereof."

It will be seen that the provisions of the lease were all-important to certificate holders and that the trustee's obligations to pay were "only from and out of the rentals when paid."

Before February 14, 1931, 3,800 certificates out of the 6,000 were redeemed in accordance with provisions contained in the trust agreement. There remained at that date 2,200 certificates outstanding. At a later date, that is, in 1937, the trustee brought proceedings against the company in the State of Maine. As a result of terms of agreement which were made by way of settlement of those proceedings the company later acquired by purchase outstanding certificates to the number of 1,869. Those certificates were not delivered to the trustee for cancellation. They remained with the company, and when the company sold its whole undertaking to the Cuban State in 1953 those certificates were delivered to the Cuban State. The remaining outstanding certificates were 331 in number.

My Lords, it will have been seen that the company had no direct liability towards the certificate holders. The company had liabilities under the lease and these enured for the benefit of the trustee as the assignee of all the rights of the car company. Unless extinguished or reduced by the operation of Cuban law the liabilities of the company to the trustee which existed at the commencement of the winding up could be ascertained by reference to the lease.

The inquiry as to whether the law of Cuba was the proper law of the lease makes it necessary to examine the provisions of the lease in some detail. The first clause provided for the payments which the company had to make, and it is of importance to observe that payments had primarily to be made in Philadelphia though interest payments had to be made in New York. The opening wording was as follows:

"The lessee shall and will pay to the lessor or its assigns at the "office of Commercial Trust Company, hereinafter called the "trustee, in the City of Philadelphia, Pennsylvania, or at the "office of Central Union Trust Company of New York, in the City "of New York when payment in New York is hereinafter specifically required, as rental for the said railroad equipment and/or "rolling stock without deduction for any taxes, duties, charges or "assessments, which the Lessee may be required to pay or withhold under the laws of the United States of America or of any "other country:

"I. Half-yearly on the Fourteenth day of February, and on the "Fourteenth day of August in each year, the first payment to be "made on August 14, 1921,

"(a) A sum payable in New York equal to 3¾ per cent. of the "par value of certain certificates not exceeding $6,000,000 issued "under agreement bearing even date herewith between Cuban "Rolling Stock Company, and Commercial Trust Company, "trustee, and outstanding and unpaid on the fourteenth day of "February and the fourteenth day of August, respectively in each "year, during the term of this lease, and an amount equal to the "accrued dividends on the certificates purchased by the trustee "during the preceding six months under the provisions of the said "agreement; less such sums derived from investments by the "trustee of undistributed rentals in its hands, as reported from "time to time by it to the lessee as applicable to the payment of "dividend warrants on the aforesaid certificates."

There followed a sub-paragraph imposing an obligation to pay a sum equal to all reasonable expenses incurred by the car company or its assigns in enforcing the covenants and terms of the lease, and in the performance of the trust under which the certificates were issued. A further sub-paragraph imposed an obligation to pay a sum equal to the taxes and duties upon the property leased or upon any income therefrom or upon the rental payments.

The company further agreed to make half-yearly payments, on February 14 and August 14 in each year. These were to begin on August 14, 1921, and were to continue until February 14, 1936. The first 20 payments were to be of $206,000 each and the last 10 were to be of $205,000 each. The payments were to be made in gold coin of the United States of America of the 1921 standard of weight and fineness. It was provided, however, that the company could be allowed upon stated terms to make payment of any instalment by delivery up of certificates. To do that the company would have to make purchases of certificates.

The concluding words of the first clause were as follows:

"In lieu and in satisfaction of all further rentals accruing here-"under, the lessee may at its option on August 14, 1921, or on "any rental date thereafter, on not less than 40 days prior notice "in writing of its intention so to do given to the Commercial "Trust Company, trustee, pay rental in such amount as the lessee "shall be advised in writing by the trustee shall enable the trustee "to call for retirement and to retire on the dividend date next "ensuing all outstanding United Railways of Havana 15-year 7½ "per cent. equipment trust certificates by the payment of the par "value thereof and a premium of 10 per cent. thereon, and "accrued dividends thereon to the date of retirement."

My Lords, a consideration of these various provisions relating to the payments to be made by the company by way of rental for the equipment and rolling stock shows clearly that though the payments were called rentals they were related to and calculated by reference to the amounts needed to pay the interest and the principal due on the certificates.

The company was under obligation to keep the railroad equipment and rolling stock insured in some approved American or United Kingdom insurance company: the equipment and stock were to be maintained in good order and to be marked so as to show the name of the trustee. The company covenanted not to assign or underlet without the consent of the car company and its assigns, and there was a provision that if the company made default in payments the lease could be terminated, in which event all instalments of rentals became due and payable and the car company could take possession of the rolling stock.

Pursuant to one of the recitals there was a clause by which it was agreed that the car company could forthwith assign, transfer and set over to Commercial Trust Company of Philadelphia, as trustee, all the car company's rights and interests in and to the railway equipment and rolling stock and all the car company's claims, demands and remedies. When the company should have fully paid all the rents, then the equipment and stock were to be reassigned to the car company.

There were two clauses the effect of which was much debated. They were in the following terms:

"ELEVENTH.—It is the intention of the parties to this lease "to enter into and execute this lease in accordance with the pro- "visions of the laws of the Republic of Cuba to the end that this "lease may be deposited or filed and/or registered thereunder, "and the railway company agrees to so deposit and/or register or "file the same, and to record the same in such States or Terri- "tories of the United States as may be required by law, and to "perform any other act required by law that may be necessary to "protect the trustee's title.

"In case it becomes necessary that this lease be translated "into the Spanish language in order that it may be filed and/or "registered in the proper offices in the Republic of Cuba, then and "in that event it is understood and agreed that the English text "shall govern in case of any conflict between the English and "Spanish texts.

"TWELFTH.—The parties hereto submit themselves to the "jurisdiction of the tribunals of the City of Havana, in the "Republic of Cuba, for all notifications, summonses and other "judicial or extra judicial formalities to which this lease shall give "rise, with express renunciation of their own jurisdiction if "different."

My Lords, in approaching the question as to whether Cuban law should be regarded as the proper law of the lease, it is of relevance to have in mind the terms of the trust agreement which was made between the car company and the trustee—the Commercial Trust Company of Philadelphia. That agreement was made in New York simultaneously with the lease, and though executed on April 18, 1921, it also bore date February 15, 1921.

In the execution of the financial plan which was adopted its terms were complementary to those of the lease. One of the recitals records the main purpose as follows:

"AND WHEREAS, the car company has purchased the said "railroad equipment and/or rolling stock particularly mentioned "in the lease and has agreed to apply in part payment therefor "the proceeds of six million dollars ($6,000,000) par value of "equipment trust certificates, to be issued under the terms of this "agreement, and known as certificates of the United Railways of "Havana 15-year 7½ per cent. equipment trust, and the car company has agreed to sell, assign, transfer and set over unto the "Commercial Trust Company, of Philadelphia, as trustee for the "holders of said certificates, the lease and all its right, title and "interest in and to the said railroad equipment and/or rolling "stock upon certain conditions and considerations mentioned in "said lease, and all its rights and remedies under contracts for "the construction or acquisition of said railroad equipment and/or "rolling stock, with the manufacturers thereof, or otherwise, and "all claims, demands and remedies of it, the car company, "accruing or to accrue under the lease, and all the rentals therein "reserved; . . ."

Pursuant to that recital the car company made assignment to the trustee and the trustee agreed to execute and then to deliver the trust certificates to the car company. There were provisions recording the powers of the trustee which included powers of sale if the trustee retook possession of the railroad equipment and rolling stock. It was provided that—

"The trustee shall apply the proceeds of the lease, sale, or "other disposal of the said railroad equipment and/or rolling "stock, as well as the moneys derived from the sale of the said "United States of America government obligations, to the payment after deduction of the expenses of the trust and all taxes "which the trustee may by law be required to pay in respect of "the trust property or the certificates or the dividends thereon:

"(1) Of the dividend warrants then due, and accrued.

"(2) Of the par value of and aforesaid premium on all the "then outstanding certificates in full, if such moneys and proceeds shall be sufficient, and if not, then pro rata; and shall "pay the surplus, if any, to the car company, its successors or "assigns."

There was a provision in the seventh clause that if the railway company made default, and if it were thought "necessary or convenient for the purpose of enforcing and carrying out all the "terms and stipulations of the lease and this agreement under "the laws and statutes of the Republic of Cuba" then under certain stipulated circumstances the trustee was to assign and to hand over to a substituted trustee authorised to act or do business in Cuba.

The tenth clause was in these terms: "Upon payment by "the railway company to the trustee of the last semi-annual "payment of $205,000, on February 14, 1936, or upon payment "of rental sufficient to retire all outstanding certificates at par "and a premium of 10 per cent. thereon and accrued dividends, "and upon retirement of the certificates and payment of the "dividends thereon, the trustee shall pay or cause to be paid "to the order of the car company all moneys held by the trustee "and remaining over and above the moneys required for "payment of the certificates issued hereunder or any dividends "thereon and when it, the railway company, shall have fully "paid all the rents as provided in the lease, the said railroad "equipment and/or rolling stock shall be re-assigned by the "trustee to the car company."

The eleventh clause corresponded with the eleventh clause of the lease, save that the last few words of the clause in the lease were not repeated in the trust agreement. In the trust agreement there was no clause corresponding to the twelfth clause of the lease.

The company failed to make payment of the rental instalment due on February 14, 1931, and did not make payment of any subsequent instalments. The unpaid instalments, which may reasonably be regarded as instalments of capital, amounted in total to $2,256,000. The company paid the interest instalments due under the lease down to August 14, 1934. The trustee did not exercise or seek to exercise any right to declare the lease terminated or any right to retake the railroad equipment and rolling stock.

Upon a consideration of the lease and its terms it was held by Wynn-Parry J. that the proper law was the law of the Commonwealth of Pennsylvania. He formed the same view in regard to the trust agreement. In the Court of Appeal, Jenkins and Romer L.JJ. held that while Cuban law was intended to be applicable to certain aspects of the lease and of the trust agreement nevertheless the proper law of both was that of Pennsylvania. As an alternative they mentioned the law of Philadelphia, but it does not appear why it was considered that such alternative could exist. Willmer L.J. took a different view on this issue. He arrived at the conclusion that the law of Cuba was the proper law of the lease.

On behalf of the appellants it was submitted that clause 12 of the lease should be regarded as providing for the general exclusive jurisdiction of the Republic of Cuba and as pointing conclusively to the view that the proper law of the contract was the law of Cuba. Alternatively it was submitted that if clause 12 did not point conclusively to that view it remained a very significant factor which tended to the acceptance of such view. Further, it was said that clause 11 either denoted that the law of Cuba was expressly chosen or was another significant factor which supported the view that the law of Cuba was the proper law. The lease, it was said, related to property in Cuba and to courses of action to be adopted in Cuba, whereas the Pennsylvanian elements were peculiarly lacking.

My Lords, these submissions and others closely linked with them, though impressively developed, have not led me to any different general conclusion from that reached by Wynn-Parry J. and the majority in the Court of Appeal. Though the provisions of clauses 11 and 12 call for special examination it is desirable to survey the nature and purpose of what was being done. When the transactions and agreements are examined in order to seek their essential central elements, it is, I think, apparent that the company was in effect borrowing money that it needed and was agreeing to repay with interest and was reinforcing its contractual monetary obligations by arrangements designed to ensure that its property would be available as security. The money which the company needed was raised in the United States of America. Thereafter what was of prime consequence to certificate holders was that they should receive their interest and in due course the return of their capital. The most important obligations, therefore, into which the company entered were their obligations to pay money. The payments which in reality were instalment repayments of capital and which in total were to amount to $6,170,000 were to be made in the City of Philadelphia, Pennsylvania, and were to be made at the office of the trustee. If, then, the question is posed as to what is the law "by reference "to which the contract was made or that with which the transaction has its closest and most real connection" (see the words used by Viscount Simonds in *Bonython* v. *Commonwealth of Australia* [29]) I would answer—the law of Pennsylvania. The lease was entered into between the company (an English company) and the car company (a company incorporated in Delaware) with the knowledge and intention that the latter company was to assign it to the trustee in Philadelphia so that its provisions would avail for the benefit of numerous certificate holders. It would not be in the nature of things that those primarily concerned would have intended or would have wished that their rights should be determined by the law of Cuba. It would seem to be unlikely that the parties to the lease would without either express statement or positive election have submitted themselves to a system of law outside the United States of America.

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[29] [1951] A.C. 201, 219.

No final view can, however, be formed until full consideration has been given to the many elements which involve and suggest links with the law of the Republic of Cuba. In particular it must be decided whether clause 12 of the lease is so framed as to place the contract exclusively under the law of Cuba. My Lords, if that had been the aim and intention of the contracting parties they would, I conceive, have employed different language. They could have agreed to submit all disputes to the jurisdiction of the Republic of Cuba. Clause 12 is a submission " for all " notifications, summonses and other judicial or extra judicial " formalities to which this lease shall give rise, with express " renunciation of their own jurisdiction if different." The submission was to the tribunals of the City of Havana in the Republic of Cuba. Though the words used are apt to cover legal proceedings I cannot think that there would have been any bar to suing the company in England for the amount of any money instalment that remained unpaid. The company was in fact sued in the State of Maine, United States of America, in 1937. Clause 12 appears in the first place to effect that the tribunals of the City of Havana, as opposed to other tribunals in Cuba, are exclusively to have jurisdiction if there are proceedings in Cuba. The evidence of Dr. Gorrin, the Cuban lawyer, supported this view. It may be, in the second place, that the company agreed to submit to the jurisdiction of the tribunals of the City of Havana in the event of the company being sued in Cuba in proceedings to which the lease might give rise. But that does not involve that only in Cuba could there be proceedings between the parties nor does it involve that they were making the law of Cuba the proper law of the contract so that the whole agreement was subjected to Cuban law. For the protection of the interests of certificate holders it might in some circumstances be necessary to invoke the assistance of the Cuban courts, but the contemplation of such circumstances would not involve that the agreement as a whole was to be governed by Cuban law.

The provisions of clause 11 are less helpful to the appellants. The clause appears to proclaim its own purpose. The purpose is to protect the title of the trustee. Accordingly the intention of the parties was proclaimed to be to execute the lease in accordance with Cuban law " to the end that " the lease could be deposited or registered or filed according to the law of Cuba where the property was. It was clearly desirable to provide that all proper steps should be taken to ensure that the trustee (to whom there was to be an assignment) should have security. But the attainment of the expressed purpose of protecting the trustee's title did not involve that the law of Cuba was to be the proper law of the contract.

It would seem to be probable, though this would not necessarily be the case, that the proper law of the lease and of the trust agreement would be the same. The trust agreement was an essential part of the mechanism that was being devised for the operation of securing money for the company. Under the trust agreement the car company assigned the lease, and all rights in and to the railroad equipment and rolling stock, and all its rights under contracts with manufacturers and rights accruing under the lease and all the rentals. The assignment was to the trustee " as trustee for the holders of " the certificates. The trust agreement was made in New York between a corporation of the State of Delaware and a corporation of the Commonwealth of Pennsylvania. It would seem unlikely that the parties to the agreement would have contemplated that its proper law would be the law of Cuba even though it would be necessary to have an agreement that would be valid under Cuban law in order to pass title in the equipment and rolling stock to the trustee. But all the provisions as to the application by the trustee of the payments that he was to receive would seem to point to a close and real connection with Pennsylvania. The omission of a clause in the trust agreement in the terms of the twelfth clause of the lease is explained by the absence of any need for it. The seventh clause of the trust agreement provides that in the event of default by the company and if it were thought necessary or convenient for the purpose of enforcing and carrying out all the terms and stipulations of the lease and of the trust agreement under the laws and statutes of the Republic of Cuba, then the trustee might, in his discretion, and upon

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request of the holders of a majority in amount of outstanding certificates, should, assign to a substituted trustee "authorised "to act or doing business in the Republic of Cuba." The language of the clause does not seem to be the language that would have been employed if the parties had selected the law of Cuba as being the law of the agreement. Nor does it follow that though the parties contemplated that there might be occasion to go to the Cuban courts in whose jurisdiction the rolling stock (the security for certificate holders) was physically located they would have contemplated that the law of Cuba was to be the proper law of their contract.

For the reasons which I have indicated, which accord with those given by the majority in the Court of Appeal and substantially with those given by Wynn-Parry J., I agree with the view that though Cuban law was clearly intended to be applicable to certain aspects of the lease and of the trust agreement, the proper law of both those agreements was that of the Commonwealth of Pennsylvania.

In the proof lodged by the trustee it was claimed in paragraph 2 that at the commencement of the winding up the company was and continued to be justly and truly indebted to the trustee in certain sums. The first sum was the sterling equivalent of $739,412. That was a sum calculated in reference to 333 certificates. The sum included the face value of the certificates, premium, interest at 7½ per cent. on the face value from August 15, 1934, to February 14, 1936, and interest at the rate of 6 per cent. on the face value from February 15, 1936, to the commencement of the winding up. The number of certificates should be corrected to 331. The next sum mentioned was the sterling equivalent of $31,296, which was stated to be the aggregate amount of the reasonable expenses incurred by the trustee in the performance of the trust down to March 4, 1954. The next sum mentioned was £20,000 as the sterling equivalent of the estimated expenses which the trustee would incur in the performance of the trusts between March 4, 1954, and the date when they would have been fully performed. The last sum mentioned was the sterling equivalent of $4,145,596.78 which was a sum calculated in the same manner as the first sum but in reference to 1,867 certificates. The number can now be taken as 1,869. These certificates were those to which I have earlier referred. They were the certificates acquired by the company and passed on by them to the Cuban State.

The sterling equivalents were calculated at the rate of $2.80, being the rate at the commencement of the winding up.

My Lords, if the proof had not been amplified or explained by later paragraphs its basis would have been difficult to follow. As has been seen, the company was not liable on the certificates though its liability was for the most part measured by reference to the certificates. The company was under obligation to pay the rental sums as set out in the lease. The trustee as assignee from the car company was entitled to receive those rental sums. The only sums, therefore, in respect of which the trustee could assert liability in the company were the rental sums which the company had contracted to pay, which included sums to cover the trustee's expenses. In the proof which the trustee lodged it was stated in paragraph 4 that "The liability of the company "to the claimant which is the subject-matter of this proof arises "under or by virtue of a covenant by the company with Cuban "Rolling Stock Company contained in an agreement dated "February 15, 1921, but executed on April 18, 1921, between "the said Cuban Rolling Stock Company of the one part and the "company of the other part the benefit whereof including the "ownership of the said railway equipment was by a trust "agreement dated February 15, 1921, but executed on April 18, "1921, assigned by the said Cuban Rolling Stock Company to "the said original trustee of whom the claimant is the successor "in title." The claim was alternatively stated to arise by way of damages for breach of a covenant not to assign which was contained in the lease and by way of damages for conversion by the company of the railway equipment.

My Lords, the position as between the company and the trustee was clear. Both the company and the trustee knew what was the extent of the failures by the company to make the rental payments that the company should have paid. The company knew that the obligation of the trustee to certificate holders was to pay the latter from and out of the rentals when paid. Both the company and the trustee knew that if the trustee received from the company more than enough to pay all that the certificate holders were entitled to receive, then any surplus was to be paid to the car company or its assigns. For this purpose the company were the assignees of the car company. The result was that in any proof of debt the trustee could not assert that he should receive from the company more than the trustee needed to satisfy the certificate holders and to discharge the trustee's expenses. As the trustee had not been paid the sums which the company owed and as the liability of the trustee to certificate holders only arose when he was paid, it seems to me that it was correct for the trustee to take the rate of exchange ruling at the commencement of the winding up for the purpose of converting into sterling the dollar amounts that he wished to receive. So converted, the trustee claimed to prove for £264,076 plus £11,177 plus £20,000 plus £1,480,570. The first and the last of these sums included interest at the rate of 6 per cent. on the face value of certificates down to the commencement of the winding up as from the date when the certificates should have been repaid (February 15, 1936)—which was the date when the final rental payment should have been paid by the company to the trustee. The liquidators did not challenge the right of the trustee to pay 6 per cent. interest to certificate holders as from February, 1936, to the date of the winding up nor the right of the trustee to prove for such interest at the rate of 6 per cent. even though there was no contractual obligation in the company to pay this interest to the trustee.

If these figures of claim had remained it would have been necessary for the liquidators to see whether the total liabilities of the company did in fact overtop the total of the amounts that the trustee claimed. If the company was indebted to a larger extent, then the excess over the trustee's claim would not be the subject of proof. If the company's liabilities were less than the total of the amounts that the trustee claimed, then the proof could only be admitted to the extent of the company's liabilities.

The dates of the various defaults by the company and the amounts of the defaults have not been in dispute. Instalments due on and after February 14, 1931, amounted in total to $2,256,000. But in assessing the total liabilities of the company dollar amounts must be converted to sterling. Should the conversions be at the rate ruling at the date of the commencement of the winding up or should they be made at the rates ruling on the respective dates upon which the respective instalment payments or interest payments ought to have been made? I am clearly of the opinion that it should be the latter.

I have had the privilege of reading in advance the opinion of my noble and learned friend on the Woolsack, and I am in agreement with the reasoning therein contained by which this conclusion is supported.

Upon an acceptance of this basis the result, we are told, would be that the indebtedness of the company as converted into sterling would be considerably less than the total of the four sterling amounts that I have mentioned. On this basis the liquidators would, apart from the overriding main legal contentions, have been obliged to admit the proof only to the extent of the total sterling amount of the company's indebtedness. The trustee would then presumably have used the money he received to discharge his expenses and to apply the remainder pro rata amongst outstanding certificate holders.

Some figures prepared by the appellants showed that if the various dollar obligations of the company were converted to sterling at the rates ruling at the respective dates when the separate payments had become due the amount owing by the company would have been about £1,201,188. This sum includes the 6 per cent. interest payments to which I have referred. There would also have been an amount owing for expenses. It will be seen, therefore, that there would not have been enough, leaving out the trustee's expenses, to meet claims of certificate holders to the extent of £264,076 plus £1,480,570. If, of course, in reference to the various liabilities of the company, the rate of exchange had been taken which was ruling at the date of the commencement of the winding up, then instead of the figure of £1,201,188 there would have been a very considerably higher figure. But that, in my judgment, would not have been correct.

But it is necessary to see how the position developed. The trustee explained in his lodgment of proof that he believed that the 1,867 certificates were retired in the books of account of the company in or about the year 1948. He further explained that as the certificates had not been physically surrendered by the company to the trustee and so had not been cancelled in the records the trustee had accordingly included in his proof an amount which was related to these certificates. There was, however, material from which it could be said that the Cuban State as the holders of the 1,867 certificates had renounced any claim. The liquidators of the company had considerable funds in their hands and wished to make an interim return of capital. They applied to Roxburgh J. for liberty to do so. In connection with this application the trustee's originating summons for a reversal of the rejection of his proof was by consent brought on for hearing before Roxburgh J. The substance of the matter was that if in fact the Cuban State was not going to assert any claim in respect of the certificates which had come to their hands and if, therefore, from the trustee's proof there could be eliminated the item of £1,480,570, then, while making provision for the possible allowance in full of the remainder of the proof, the liquidators would be justified in making an interim return of capital. Roxburgh J. was satisfied on the evidence that the holders of the 1,867 certificates had renounced any claim to participate in the assets available for distribution in the winding up and that such renunciation alone was a sufficient ground for rejecting that part of the trustee's proof of debt (that is, the £1,480,570) which was based upon or measured by reference to the 1,867 certificates. Roxburgh J. therefore made an order affirming the rejection of the proof of debt so far as it related to the sum of £1,480,570 and ordered that the remainder of the summons should stand over.

My Lords, the effect of that was that when the matter came before Wynn-Parry J. the trustee could not claim to prove for more than £264,076 plus £11,177 plus £20,000. Once the questions relating to the 1,867 certificates were out of the way the trustee did not wish to do so. But the issue as to the amount that the trustee needed to receive in order to satisfy the outstanding certificate holders left untouched the liabilities of the company. The only result, in my view, of the order of Roxburgh J. was that whereas previously a proof of debt as against the company might have been admitted for the full amount of what the company owed (it being immaterial that that amount might not be enough to pay certificate holders in full), the position after the order of Roxburgh J. was that the company would be relieved of part of its liability because the trustee did not need to draw upon the full amount of that liability in order to meet the claims of outstanding certificate holders and to cover his expenses. The 6 per cent. interest payments would thereafter only be referable to the remaining 331 certificates. But the money instalments due under the lease were payable irrespective of the number of certificates that might be outstanding. The same observation applies to the payments due in respect of the trustee's expenses. There was no relation between the claim of a certificate holder as against the trustee and the amount of any instalment due under the lease. The trustee was only liable to certificate holders out of rentals when paid. It seems to me that the trustee is entitled to point to the total indebtedness of the company (calculated in sterling by reference to rates of exchange ruling when particular instalments were payable) and to claim either that amount or such lesser amount as is sufficient to enable him to pay the amount of his expenses and to satisfy certificate holders whose claims are outstanding and which fall to be honoured when the trustee is paid.

On the view that I have formed, the order of Roxburgh J. never purported to relieve the company of its contractual obligations or to assess them or to deal with them. The order merely provided that on the hearing of the summons of the trustee for a reversal of the liquidators' rejection of the proof the trustee should be limited to asserting his claim to the item of £264,076 together with his two claims for expenses. My Lords, he seeks to do no more. On the figures prepared by the appellants, and taking the conversion rates referable to the dates when instalments should have been paid and leaving out of account any question of 6 per cent. interest on the face value of the 331 certificates, the sterling equivalent of the unsatisfied contractual liabilities of the company would be very much more than the sum claimed by the trustee.

My view of the matter makes it unnecessary to deal with the alternative ways of showing liability in the company, that is, by way of damages for conversion or of breach of covenant not to assign.

For the reasons that I have given, I agree with the learned judge and with the majority in the Court of Appeal, and I would be in favour of dismissing this appeal to your Lordships' House.

Appeal allowed in part.

Solicitors: *Norton, Rose & Co.; Herbert Smith & Co.*

J. A. G.

[HOUSE OF LORDS.]

C. A.

1960
April 28, 29;
May 19.

Ormerod and
Devlin L.JJ.

H. L. (E.)*

1961
Jan. 25,
26, 30;
Mar. 2.

PLATO FILMS LTD. AND OTHERS . . . APPELLANTS;

AND

SPEIDEL . . . . RESPONDENT.

Libel—Pleadings—Reputation—Striking out—Defence—Mitigation of damages—Reputation of plaintiff—Admissibility of specific instances of misconduct—Different kinds of reputation—Necessity of pleading—New issue of fact—R.S.C., Ord. 19, *r.* 15; *Ord.* 21, *r.* 4.
Practice—Pleadings—Damages—Defence—Need to plead new issue of fact in mitigation—Libel—Bad reputation of plaintiff—R.S.C., Ord. 19, *r.* 15; *Ord.* 21, *r.* 4.

The plaintiff, who was the Supreme Commander of Allied Land Forces in Central Europe, brought an action against the defendants claiming that he had been libelled in a film published and exhibited by them, in which he was depicted as being privy to the murders of King Alexander of Yugoslavia and M. Barthou in 1934, and as having betrayed Field-Marshal Rommel in June, 1944. By paragraph 5 of their defence the defendants pleaded justification. Alternatively, in mitigation of damages they said that evidence in chief would be given at the trial of (A) the "circumstances under "which the alleged libel was published," and (B) as to the plaintiff's character. As particulars of (A) they pleaded that the matters of complaint formed part of the film in which the plaintiff was further depicted as having been guilty of war crimes and atrocities (specific instances of which were given), the truth of which the plaintiff did not deny in his statement of claim. Under (B) the defendants pleaded that the plaintiff was widely reputed to have been guilty of the two acts with which he had been charged in the alleged libel, and also of the war crimes instanced in (A) and, in addition, of the direction of aspects of Nazi anti-Jewish policy and the suppression of German democratic life.

The Court of Appeal held that sub-paragraph (A) should be struck out and gave leave for (B) to be amended to read: "Alternatively "in mitigation of damages the defendants will at the trial of the "action give evidence in chief that the plaintiff had on or before "November 19, 1958, a bad reputation as a man who was a party to "and/or responsible for acts which were war crimes and/or against "humanity and/or atrocities."

On appeal by the defendants:—

Held, dismissing the appeal, (1) that sub-paragraph (A) was objectionable and should be struck out (post, pp. 1125, 1127, 1143, 1148, 1149).

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD DENNING, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST.

(2) That (Lord Radcliffe not concurring), as to sub-paragraph (B), evidence of particular acts of misconduct on the part of the plaintiff could not be given in mitigation of damages where the defendants had failed to justify the libel complained of (post, pp. 1123, 1139, 1147).

Per Lord Radcliffe. It would be wrong to hold that general evidence of reputation cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to the plaintiff's current reputation; they are the basic material on which his reputation rests (post, p. 1131).

Scott v. *Sampson* (1882) 8 Q.B.D. 491, D.C. and *Hobbs* v. *Tinling* [1929] 2 K.B. 1; 45 T.L.R. 328, C.A. applied.

Wood v. *Earl of Durham* (1888) 21 Q.B.D. 501; 4 T.L.R. 778, D.C. overruled.

Decision of the Court of Appeal, post, p. 1098; [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521, C.A. affirmed.

Appeal from the Court of Appeal (Ormerod and Devlin L.JJ.).

This was an appeal, by leave of the Appeal Committee of the House of Lords, by the appellants, Plato Films Ltd., Stanley Forman and Kenneth John Edward Smith, who were the defendants in the action, from an order of the Court of Appeal dated May 19, 1960, whereby (subject to variations hereinafter mentioned) the order of Sachs J. made in chambers on March 31, 1960, affirming the order of Master Clayton made on November 16, 1959, was upheld, and it was ordered that the appellants should pay the respondent, General Hans Speidel, the plaintiff in the action, two-thirds of the costs of the appeal. By his order, Master Clayton ordered that paragraph 5 of the appellants' defence should be struck out and the variation made by the Court of Appeal, hereinbefore mentioned, was that the introductory words of paragraph 5 of the defence, namely, " Alternatively, in mitigation of damages, " the defendants will at the trial of this action give evidence in " chief " should be restored, and that the appellants should have leave to amend by adding thereafter " that the plaintiff had on or " before November 19, 1958, a bad reputation as a man who was " party to and/or responsible for acts which were war crimes " and/or crimes against humanity and/or atrocities."

General Hans Speidel, the Supreme Commander of Allied Land Forces in Europe, claimed damages for libel against Plato Films Ltd., as distributors in the United Kingdom of a sound film entitled " Operation Teutonic Sword," and against Stanley Forman and Kenneth J. E. Smith, who were the directors of the first defendant company. The film was exhibited by the defendants in the second action, Unity Theatre Society Ltd., at the National

Film Theatre, London, on November 19, 1958, and the plaintiff alleged that the photographic pictures and words depicted him as being a party to the murders of King Alexander of Yugoslavia and M. Barthou in October, 1934, and as having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944. The defendants admitted that the plaintiff was so depicted but pleaded that the pictures and words were true in fact and in substance. Paragraph 5 of their defence in the first action was:

" 5. Alternatively in mitigation of damages the defendants will " at the trial of this action give evidence in chief as to the " circumstances under which the alleged libel was published and " as to the character of the plaintiff.

" (A) PARTICULARS OF CIRCUMSTANCES UNDER WHICH THE " ALLEGED LIBEL WAS PUBLISHED.

" The photographic pictures and words of which the plaintiff " complains were published and exhibited as part of the film " wherein the plaintiff was further depicted as having been guilty " of the conduct hereinafter set out the truth of which the " plaintiff in his amended statement of claim does not deny; " namely, that he: (a) while chief of staff to the military com- " mander in occupied France between about September, 1940, " until about May, 1942, was party to and/or responsible for acts " which were war crimes and/or against humanity and/or atroci- " ties namely: (i) The taking and/or shooting of civilians or others " as hostages; (ii) the deportation and/or removal to concentra- " tion camps and/or to the east of Jewish and other persons; " (iii) the execution in occupied France of the decrees whereunder " the aforesaid and similar acts were carried out . . . [the parts " of the film were specified]. (b) While Chief of General Staff to " German army groups during the retreat of the German armies " in the U.S.S.R. was party to and/or responsible for acts gener- " ally accepted among civilised peoples as being contrary to the " rules of warfare and/or wanton destruction of property and/or " of terrorisation. . . . [The parts of the film were again speci- " fied.] (c) While being a military attaché on the staff of or " attached to the German Embassy in Paris between in or about " the period between 1934 and 1938 (inclusive) engaged in " espionage on behalf of Nazi Germany in preparation for the " invasion of France. . . . [The relevant passages in the film " were specified.] (d) While being a military attaché on the staff " of or attached to the German Embassy in Madrid in and about " 1939, engaged in espionage on behalf of Nazi Germany against

"France, Great Britain and North Africa. . . . [The relevant "passages were specified].

"(B) PARTICULARS OF THE MATTERS RELATING TO THE CHARACTER "OF THE PLAINTIFF.

"The plaintiff is widely reputed to have been and in fact was: "(i) guilty of the conduct alleged against him in the said film "as set out in paragraphs 3, 4 and 5 (A) hereof; (ii) while chief "of staff to the military commander in occupied France between "the aforesaid dates: (a) concerned in enforcing and carrying out "the General Staff and other orders relating to the taking, selection, arrest, detention, execution and deportation of hostages: "(b) concerned in developing, directing and enforcing Nazi anti-"Jewish policy in occupied France; (iii) since 1926 an advocate "of and believer in the suppression of German democratic "political life."

Paragraph 7 in the second action was substantially the same as paragraph 5. By paragraph 6 in the second action the defendants pleaded, inter alia: "The character, credit and reputation "of the plaintiff as having been concerned in inhuman barbarities "and mass murder as set out by paragraph 7 hereof are such that "they could not be harmed by any publication therein complained "of."

The plaintiff applied to strike out paragraph 5 in the first action and paragraphs 6 and 7 in the second action. The master made the order asked for and the defendants appealed, but Sachs J. dismissed the appeals. The defendants appealed.

Roy Wilson Q.C. and *D. J. Turner-Samuels* for the defendants in the first action. The first of the two main issues raised by this appeal is whether, assuming that the facts and circumstances alleged in paragraph 5 are admissible in evidence by way of mitigation of damages, such facts and circumstances may properly be pleaded. It was on this issue that the judge decided against the defendants, holding that he was bound by *Wood* v. *Durham*.[1] It is submitted that that case, which is not binding on the Court of Appeal, was wrongly decided. Nothing in the Rules of the Supreme Court justifies such a decision; R.S.C., Ord. 19, r. 4, provides that only material facts are to be pleaded, but facts going to mitigation of damages are "material" if they are admissible in evidence. In the Annual Practice, 1960, p. 447, it is said that "any facts which the party is entitled to prove may

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[1] (1883) 21 Q.B.D. 501; 4 T.L.R. 778.

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"be pleaded." R.S.C., Ord. 21, r. 4, provides that no denial or defence shall be necessary as to damages claimed or their amount; but this does not mean that the defence ought not to include acts and matters relevant to damages where reliance on those facts and matters might otherwise take the plaintiff by surprise. Where justification is not pleaded, R.S.C., Ord. 36, r. 37, provides a means by which the defendant gives notice to the plaintiff of his intention to rely on such facts and matters. That rule does not apply in the present case, because justification has been pleaded; and the proper way of giving notice of the facts and matters in question is to plead them: see R.S.C., Ord. 19, r. 15. *Wood* v. *Durham*[1] (which has not met with the favour of textbook writers) conflicts with the earlier decision of the Court of Appeal in *Millington* v. *Loring*[2] and the later decision of this court in *Whitney* v. *Moignard*[3] that matters alleged in aggravation of damages (which must stand on the same footing as matters alleged in mitigation) were material facts and that an application to strike them out of the statement of claim must fail. In *Wood* v. *Durham*[4] the court seems to have been under the erroneous impression that the ratio decidendi of *Millington* v. *Loring*[5] was that the allegations which in that case were not struck out constituted a good separate cause of action. *Wood* v. *Durham*[6] is in any event distinguishable from the present case in that the defendant was there applying to amend his defence by including the additional matters relied on, and was accordingly in mercy. In *Wood* v. *Cox*[7] it was assumed that evidence as to the general bad reputation of the plaintiff could not strictly speaking be given unless it was pleaded, but the question was disposed of by the plaintiff agreeing not to take this pleading point.

The second main issue is whether the matters alleged in paragraph 5 are admissible in evidence. R.S.C., Ord. 36, r. 37, groups conveniently under two main headings the matters which may be given in evidence in mitigation of damages, and this grouping has been followed in paragraph 5 (A) (the circumstances under which the libel was published) and 5 (B) (the character of the plaintiff).

As to paragraph 5 (A), it is essential in all cases to look at all the circumstances in which the defamatory publication was made: Gatley, Libel and Slander, 4th ed. (1953), pp. 574–577, 635–641. Included in these circumstances is the context in which the passages complained of appear. In the present case the jury would have to see the film as a whole in order to form a view as to the impact on the mind of a reasonable man of the passages complained of and to assess the damages flowing from those particular passages. If paragraph 5 (A) is correct, the matters for which the plaintiff seeks to recover damages are of a minor description compared with the matters alleged in the rest of the film; and in view of the inevitable effect on his reputation of the rest of the film the jury will have to assess whether any further damage to that reputation has been caused by the only passages of which he makes complaint.

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[1] 21 Q.B.D. 501.

[2] (1880) 6 Q.B.D. 190, C.A.

[3] (1890) 24 Q.B.D. 630; 6 T.L.R. 274, D.C.

[4] 21 Q.B.D. 501.

[5] 6 Q.B.D. 190.

[6] 21 Q.B.D. 501.

[7] (1888) 4 T.L.R. 652; (1889) 5 T.L.R. 272, C.A.

[Ormerod L.J. It cannot be said that the failure to deny the other allegations imports agreement with them.]

The defendants would welcome an opportunity to justify the other statements but, as no complaint is made of them, they are unable to do so: *Hobbs* v. *Tinling & Co. Ltd.*[8] The rest of the film will nevertheless have to be considered by the jury so that they may assess the damages flowing only from the passages complained of against the background of the total personality depicted in the film.

The issue is not whether the pleading is unnecessary but whether, in all the circumstances, the plaintiff has been embarrassed by it. It is desirable that the plaintiff should know at an early stage that the defendants take a different view from his of what appears in the rest of the film. It is apparent that this is a matter of controversy.

The defendants would not object to amending the pleadings to read that "the photographs form part of a film which the "defendants will seek to have exhibited at the trial," striking out the words "the truth of which the plaintiff does not deny," and replacing them by "of which the plaintiff in the statement "of claim does not complain."

As to paragraph 5 (B), it is conceded that *Scott* v. *Sampson*[9] (approved in *Hobbs* v. *Tinling*[10]) binds this court, but not the House of Lords, to hold that the defendant is confined to tendering evidence of actual, general bad reputation, and cannot contend that if the plaintiff's actual reputation at the date of publication was not bad, it was undeserved and should not form the basis of a claim for damages. The defendants wish to reserve the right to submit a contrary contention elsewhere, but in this court it must be conceded that the words "and in fact was" in paragraph 5 (B) cannot stand. General character does not, however, mean something entirely vague. Evidence that "the plaintiff's "general reputation was bad" might be misleading because the general reputation referred to might be of a kind totally irrelevant to the matters complained of, such as a reputation of being a persistent wife-beater or seducer or non-payer of debts. It is, therefore, essential to define what sort of general bad reputation the plaintiff has. Paragraph 5 (B) says, in effect, that the plaintiff has the reputation of being the kind of man who was capable and guilty of the conduct mentioned. This is neither inconsistent with the ruling in *Scott* v. *Sampson*[11] nor at all embarrassing to the plaintiff.

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[8] [1929] 2 K.B. 1; 45 T.L.R. 328, C.A.

[9] (1882) 8 Q.B.D. 491, D.C.

[10] [1929] 2 K.B. 1.

J. G. Foster Q.C. and *Colin Duncan* for the plaintiff. The only matters which can be pleaded in mitigation are, first, matters of general reputation, and secondly, matters that reduce malice or tend to disprove it. Paragraph 5 (A), as pleaded, does not come under either head. Other libels, even if made in the same document, are not relevant to a case on a particular libel: *Pankhurst* v. *Hamilton*.[12] Evidence of other defamatory publications would be the converse of circumstances surrounding the publication of the libel of which complaint is made. Fraser on Libel and Slander, 7th ed. (1936), p. 185, lays down the same dichotomy. The Rules of the Supreme Court, Ord. 36, r. 37, did not change the previous law, and "circumstances" in that order means circumstances as applied to the publication of the libel by the defendants. The insertion in the pleadings of what the defendants allege is contained in the rest of the film is clearly irrelevant, unnecessary and embarrassing. The defendants cannot prove their allegations and the pleading is merely their own characterisation of the effect of the rest of the film. The notewriter in Halsbury's Laws of England (2nd ed.), vol. 10, p. 146, note (*c*), said that *Wood* v. *Durham*[13] is an unsatisfactory decision because it overrides R.S.C., Ord. 19, r. 4. In *Wilson* v. *Dun's Gazette Ltd.*[14] Madden C.J. said that the evidence is admissible but that it should not be pleaded. If the case is not within R.S.C., Ord. 36, r. 37, and justification is pleaded, the plaintiff knows that his character is going to be attacked and notice to that effect is unnecessary.

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[11] 8 Q.B.D. 491.

[12] (1886) 2 T.L.R. 682, D.C.

[13] 21 Q.B.D. 501.

[14] (1912) Vict.L.R. 342.

The pleading in paragraph 5 (B) runs counter to the principles in *Scott* v. *Sampson* [15] and *Hobbs* v. *Tinling & Co. Ltd.*[16] It makes allegations of particular acts of misconduct, not of general bad reputation. Evidence of a reputation of having done particular acts must not be pleaded, for these would be allegations of rumours and reasons why a person has a bad reputation and reasons are not admissible: *Hobbs* v. *Tinling & Co. Ltd.*[16] To disprove such allegations the plaintiff would have to get witnesses to deal with particular instances, witnesses to general good reputation would not be in point. It is permissible to plead, for example, that X has a bad reputation as a murderer, but not that he is " widely reputed to have done such and such " —giving instances. A compendious expression is not any the less particular. The relevant reputation must be referable to the trait applicable to the libel. One is not seeking a general reputation for doing other things. Most of the instances given here have nothing to do with the matters of which complaint is made. Even if paragraph 5 (A) and (B) (and 7 (A) and (B) in the second action) were admissible, the rule in *Wood* v. *Durham* [17] prevents them from being pleaded. *Curtis* v. *Fay* [18] is not directly in point, for in that case there was a cause of action.

It is embarrassing to the plaintiff to have all these allegations in the pleadings; they are available to be read by anyone, and counsel could not be stopped from reading them to the jury in opening, because in theory the pleadings would contain only material facts and not evidence: R.S.C., Ord. 19, r. 4. To succeed in an objection, counsel for the plaintiff would have to show that they were irrelevant. If the accusations of the defendant are irrelevant and unnecessary, then they are scandalous, and that is a ground for striking them out.

Roy Wilson Q.C. in reply. The authority cited for the irrelevance of other libels is distinguishable from this case, in which the audience would see the whole film at one sitting and would, ex hypothesi, believe in the truth of the various incidents depicted in it. It is not pleaded in paragraph 5 (A) that the matters in the film of which the plaintiff does not complain are true. They are relevant as part of the picture which has to be considered by the jury before they can properly decide whether the plaintiff has

[15] 8 Q.B.D. 491.

[16] [1929] 2 K.B. 1.

[17] 21 Q.B.D. 501.

[18] (1960) April 26, Court of Appeal (unrep.).

suffered any damage. The test which the jury has to apply is whether and to what extent they would think the worse of the plaintiff because of the two instances, having seen the rest of the film. That has nothing to do with whether the film as a whole, apart from the two isolated instances, is true or not. The authorities on aggravation of damages apply conversely to mitigation of damages. Paragraph 5 (B) merely states the nature of the plaintiff's bad reputation and gives some indication of the basis for the belief. The indications may be unnecessary but they are not embarrassing or scandalous. The defendants do not have to show that the plaintiff had a bad reputation for killing prime ministers or Balkan kings; it is sufficient to show that he had the reputation of being ruthless in destroying human lives or liberties, or of being notoriously a doer of atrocities. A reputation may be founded on a single instance but that does not destroy the generality of the reputation.

Roy Wilson Q.C. and *J. F. F. Platts-Mills* appeared for the defendants in the second action, counsel for the plaintiff being the same as in the first action.

Cur. adv. vult.

May 19. ORMEROD L.J. I will ask Devlin L.J. to read the judgment of the court.

DEVLIN L.J. The plaintiff is the Supreme Commander of Allied Land Forces in Central Europe, and he has brought an action against the defendants alleging that he has been libelled in a film exhibited by them called "Operation Teutonic Sword." He alleges that in this film he is depicted as being a party to the murders of King Alexander of Yugoslavia and Monsieur Barthou in October, 1934, and of having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944. The defendants admit that the film showed the plaintiff as privy to the murders in 1934 and as having betrayed Field-Marshal Rommel; and they allege that these things are true.

But they say also that there is a great deal of other material in the film which is just as defamatory of the plaintiff, showing him as being responsible for war crimes of various sorts, and that the plaintiff makes no complaint about that. So they want to say in effect: "Even if we did falsely accuse the plaintiff of being a "murderer, can his reputation be worth much if he is prepared "to sit down under a charge of being a war criminal and makes "no complaint about it?"

There are two things to be said at the outset. The first is that the plaintiff does not accept that the film shows him as implicated in any war crimes. So a very curious position is created: the defendants are saying that their statements about the plaintiff are even more defamatory than he thinks they are. Since we are dealing with a summons to strike out a part of the defence, we have to assume that the allegations in that part are true. We have therefore to assume that there are parts of the film that do show the plaintiff as guilty of war crimes. But it is only fair that we should make it quite clear in our judgment, as Mr. Foster has done in argument, that the plaintiff himself does not accept that. It would be quite wrong for anyone to say that these proceedings prove General Speidel to be the sort of man who does not resent the charge of having committed war crimes. We have no reason to believe that if he considered that he had been defamed in this respect, he would not have taken the same action in regard to that libel as he has taken in regard to those that have been admitted.

The second thing is, that the question whether the defendants should be allowed at the trial to make the sort of comment which I have summarised above, and which they would clearly like to make, will be a matter for the trial judge. It will also be for him to determine whether the jury should see the whole film, including those parts which are supposed to represent the plaintiff as a war criminal, or whether they should see only the parts that are relevant to the libel. We express no opinion on these matters because we are concerned with questions of the admissibility of evidence only in so far as they enter into the point of pleading.

The question we have to decide is whether paragraph 5 of the defence, which sets out the matters I have indicated in support of the plea in mitigation of damages, should be struck out. In a decision which we gave recently in this court,[1] we said that we would not, on an application of this sort, ordinarily decide arguable questions on the admissibility of evidence; they are for the judge at the trial. Following the principle that is well established when an application is made to strike out a statement of claim as showing no cause of action, we should strike out matter as inadmissible only if it is plainly inadmissible; if it can reasonably be argued at the trial that the matter is relevant, it cannot, as a general rule, be scandalous or embarrassing or otherwise harmful to the opposite party by pleading it.

There is no doubt that a defendant in a libel action may in mitigation of damages give evidence that the plaintiff bears a bad character. The word "character" is not here used in the sense of a man's quality or disposition but in the sense of the reputation which he bears. The action for libel is an action for loss of reputation. On the issue of damage, what has to be investigated is not whether the plaintiff is in truth a good or a bad man, but whether he is reputed to be a good or a bad man. If a man's reputation is already so bad that it cannot be made worse, the man who defames him will, in fact, have done him no further damage; and it is nothing to the point to say that his previous reputation was unjustly bestowed upon him. What is relevant is what sort of reputation the plaintiff has in fact, not whether he ought to have it or not. Further, the inquiry must be limited to general reputation. If, under the guise of investigating what sort of reputation a man bears, one were to investigate whether he was thought or said to have committed specific acts, the inquiry would soon degenerate into an inquiry about what a man had actually done in his past life as ascertained by rumour and not by fact. All this is laid down in *Scott* v. *Sampson* [2] and *Hobbs* v. *Tinling & Co. Ltd.*,[3] particularly *per* Scrutton L.J.[4] Scrutton L.J. says clearly [5] that one cannot prove in chief specific instances of misconduct, as distinguished from general reputation, whether involved in the libel or not, in order to mitigate damages.

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[1] *Curtis* v. *Fay*, April 26, 1960, unreported, C.A.

Paragraph 5 of the defence, which we have to consider in the present case, is divided into two main sub-paragraphs (A) and (B). In our opinion, sub-paragraph (A), which bears the dubious headnote, "Particulars of circumstances under which "the alleged libel was published," is simply an attempt to circumvent the rule I have just stated. The sub-paragraph alleges that the libel complained of is "part of the film wherein the "plaintiff was further depicted as having been guilty of the con-"duct hereinafter set out the truth of which the plaintiff in his "amended statement of claim does not deny" and the guilty conduct is then particularised under the description of various war crimes.

We say that this is an attempt to circumvent the rule because it is an attempt to get in specific allegations of misconduct on matters which are not in issue. It does not matter whether the allegations are to be found in the same film as the libel or in some other distinct film or document; unless they are pleaded as defamatory and justified, they cannot be gone into. The defendants do not, therefore, allege that the allegations are true; Mr. Wilson agrees that it is not open to him to do so. They do not allege that they are untrue; if they did, it would aggravate the damages and not mitigate them. They want to put them before the jury as matters that are neither true nor untrue. If these matters are left in that state, how can they help the jury in the assessment of damages? They will help only if the defendants can manage to convey with them the innuendo that, because they have not been denied by the plaintiff, they are to be taken as true. This is the point of the words: " the truth of which the " plaintiff in his amended statement of claim does not deny." These words are embarrassing in the pleader's sense of the term. They imply that there is some obligation on a plaintiff, which there is not, to go through the whole film or book in which a libel is contained and admit or deny the truth of everything in it that is said against him. The sum of the matter is that it is not open to the defendants to assert or to insinuate that these allegations are true: it is not open to them to tender evidence from which it might be inferred that the plaintiff is the sort of man who does not resent defamatory charges because that would be to give evidence of character in the sense of quality or disposition and not of reputation. Sub-paragraph (A), therefore, introduces matters that are plainly inadmissible, that are scandalous in their content and embarrassing in their effect, and that ought to be struck out.

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[2] (1882) 8 Q.B.D. 491, D.C.

[3] [1929] 2 K.B. 1; 45 T.L.R. 328, C.A.

[4] [1929] 2 K.B. 1, 17.

[5] Ibid. 18.

Sub-paragraph (B) is more closely designed to raise what is permissible. It bears the headnote: " Particulars of the matters " relating to the character of the plaintiff "; and begins with the general allegation that " the plaintiff is widely reputed to have " been and in fact was " guilty of the various matters which I have described broadly as war crimes. We think that—quite apart from two obvious defects which Mr. Wilson concedes—this paragraph as it stands is embarrassing, because what is being alleged is that the plaintiff is reputed to have done certain bad acts, and that he is reputed to be a bad person. The latter is admissible and the former is not. We agree that it is not always easy for the pleader to use appropriate language which draws this distinction, but we think that it could be made clearer than it is. In considering whether or not the pleading should be struck out because of this, we have had regard to the fact that there are two admitted defects, which will have to be remedied anyway; and also a third one which, in our judgment, necessitates a substantial part of the sub-paragraph being struck out.

The first admitted defect is in the sentence I have already quoted—" the plaintiff is widely reputed to have been and in fact " was." Mr. Wilson agrees that it is inadmissible to go into the facts, and that the words " and in fact was " must come out. The second admitted defect is that the sub-paragraph alleges the plaintiff to have been reputedly guilty, not only of war crimes, but also of the conduct alleged against him in paragraphs 3 and 4 of the defence; that conduct is the murder and betrayal which those paragraphs seek to justify. This is clearly an attempt to prove, not the bad reputation itself, but specific acts of misconduct as justifying it and is, therefore, inadmissible. It would, of course, be most embarrassing if the defendants were permitted to call evidence that the plaintiff was reputed to be guilty of the very acts which, under their plea of justification, they must prove that he actually did.

In addition to these admitted defects there are two allegations in the sub-paragraph which, in our judgment, cannot remain. One alleges that the plaintiff was concerned in developing, directing and enforcing Nazi and anti-Jewish policy in occupied France; and the other alleges that since 1926 he was an advocate of and believer in the suppression of German democratic political life. The bad reputation which is pleaded in mitigation of damages must bear some relation to the libel that is complained of. One cannot, for example, mitigate the fact that one has falsely called a man a traitor by proving that he had a reputation for loose morals. There does not appear to be any authority on this point. In Gatley on Libel and Slander, 4th ed. (1953), at p. 629, it is submitted as being the rule that evidence of general bad reputation must be confined to the particular trait in the plaintiff's character which is attacked by the libel. This may be too narrow. We would prefer to state the principle as being that the evidence must be confined to matter which a reasonable jury could properly take into account as diminishing the damages they would otherwise have awarded. The enforcement of anti-Jewish policy in occupied France may, of course, have involved the commission of atrocities; but, if so, that is covered under the general term of war crimes which we shall next consider. Apart from that, no jury ought to diminish the damages that they would award to a man falsely accused of murder and betrayal because they hear that he has a reputation for anti-Jewish and anti-democratic activities, however repugnant such activities may be to them.

All that is now left in sub-paragraph (B) is the allegation about war crimes, which incorporates and also largely repeats the material in sub-paragraph (A). As I have already said, we accept Mr. Foster's submission that the language used by the pleader does not show clearly enough that his case will be confined to reputation and will not extend to specific facts. Mr. Foster agrees that the pleader is not confined to alleging simply that the plaintiff has a bad reputation; he must be permitted—and we think can be compelled—to specify what sort of bad reputation is being alleged. The form of words used in sub-paragraph (A) (a) is, we think, permissible, and Mr. Wilson agrees that it would be sufficient for his purpose. We shall therefore order that paragraph 5 be struck out, except for the introductory words which are as follows: "Alternatively in mitigation of damages the "defendants will at the trial of this action give evidence in "chief": and we shall give leave to the defendants to amend by adding thereafter: "that the plaintiff had on or before "November 19, 1958, a bad reputation as a man who was party "to and/or responsible for acts which were war crimes and/or "against humanity and/or atrocities." This is based upon our view that evidence of a reputation of this sort is not plainly inadmissible. We are not holding that it is admissible. That will be for the judge at the trial to decide in the light of all the circumstances as he sees them when the question is put.

In arriving at these conclusions, we have approached the matter in a different way from that taken by the judge, and have reached a slightly different result. We have considered the admissibility of the matters pleaded in paragraph 5; the judge decided that, whether admissible or not, they ought not to be pleaded. He reached this conclusion on the authority of *Wood* v. *Durham (Earl)*,[6] a decision of the Divisional Court which—with some reluctance we are told—he felt bound to apply. On the same authority, Mr. Foster has submitted, in the alternative, that the whole of paragraph 5, whether or not it contains matter admissible at the trial, should be struck out as improperly pleaded.

In *Wood* v. *Durham*[6] the plaintiff, a professional jockey, sued to recover damages for a libel charging him with unfairly and dishonestly riding the horses in a particular stable. The defendants delivered a defence pleading justification, and later

[6] (1888) 21 Q.B.D. 501; 4 T.L.R. 778, D.C.

sought leave to amend it by adding a paragraph in which they alleged that the plaintiff was commonly reputed to have been in the habit of unfairly and dishonestly riding racehorses. The application was refused on the ground that, whether the allegation would be admissible at the trial or not, it ought not to be pleaded. We are dealing with an application to strike out a paragraph that is already in the pleading, and it is not the practice to do that merely because the matter alleged is unnecessary. It may be that different considerations arise when an application is being made for leave to amend. But the order we propose grants leave to the defendants to amend their defence in the form of an allegation very similar to that in *Wood* v. *Durham*,[6] and it is, therefore, an authority with which we must deal.

The correctness of the decision in *Wood* v. *Durham*[6] has been doubted in the textbooks. It is difficult to read the judgments of Manisty and Hawkins JJ. without feeling that they thought of *Scott* v. *Sampson*[7] as having been wrongly decided, and did not believe that the matter complained of would be admitted at the trial; in this they were wrong, for *Scott* v. *Sampson*[7] has been approved by this court in *Hobbs* v. *Tinling*.[8] Mr. Wilson has invited us to say that *Wood* v. *Durham*[9] was wrongly decided; we think that we should so hold and should not follow it. The decision was based on R.S.C., Ord 21, r. 4, which provides that no denial or defence shall be necessary as to damages claimed or their amount; the Divisional Court held that matter which went only to mitigation of damage was not, therefore, a material fact within R.S.C., Ord. 19, r. 4.

R.S.C., Ord. 19, contains the rules which apply to pleadings generally, and R.S.C., Ords. 20 and 21, contain the rules relating to the statement of claim and defence and counterclaim respectively. Order 19, r. 15, specifies certain matters which the defendant or plaintiff "must raise by his pleading," and which should, therefore, be regarded as material within the meaning of Order 19, r. 4. The matters which must be raised under rule 15 include all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings. It may be that, as was said in *Wood* v. *Durham*,[9] evidence of bad reputation is not a ground of defence because it goes only to damages. We do not pause to deal with that, because it is sufficient if the matter introduced raises a new issue of fact. A plaintiff who has come to meet two specific charges, one of murder in 1934 and another of treachery in 1944, and who finds that it is also being said against him that he has an evil reputation as a war criminal, could rightly complain that this is a new issue of fact. It raises the sort of issue upon which, as Cave J. anticipated in *Scott* v. *Sampson*,[10] a plaintiff would wish to come "prepared with friends "who have known him to prove that his reputation has been "good." In our judgment, the conclusion of Cave J. in the same part of his judgment that general evidence of bad character is a material fact was correct. The rule upon which the court in *Wood* v. *Durham*[11] relied in Order 21, is a rule which relates only to defence and must be read subject to the general rules of pleading in Order 19. It makes unnecessary a general plea that no damage has been suffered; but it would not excuse the failure to raise in the pleading any matter that comes within Order 19, r. 15.

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[6] 21 Q.B.D. 501.

[7] 8 Q.B.D. 491.

[8] [1921] 2 K.B. 1.

[9] 21 Q.B.D. 501.

E. D.

The appellants appealed to the House of Lords.

Gerald Gardiner Q.C. and *D. J. Turner-Samuels* for the appellants. The Court of Appeal was wrong in holding that the matters set out in paragraph 5 (A) and (B) of the defence were not relevant and material in mitigation of damages.

Wood v. *Earl of Durham*[1] was wrongly decided. It is not necessary to trouble the House with *Millington* v. *Loring*.[2] The Court of Appeal relied on *Scott* v. *Sampson*[3] and *Hobbs* v. *C. T. Tinling & Co. Ltd.*[4] The latter case was based on the former, which was wrong in deciding that a defendant in mitigation of damages can adduce evidence of a plaintiff's general reputation, but not of specific facts and circumstances to show the plaintiff's true character and disposition, nor evidence of rumours. Both cases, which have never been reviewed in the House of Lords, were wrongly decided on this point and were based on decisions given at a time when there did not exist the present rule whereby each party must plead all the material facts on which he relies if they are likely to take an opposing party by surprise.

[10] 8 Q.B.D. 491, 503.

[11] 21 Q.B.D. 501.

[1] (1883) 21 Q.B.D. 501; 4 T.L.R. 778.

[2] (1880) 6 Q.B.D. 190, C.A.

[3] (1882) 8 Q.B.D. 491, D.C.

[4] [1929] 2 K.B. 1, 10–11, 16, 17–22, 53; 45 T.L.R. 328, C.A.

Watt v. *Watt*[5] bears on mitigation of damages, but the ratio of the decision was that the Court of Appeal had made an order it had no jurisdiction to make.

If a defendant has said that a plaintiff has been convicted of dishonesty six times, whereas it was only twice, the plaintiff is entitled to damages but not to as much as if he had an exemplary character. In common sense there is no reason why the jury should not be told the truth.

There has been a confusion in the cases as to whether "character" means "disposition" or "reputation." What is meant by "general reputation"? What evidence would one call, say, to swear that a plaintiff has a "general reputation" for being a rogue? There would be cross-examination of the witness as to his source of knowledge, since he might be speaking of his own knowledge or merely on rumours.

Jones v. *Stevens*[6] is hard to understand. It either decides that evidence of general bad reputation in mitigation of damages cannot be proved at all or that evidence of specific facts bearing on reputation cannot be called if no notice has been given and if the evidence is too general and wide for the plaintiff to be able to meet it without notice. The first point is wrong, though the second may be right. The point was important only under the old system of pleading, because now due notice must be given.

Most of the old cases can be reconciled by consideration of the old forms of pleading. The general principle is that it is unfair for a plaintiff to find incidents in his past raked up without previous notice, so that he cannot get evidence to deal with them. If such evidence were admitted in mitigation, he would be taken by surprise, because he would not know what part of his life was going to be investigated. But *Scott* v. *Sampson*[7] has taken away the basis of the old decisions.

The main reason put forward in *Jones* v. *Stevens*[8] is the unfairness to the plaintiff in taking him by surprise. See also Starkie on Evidence, 3rd ed., vol. II, pp. 641–642. *Scaife* v. *Kemp & Co.*[9] is relied on.

As to Cave J.'s first classification in *Scott* v. *Sampson*,[10] general evidence of reputation, what should matter is a man's real character, even if evil has wrongfully been attributed to him.

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[5] [1905] A.C. 115, 120–121, 123; 21 T.L.R. 386, H.L.

[6] (1822) 11 Price 253.

[7] 8 Q.B.D. 491.

[8] 11 Price 253.

[9] [1892] 2 Q.B. 319; 61 L.J.Q.B. 515.

[10] 8 Q.B.D. 491.

The question for the jury is the damage done to the reputation which a man ought to have, his real character. Such evidence was allowed in *Mawby* v. *Barber*,[11] *Moore* v. *Oastler*,[12] *Hardy* v. *Alexander*[13] and *Richards* v. *Richards*.[14]

As to Cave J.'s second class in *Scott* v. *Sampson*,[15] evidence of rumours, see *Earl of Leicester* v. *Walter*,[16] *Anon.* v. *Moor*,[17] *Wyatt* v. *Gore*,[18] *Thompson* v. *Nye*[19] and *Knobell* v. *Fuller*.[20]

Where in Holt on the Law of Libel, 2nd ed. (1816), p. 270, it is said that " the defendant might give in evidence somewhat " of the real character of the plaintiff," the word " character " means disposition rather than reputation. In an anonymous case before Le Blanc J., referred to in *Scott* v. *Sampson*,[21] there was admitted under the general issue evidence that the plaintiff had been guilty of attempts to commit the crime imputed to him. Apart from *Scott's* case[22] and *Watt's* case[23] the only case relied on in support of the decision in *Hobbs's* case[24] was *Bracegirdle* v. *Bailey*.[25]

The admissibility of evidence as to the plaintiff's previous character is discussed in Starkie on the Law of Slander and Libel, 2nd ed. (1830), p. 89, n. (*n*), and pp. 92–93 and 94. This was eight years after *Jones* v. *Stevens*.[26] It expresses the view that in such cases the ratio of the rule for excluding evidence of particular facts is that, where there is no notice, the plaintiff cannot be expected to call evidence to disprove specific alleged acts of past misconduct.

The classification by Cave J. in *Scott* v. *Sampson*[27] of the evidence which will be admitted as to a plaintiff's character is unscientific and unsatisfactory from the practical point of view. The difficulty of the classification is that the classes fade into one another. The first class must be based either on class 2 or class 3 because reputation is based on either rumour or knowledge. Further, the principal ratio of the decision is the unfairness of bringing up at the trial matters of which the plaintiff has no notice and with which he cannot be expected to deal. The judgments in that case show no appreciation of the fact that the rules there laid down would enable a plaintiff to get damages for the loss of a reputation which he should never have had. That is why justification is a defence in defamation proceedings: see *M'Pherson* v. *Daniel* [28] and *Carr* v. *Hood*.[29] See also Folkard on Slander and Libel, 4th ed. (1870), pp. 528–529; 7th ed. (1908), p. 303. Nothing is actually laid down in *Scott* v. *Sampson* [30] which would enable a man to recover damages for the loss of a reputation to which he had no right.

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[11] (1826) Starkie on Evidence, 3rd ed., vol. II, 642n.
[12] (1836) ibid.
[13] (1837) ibid.
[14] (1844) 2 M. & Rob. 557.
[15] 8 Q.B.D. 491.
[16] (1809) 2 Camp. 251.
[17] (1813) 1 M. & S. 284.
[18] (1816) Holt N.P. 299, 306.
[19] (1850) 16 Q.B. 175.
[20] (1797) Peake Add.C. 139.
[21] 8 Q.B.D. 491, 499.
[22] 8 Q.B.D. 491.
[23] [1905] A.C. 115.
[24] [1929] 2 K.B. 1.
[25] (1859) 1 F. & F. 536.
[26] 11 Price 253.
[27] 8 Q.B.D. 491.

What was there laid down was that in an action for libel the defendant in mitigation of damages can adduce evidence of the plaintiff's general reputation, but cannot adduce evidence of particular facts and circumstances to show the plaintiff's true character or disposition, nor evidence of rumours. It was not argued that that case was wrong when *Hobbs's* case [31] was decided, and on that point the Court of Appeal then heard no argument. It was wrong in so far as the Divisional Court held that in an action for defamation evidence of specific facts and circumstances to show the true character and disposition of the plaintiff could not be adduced in mitigation of damages. The court, particularly Cave J., misunderstood the true effect of the authorities which, together with the requirements of a just and fair trial, call for the admission of such evidence. Rules of the Supreme Court, Ord. 36, r. 37, which is hard to explain, evidently contemplates the admission of such evidence, at least where justification is pleaded. The adoption of the rule has led to strange, artificial and inequitable results and to serious injustices: see the report of the Committee on the Law of Defamation presided over by Lord Porter (1948 Cmd. 7536), paras. 142, 146–156. As the report says, it is in practice virtually impossible in any action to find witnesses who are prepared to give evidence that a plaintiff is of general bad reputation. Ordinary people do not usually understand the concept of general reputation or deal in terms of it.

Further, the decision in *Scott* v. *Sampson* [32] has caused injustice to plaintiffs as well as defendants because any witness may be cross-examined to credit with a view to showing that he is not to be believed on his oath. If the plaintiff gives evidence in an action for defamation, he can be cross-examined to "credit" and may be asked questions as to any particular acts of misconduct in his past life, with the ostensible object not of mitigating damages but of showing that he is not to be believed on his oath. Therefore a tactical battle may develop to force the plaintiff into the witness-box. The injustice would be eliminated if notice could be served that specific allegations would be relied on in mitigation.

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[28] (1829) 10 B. & C. 263, 272.

[29] (1808) 1 Camp. 254n., 258.

[30] 8 Q.B.D. 491.

[31] [1929] 2 K.B. 1.

[32] 8 Q.B.D. 491.

Moreover, it is inequitable that a person who is in fact, and can by evidence be shown to be, guilty of very grave conduct of the same character as that alleged in a libel should be able to recover damages as though he were a man who had never been guilty of any such conduct, thus recovering damages for injury to a reputation which he does not deserve. As the rule now stands, a man who has as the result of rumours unjustly acquired a bad reputation may recover less in damages than a man who has succeeded up to the time of the defamatory publication in keeping his true guilty character secret. So, too, a man of whom it is published in a newspaper that he has been convicted six times of dishonesty, whereas in fact he has been convicted only twice, can start a libel action in respect of the false allegations. The newspaper cannot justify and the plaintiff can recover damages on the basis that he has never committed any such crime, because, by his duplicity, he has kept his reputation clear and the two convictions cannot be proved in mitigation because they are specific instances of misconduct. The effect of *Scott* v. *Sampson*[32] has been further aggravated by the amendment of the Rules of the Supreme Court in 1949 when sub-rule (2) was added to Order 19, r. 6. Before then one rarely saw a statement of claim in a libel action which did not plead an innuendo. The effect of that in a case where the defendant might justify was to make him decide whether to justify with or without the innuendo. After 1949, when particulars of the innuendo had to be given, difficulty arose because an innuendo generally depends on facts known only to certain people: see *Cassidy* v. *Daily Mirror Newspapers Ltd.*[33] In the ordinary case an innuendo is now rarely pleaded; for example, it was not pleaded in *Liberace* v. *Daily Mirror Newspapers Ltd.*[34] See also *Maisel* v. *Financial Times Ltd.*[35] and *MacGrath* v. *Black.*[36]

It is right to consider cases other than libel in which reputation and disposition are material, for example, seduction. The present practice is that if a man seduces a woman, evidence of her previous unchaste conduct, however recent and however good her reputation, is admissible in mitigation of damages. It would be unsatisfactory if in a defamation action it were not admissible, though evidence of bad reputation, however undeserved, would be admissible: see *Bamfield* v. *Massey*,[37] *Bate* v. *Hill*,[38] *Verry* v. *Watkins*[39] and *Carpenter* v. *Wall*.[40] If the respondent were right, the position would be that if a defendant had defamed a plaintiff alleging unchastity with a particular man, the fact that she was in fact promiscuous would not be admissible in evidence, though a general reputation for promiscuity, which might be quite undeserved, would be admissible.

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[32] 8 Q.B.D. 491.

[33] [1925] 2 K.B. 331; 45 T.L.R. 485, C.A.

[34] The Times, June 17, 18, 1959.

[35] (1915) 84 L.J.K.B. 2145; 31 T.L.R. 192, H.L.

[36] (1926) 95 L.J.K.B. 951, C.A.

If a newspaper had published of a man that " he has murdered " his father, stolen from his mother and does not go to church " on Sundays," and the plaintiff brought an action in respect of the last imputation only, the newspaper, if the respondent is right, could not justify the major charges because the plaintiff had not complained of them (as this plaintiff has not complained of the gravest charges in the film), nor give evidence of them in mitigation of damages, because they were specific instances of misconduct. It would be most unjust if the plaintiff could get damages for the minor imputation when, if the jury had had the whole matter before them, he would have got nothing.

Although *Scott* v. *Sampson*[41] has stood for several years, it should be reversed because it is not a case where property or contractual arrangements or personal rights have been regulated on the basis of it. Its effect is contrary to the best interests of justice and a fair trial.

Even if paragraph 5 (B) of the defence must be struck out, paragraph 5 (A) should remain as the only way of insuring that the whole film is shown to the jury. The decision of the Court of Appeal that the appellants did not have the right to require that those parts of the film referred to in paragraph 5 (A) be shown to the jury at the trial of this action was wrong. It is a rule of law that in a libel action the defendant has the right to have exhibited to the jury the whole of the film or other publication in which the libel is contained. The Court of Appeal by its decision implied that there is no such right but that the matter is in the discretion of the trial judge. Other parts of this film constitute " circumstances in which the alleged libel was pub- " lished "—a recognised head of mitigation. The allowance or rejection of this pleading involves a decision of law as to whether at the trial the appellants will be entitled to require that there shall be shown to the jury the whole film or just those parts made up of the sound track and pictures conveying the alleged libels complained of.

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[37] (1808) 1 Camp. 460.
[38] (1823) 1 C. & P. 100.
[39] (1836) 7 C. & P. 308.
[40] (1840) 11 A. & E. 803.
[41] 8 Q.B.D. 491.

A plaintiff should not be allowed to keep the jury ignorant of the truth or existence of other defamatory parts of the very publication in which the alleged libel appears. Thus a man of previous good reputation who is explicitly and truly alleged in the same publication to have been concerned in numerous monstrous but secret crimes should not be allowed to put in issue only one of the minor incidents, which is untrue, and to recover damages from the jury as a man of good character and reputation.

Until this case it has never been disputed that either party is entitled to put before the jury the whole of the publication in which the alleged libel is contained, and the general view seemed to be that the plaintiff was bound to put it in: see *Cooke* v. *Hughes*[42] and *Thornton* v. *Stephen*.[43] That must be right, because, if no admission was made as to publication, the plaintiff would certainly have to prove it by putting in the book or film.

If the object of the action is to reflect in the damages awarded the injury to the plaintiff's reputation, the damages cannot be properly assessed unless the jury see the whole film and not 30 seconds of it. The whole film by the allegations contained in it would seriously affect the jury's view of the plaintiff. It would be unreal to assess damages in respect of the allegation complained of when in the same publication far more serious allegations were made of which he had not complained.

The following questions are to be answered: (1) To what extent may the defendant in an action for defamation adduce evidence in mitigation of damage to show the true character and disposition of the plaintiff in relevant respects? In any action for defamation a defendant, on giving due notice, may adduce evidence in mitigation of damage of the circumstances in which the matter complained of was published and of the true character and disposition of the plaintiff at the material time and relevant to the nature of the allegations made against him in the publication complained of. (If dishonesty is alleged in the libel the fact that the plaintiff has committed adultery is not relevant.)

(2) To what extent in an action for defamation may the defendant in mitigation of damage rely on the truth or existence

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[42] (1824) Ry. & M. 112.

[43] (1837) 2 M. & Rob. 45.

of other passages in the same publication, which are grossly defamatory of the plaintiff, but in respect of which the plaintiff has not made any claim for damages in his pleadings? In a defamation action a defendant may in mitigation of damages rely on (a) the existence and (b) the truth of those other passages.

(3) To what extent and with what particularity should or may matters intended to be adduced in evidence in mitigation of damage be pleaded? All such facts should be pleaded if they raise issues of fact not otherwise raised in the pleadings.

(4) To what extent, if at all, does a plea of justification affect the answers to the above questions? That plea does not affect those answers.

(5) Has the defendant in a libel action the right to have the whole publication in which the alleged libel is contained put to the jury by the plaintiff as part of the plaintiff's case, or at all? The defendant has that right. Alternatively, either party has the right to refer to it.

D. J. Turner-Samuels following. The defendants have a right to show the remainder of the film in mitigation of damages. Even assuming that the damages are to be assessed on the plaintiff's reputation and not on his true character, there is a right to show the remainder of the film. If people's estimation of the plaintiff has been reduced, it has been reduced in the minds of those who saw the film, and if the rest of the film, in respect of which no action is brought by the plaintiff, has utterly destroyed his reputation, he cannot complain of the parts of the film, in respect of which he is suing, even if those shown alone may be libellous of him. The purpose of paragraph 5 (A) is to say that the defendants will in mitigation of damages put before the jury other parts of the film which show the defendant as having been guilty of conduct set out in that sub-paragraph. Suppose in the biography of a person there were grave criticisms of him, which utterly destroyed his reputation by a whole series of allegations, while at the end there was one further allegation which was not true. It would be strange if he could come to court in a libel action complaining of that allegation and insist that the effect of the whole book on the minds of the readers should not be considered, so that the court must assume that a reader has not read the earlier part and thinks the plaintiff a fine fellow when he reads the latter part. That would be wholly unreal. What is material here is the effect of the part of the film complained of on the mind of a person who saw the whole film. The jury must consider whether those parts of which the plaintiff complains serve to reduce his reputation any further than it had been reduced by the other parts in the minds of persons who saw the film. Sub-paragraph (A) should be restored. The plaintiff must be taken to have admitted the truth of the parts of the film of which he does not complain: see *Cooke* v. *Hughes*.[44]

It has often been held that the existence of malicious intent and the degree of malice is relevant to the quantum of damages. The quantum of malice can affect the quantum of damage. It is open to a plaintiff to prove the existence and the extent of malice in the defendant by adducing evidence of other false and defamatory matter published by the defendant of the plaintiff, whether or not it is connected with the libel complained of. It should logically follow that the defendant is entitled to disprove or minimise malice by adducing in evidence other matter published by him concerning the plaintiff. For example, a biography might be written in praise of a man, but might also show some human frailties, despite his noble character. If the person sued for libel in respect of these allegations, the defendant could rebut or diminish a suggestion of malice by showing that the book as a whole praised the plaintiff. It might be that the plaintiff had not been held in high regard and the object of the book was to show that he should be.

Or suppose that in a work of serious historical criticism a character was reassessed seriously and historically, the result might be to show that his actions had not been as praiseworthy as was formerly thought. One statement might be erroneous and libellous, but in mitigation of damages the author should be able to require the jury to look at the book and see that it was a serious historical work, not actuated by malice. In addition to the libellous passage there might be others that were defamatory and yet true. It would be wholly wrong in principle if, while the defendant could not put the whole book in, the plaintiff could do so in order to support the argument that the other criticisms of him, because they were criticisms, showed that the defendant was actuated by malice. If they were false the jury might consider that they showed the existence of malice in the defendant. But if there were passages critical of the plaintiff which were true, their tendency would be to diminish the suggestion of malice. So it should be open to a defendant, sued in respect of one passage in a biography, to put in the whole book to show that there was no malice because, for example, it was a serious historical study.

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[44] Ry. & M. 112.

Scott's case[45] and *Hobbs's* case[46] were wrongly decided in so far as they would prevent the defendant from putting before the jury the remainder of the film on the issue of the extent of malice, presuming the truth of the remainder of the film: see *Pearson* v. *Le Maitre*,[47] *Anderson* v. *Calvert*[48] and *Bridgmont* v. *Associated Newspapers Ltd.*[49]

It is open to a plaintiff to put in other publications of the defendant to show the extent of the defendant's malice, separate publications from that on which the plaintiff is suing. There are no grounds for denying the defendant a similar advantage.

Paragraph 5 (A) shows that the defendants intend to rely on other allegations, true or false, in the rest of the film, of which the plaintiff has not complained. Their truth is asserted in paragraph 5 (B).

In any trial, even in a simple running-down case, the evidence on the issue as to quantum of damage is almost always different from the evidence on the issue of liability: see Gatley on Libel, 5th ed., pp. 556–557, para. 1019.

If it were open to a defendant to adduce evidence as to the truth of matters mentioned in mitigation, the length of the trial would not necessarily be greatly increased. It would be open to the plaintiff to admit allegations which were true and the defendant would be unlikely to make allegations unless there were good ground for them, because of the risk of increasing the damages.

John Foster Q.C. and *Colin Duncan* for the respondent. The argument for the appellants is divided into two parts, first, seeking to say what the law is, and, secondly, seeking to say what it should be.

The old cases do not depend simply on the old rules of pleading which no longer obtain. The idea which runs through them all is that to go into what might be a host of other libels is something which should not be allowed in mitigation of damages, because it would lead to trials being hopelessly clogged and would be proceeding on a wrong principle. In an action for defamation the object of the trial is to examine and find the damage which the plaintiff has suffered to the reputation which he has, and not to the reputation which, after all the relevant good and bad actions of his life have been weighed up, he is found to deserve. If one had to weigh up the true character of the plaintiff the field would be impossibly wide and it is very hard to find the true character of a plaintiff on a consideration of all his actions. Here the plaintiff complains of untrue allegations that he was concerned in the murder of King Alexander and Monsieur Barthou and the betrayal of Rommel, and the defendants seek to say that the allegations of war crimes in the film are in the same field, although the allegations concern hundreds or thousands of individual acts and each allegation would be capable of being the subject of a separate action. On the argument for the defendants, they would be entitled to rely on all these specific instances and bring witnesses from all parts of the world to support them, the plaintiff being entitled to try to repel them. This would make the collateral field extremely wide. The danger of increasing the damages would not necessarily deter defendants from making wild allegations, because in certain actions, particularly those with political overtones, the main object might be to get across a political point of view. The contention for the defendants is a breach of the principle that in defamation actions one must look at the plaintiff's reputation as it is without going into collateral matters.

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[45] 8 Q.B.D. 491.

[46] [1929] 2 K.B. 1.

[47] (1843) 5 M. & Gr. 700.

[48] (1908) 24 T.L.R. 399, C.A.

[49] [1951] 2 K.B. 578; [1951] 2 T.L.R. 682; [1951] 2 All E.R. 285, C.A.

As to R.S.C., Ord. 36, r. 37, when a defendant pleads justification, he is saying that, although the statement is defamatory, it has not hurt the plaintiff's character in respect of which it is true; therefore character is put in issue, since it is said that the plaintiff is of bad character qua the libel. In the case of other defences the plaintiff's character is not put in issue. Before the "general issue" was abolished in 1873 there was a time when the plaintiff put his character in issue: see section 69 of the Supreme Court of Judicature Act, 1873, and the Rules of Court, 1875, Order 19, r. 4, and Order 21, r. 4. In *Wood* v. *Earl of Durham*[50] the court was not saying that *Scott's* case[51] was wrongly decided but only doubting it. As to the former case, see *Wood* v. *Cox*.[52] Rules of the Supreme Court, Ord. 36, r. 37, were put into the Rules because, when evidence of bad character is to be given, the plaintiff should be given a chance of bringing evidence of his own good character, but this consideration does not apply where justification is pleaded and his character is in issue. In all actions for defamation the plaintiff starts off with an assumed good character. The defamation is an injury to his character. So, if a defendant justifies, he says that the injury to the plaintiff's character is justified because in that respect his character is not good. If the words are true, there is no civil wrong because the plaintiff's reputation has not been damaged. Where the defence is, say, privilege it is necessary for the defendant to say in addition that, if that defence fails, the plaintiff's general reputation will be attacked. The court must judge the damage to his reputation as it is and not as it ought to be. It is assumed by the defendants that the allegations of complicity in the murder of the king and of Monsieur Barthou are in the same field as the alleged war crimes. The law was rightly stated in *Mangena* v. *Wright*.[53] *Scaife* v. *Kemp & Co.*[54] does not really grapple with the present case. The notice there could have been struck out. It is no authority for the proposition that specific acts not connected with the libel may be given in evidence in mitigation of damages. It is not true that before *Scott's* case[55] the law allowed evidence of specific acts with regard to the plaintiff's reputation to be given in mitigation of damages, where those acts are not directly dealing with the libel. In what he said in *D. & L. Caterers Ltd.* v. *d'Ajou*[56] Lord Goddard was speaking quite generally. See also *Bell* v. *Parke*.[57]

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[50] 21 Q.B.D. 501, 507–508.

[51] 8 Q.B.D. 491.

[52] (1888) 4 T.L.R. 652, 655.

The defendants in mitigation of damages seek to rely on other parts of the film than those complained of, "the truth of which "the plaintiff . . . does not deny." But it would be idle for the plaintiff to deny charges in an action in which he is not complaining of them, and no inferences are to be drawn from his omission to do so.

As to the cases relied on by the appellants, *Knobell* v. *Fuller*[58] does not support the theory that specific facts may be relied on in mitigation of damages although they are not connected with justification. It relates to grounds of suspicion and, in any event, it is now bad law. What was said in the note to *Wyatt* v. *Gore*[59] suggesting that, though a defendant could not establish justification, he might prove something less in mitigation, would not be accepted now. *Anon.* v. *Moor*,[60] the case on rumours and reports, is not any authority for the appellants' proposition. Nor is *Bracegirdle* v. *Bailey*,[61] which is authority for rejecting evidence of specific facts, sought to be established in mitigation. *Jones* v. *Stevens*[62] is authority for the respondent's proposition. Reliance is also placed on *Waithman* v. *Weever*[63] and *Underwood* v. *Parks*.[64] See also Folkard on Slander and Libel, 4th ed., pp. 539, 540, 541, 543–544; 7th ed., p. 310.

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[53] [1909] 2 K.B. 458, 973; 25 T.L.R. 534.

[54] [1892] 2 Q.B. 319.

[55] 8 Q.B.D. 491.

[56] [1945] K.B. 364; 61 T.L.R. 343; [1945] 1 All E.R. 563, 565, C.A.

[57] (1860) 11 Ir.C.L.R. 413, 416–418.

[58] Peake Add.C. 139.

[59] Holt N.P. 299, 306.

[60] 1 M. & S. 284.

The law stated by Cave J. in *Scott's* case[65] was approved in *Hobbs* v. *C. T. Tinling & Co. Ltd.*[66]

As to the background of R.S.C., Ord. 36, r. 37, see *M'Pherson* v. *Daniels*.[67]

As to the Scottish law which is in consonance with the English law, see *E.* v. *M.*[68]

As to the law of the United States, see Prosser's Law of Torts, 2nd ed., p. 634, and the Corpus Juris Secundum, vol. 53, Libel and Slander, section 267 (c).

The report of Lord Porter's Committee on the Law of Defamation, paragraphs 155 and 156, only expresses what the appellants say the law should be. The recommendations were not accepted as a desirable amendment to the law: see the Parliamentary Debates (Hansard), House of Lords, vol. 178, p. 347.

The case of actions for seduction is not parallel to that of actions for defamation.

It would be dangerous in political cases for the evidence to be centred on collateral issues. The present case is particularly bad in this respect: see paragraph 5 (B) of the defence. A defendant should not be allowed to prove in mitigation of damages even allegations, which could be established as true, but which relate to transactions many years previously and which, if he published them, might form the basis of a prosecution for criminal libel, because, though they were true, the publication was not in the public interest. It would be paradoxical if the law allowed the defendants to take such a course. In the present case the defendants are, in effect, saying in mitigation: "In this film we "libelled you in another way and you did not object." The plaintiff is, in effect, saying: "No, you did not so libel me." Further, if the matters raised by the defendants in mitigation were gone into, there would be all sorts of side issues, for example, as to whether the documents relied on by the defendants were fabricated. It is not right in law that, as a general principle, the whole document containing the alleged libel must be looked at. The circumstances in which a libel was published do not include the fact that the defendant has published other libels. The circumstances that can be relied on as diminishing malice are, for example, that the defendant had the libel from someone else or that there was provocation.

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[61] 1 F. & F. 536.

[62] 11 Price 235.

[63] (1822) 1 Dow. & Ry.N.P. 10.

[64] (1743) 2 Stra. 1200.

[65] 8 Q.B.D. 491.

[66] [1929] 2 K.B. 1, 10, 17–18.

[67] 10 B. & C. 263, 272.

[68] 1923 S.C. 1.

Everything points to the conclusion that specific acts are excluded from evidence admissible in mitigation of damages.

Colin Duncan following. Since *Scott's* case [69] was decided in 1882 there has been no reported case in which it has been argued that it was wrongly decided. In a few cases, for example, the *Hobbs* case,[70] an attempt has been made to introduce evidence outside the rules in the *Scott* case,[71] but it was not, even then, suggested that it was wrong: see the argument of counsel in the *Hobbs* case,[72] where an attempt was made to distinguish the *Scott* case,[73] although it would have been competent for the Court of Appeal to come to a different conclusion. For almost 80 years now the practice has been that a defendant is limited to tendering evidence of the plaintiff's bad reputation. The appellants are arguing that the law ought to be different from what it is. Order 36, rule 37, of R.S.C. did not change the common law: see *Mangena* v. *Wright*.[74] *Scaife* v. *Kemp & Co.*[75] does not support the appellants. It is not accurate to speak of "notice" under the rule; the word used is "particulars." If the particulars are delivered by the defendant, they cannot be struck out if they do not form part of the defence: evidence in support of the particulars can, however, be objected to at the trial. In *Scaife's* case [75] the evidence would have been ultimately objected to as being outside the scope laid down in *Scott's* case.[76] It is quite true that R.S.C., Ord. 36, r. 37, has never been properly understood. It is to be noted that, besides the character of the plaintiff, it covers the circumstances in which the libel was published. Of the so-called "particulars" filed in actions for defamation, 75 per cent. set out particulars of specific facts which are inadmissible in evidence but cannot be struck out; 20 per cent. pay lip-service to *Scott's* case [76] by alleging a general bad reputation for the same specific facts; and 5 per cent. strictly conform to it and are therefore not "particulars" at all and are more or less valueless. Defendants in general do not seek to take advantage of R.S.C., Ord. 36, r. 37, unless they are on pretty sure ground, so that the normal effect is that, after a notice is served, the plaintiff takes fright and the action is discontinued; either the action is withdrawn or the notice is withdrawn.

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[69] 8 Q.B.D. 491.
[70] [1929] 2 K.B. 1.
[71] 8 Q.B.D. 491.
[72] [1929] 2 K.B. 1, 7–8.
[73] 8 Q.B.D. 491.
[74] [1909] 2 K.B. 958, 979.
[75] 61 L.J.K.B. 505, 506.
[76] 8 Q.B.D. 491.

As to the argument for the appellants based on the effect of R.S.C., Ord. 19, r. 6 (2), on the innuendo, nothing is affected except the silly or exaggerated innuendo. At the present time half the defamation cases are pleaded with an innuendo. Otherwise all the defendant has to contend with is the ordinary and natural meaning of the words, whatever the plaintiff's counsel may say.

Wood v. *Earl of Durham*,[77] by which Sachs J. felt himself bound, is not relied on.

The contentions of the appellants would produce chaotic and incomprehensible results. An action for defamation is brought by A B to be compensated for the wrongful acts of Y Z. His claim only arises for damage to the reputation which he previously enjoyed. It is said by the appellants that a man who is a rogue is not entitled to be compensated for damage to a reputation which he should not have had. But the courts do justice between the parties and do not go into the impossible question of what are a man's deserts. Suppose the defendant has written that "A B is a coward" or that he "did a cowardly thing." It would be absurd to allow him to prove in mitigation that A B turned rather pale when a bomb fell in Sloane Square 20 years ago, or for the plaintiff to call evidence to show that he rescued a dog 25 years ago.

Gerald Gardiner Q.C. in reply. It is open to the House of Lords to reverse *Scott's* case.[78] As to the proper attitude towards cases of long standing, see *Mills* v. *Armstrong*,[79] *West Ham Union* v. *Edmonton Union*,[80] *Westminster Corporation* v. *Southern Railway Co.*,[81] *Admiralty Commissioners* v. *Valverda (Owners)*,[82] *Lissenden* v. *C. A. V. Bosch Ltd.*[83] and *Hill* v. *William Hill (Park Lane) Ltd.*[84] To hold that the law is as the appellants contend would not result in an increase in libel actions.

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[77] 21 Q.B.D. 501.

[78] 8 Q.B.D. 491.

[79] (1888) 13 App.Cas. 1; 4 T.L.R. 360, H.L.

[80] [1908] A.C. 1, 4–5; 24 T.L.R. 108, H.L.

[81] [1936] A.C. 511, 563–565; 52 T.L.R. 541; [1936] 2 All E.R. 322, H.L.

[82] [1938] A.C. 173, 194; 54 T.L.R. 305; [1938] 1 All E.R. 162, H.L.

[83] [1940] A.C. 412, 432; 56 T.L.R. 347; [1940] 1 All E.R. 425, H.L.

[84] [1949] A.C. 530; 65 T.L.R. 471; [1949] 2 All E.R. 452, H.L.

On the contrary, a man of bad character would be discouraged from bringing an action, whereas now he can succeed as if he were a man of good character. It is not sought to extend the area of what may be proved in mitigation. All that is said is that it is truth and not mere reputation that is relevant.

As to the difficulties of R.S.C., Ord. 36, r. 37, the source of the information on which the defendant's allegations are made is material. There is no reason why notice should be given if there is a plea of justification, but no notice should be given if there is not. Why should the plaintiff have notice that the defendant had his information from a good source in the first case but not in the second? A defendant may want to rely in mitigation on the fact that he has at once apologised; that relates neither to the circumstances in which the libel was published nor to the character of the plaintiff, but there is nothing in the rule to show whether he must give notice in respect of that. What does the rule mean by " the character of the plaintiff "? Does it mean his reputation or his disposition? And how, in the evidence, can one distinguish between them? If a witness speaking to reputation is challenged, he must rely either on rumour or specific facts, but the respondent contends that notice should not be given of the facts which will be relied on. One should give notice of any facts which, if not pleaded, would take the other side by surprise. The particulars form part of the pleadings, even if given in a letter.

D. & L. Caterers Ltd. v. *d'Ajou*[85] does not help the appellants.

The real basis of the plea of justification is that the plaintiff should not obtain damages for a reputation which he does not deserve: see *Wyatt* v. *Gore*,[86] Folkard on Slander and Libel, 4th ed., p. 529 (just before the decision in *Scott's* case[87]), *M'Pherson* v. *Daniels*,[88] *Hood* v. *Carr*[89] and Starkey on Slander and Libel, 2nd ed., vol. I, pp. 229–230. The real character of the plaintiff and not his reputation is the criterion on which liability is determined. A man who had committed six secret acts of dishonesty might have a good reputation. It is hard to see why the amount of damages should depend on whether they were generally known or whether he has managed to conceal them. Conversely, it would be hard on a plaintiff if all sorts of baseless rumours of a particular kind had sprung up about him

[85] [1945] K.B. 364.

[86] Holt N.P. 299.

[87] 8 Q.B.D. 491.

[88] 10 B. & C. 263, 272–273.

[89] 1 Camp. 354n., 357n.

until his reputation was bad, and when at last he found someone whom he could sue for libel, he could only recover small damages because the persistent rumours had given him such a terrible reputation. There is no reason why a judge and jury should have to decide a case on a fiction that a man with a bad character has an exemplary character. Section 5 of the Defamation Act, 1952, does not cover the case where several gravely defamatory charges are made against the plaintiff but he complains of only one or two. Evidence of specific acts of misconduct by the plaintiff are admissible in mitigation of damages: see the anonymous decision of Le Blanc J. referred to in *Scott's* case,[90] *Knobell* v. *Fuller*[91] and *Scaife's* case.[92] *Bracegirdle's* case[93] is the only specific authority for the respondent's contentions. In the case of *Hobbs*[94] there was no plea of justification nor a notice in mitigation of damages. Before *Scott's* case[95] the law was very fluid, and all the authorities are open to review in the House of Lords. See p. 35 of the report of the Committee on the Law of Defamation presided over by Lord Porter. See also *Underwood* v. *Parks*,[96] *Collinson* v. *Loder*[97] and *Warne* v. *Chadwell*.[98]

A plaintiff may always refer to other publications of the defendant in order to aggravate damages. It would be hard if defendants did not have a similar liberty and were debarred from referring to their own publications. Unless the whole of the film were shown, the respondent would put the libel complained of out of its context. It is essential for the jury to see the whole publication together: *Cooke* v. *Hughes*.[99] Accordingly, paragraph 5 (A) of the defence should be retained, because the jury could not assess damages without seeing the alleged libel in its context. If the defendants had not admitted the publication of the film the plaintiff would have had to put it in. If a plaintiff brings an action in respect of an allegation that he has murdered two people, but does not complain of an allegation in the same publication that he has murdered a thousand people, that fact is relevant in mitigation of damages because in the context no one would think the worse of the plaintiff for the libel complained of.

It is doubtful whether the rule as to the admission of evidence of reputation is more unfair to the plaintiff or the defendant. It would be hard if when a man brought a libel action the defendant, instead of alleging something specific in mitigation, merely said that he had a bad "reputation." A man can meet a specific allegation, but how can he meet an allegation that he has a "reputation" for something?

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[90] 8 Q.B.D. 491, 499.

[91] Peake Add.C. 139.

[92] 61 L.J.Q.B. 515.

[93] 1 F. & F. 536.

[94] [1929] 2 K.B. 1.

[95] 8 Q.B.D. 491.

[96] 2 Stra. 1200n. (1).

[97] (1750) Buller's Nisi Prius 9.

[98] (1819) 2 Stark. 457.

[99] Ry. & M. 112.

John Foster Q.C. As to *Cooke* v. *Hughes*,[99] it cannot be read as laying down a general principle; the decision must be read in relation to the particular case. Here the matter will be one for argument before the judge and the whole matter will be open to him. The decision cited is limited by *Scott's* case.[100]

As to the reliance placed on the liberty of a plaintiff to aggravate damages by proving other defamatory statements made by the defendant, in that case the plaintiff himself has enlarged the area of proof. But the present case is different. The defendants claim to have libelled the plaintiff in other parts of the film, but the plaintiff says that the film does not allege that he was guilty of war crimes. The defendants should not be allowed to say that they made other libellous statements and can prove them true.

Their Lordships took time for consideration.

March 2. VISCOUNT SIMONDS. My Lords, this appeal raises an interesting question, but it is one to which I have no doubt that the Court of Appeal has given the correct answer.

The respondent was at all material times the Supreme Commander of the Allied Land Forces in Central Europe. He brought the action out of which this appeal arises against the appellants, Plato Films Ltd., and two directors of that company, claiming damages for libel and an injunction. The libel alleged was that in a film called "Operation Teutonic Sword," which was exhibited and published by them at the National Film Theatre, London, on November 19, 1958, he had by words and photographic pictures been depicted (a) as a party to the murders of King Alexander of Yugoslavia and M. Barthou in October, 1934, and (b) as having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944.

By their defence the appellants pleaded that the words and photographic pictures were true in substance and in fact. But, in addition to this plea of justification, they sought to put in a plea which I must set out in full. It was as follows: [His Lordship read paragraph 5 of the defence and continued:] The paragraphs to which reference is made in the plea are from the English text of the film.

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[99] Ry. & M. 112.

[100] 8 Q.B.D. 491.

The respondent forthwith applied in chambers that this plea should be struck out of the defence on the ground that it was scandalous and contrary to the rules of pleading and tended to prejudice, embarrass or delay the fair trial of the action. The master in chambers ordered that it should be struck out and his order was upheld by Sachs J. The appellants appealed to the Court of Appeal, who in part allowed their appeal, in that they were permitted to plead as follows: "Alternatively in mitigation "of damages the defendants will at the trial of this action give "evidence in chief that the plaintiff had on or before November "19, 1958, a bad reputation as a man who was a party to and/or "responsible for acts which were war crimes and/or against "humanity and/or atrocities." The respondent has not appealed against this order and I say nothing about it. It must be left to the trial judge to determine what evidence he will admit. But this was not enough for the appellants, who by their appeal to this House ask that their plea should be restored in its entirety.

My Lords, I do not think that the Court of Appeal could have come to a different conclusion so far as they affirmed Sachs J. if this case had come before them in or before the year 1882. For already by that time the clear preponderance of authority extending over a considerable period was that evidence of particular acts of misconduct on the part of the plaintiff could not be given in mitigation of damages where the defendant had failed to justify the libel of which the plaintiff complained. I find it unnecessary to examine this volume of authority, for that task was thoroughly performed by Cave J. in *Scott* v. *Sampson* [1] in a judgment which has to this day never been challenged. His conclusion was that: "As to . . . evidence of facts and circumstances tending to show "the disposition of the plaintiff, both principle and authority seem "equally against its admission. At the most it tends to prove "not that the plaintiff has not, but that he ought not to have, a "good reputation, and to admit evidence of this kind is in effect "as was said in *Jones* v. *Stevens* [2] to throw upon the plaintiff "the difficulty of showing a uniform propriety of conduct during "his whole life. It would give rise to interminable issues which "would have but a very remote bearing on the question in "dispute, which is to what extent the reputation which he "actually possesses has been damaged by the defamatory matter "complained of. Among all the cases which have been reviewed

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[1] (1882) 8 Q.B.D. 491, 504–505.

[2] (1822) 11 Price 235.

"there is not one which can be cited in support of the admissibility of this evidence. In *Bracegirdle* v. *Bailey*[3] such "evidence was rejected by Byles J., after consulting with Willes "J., and in *Jones* v. *Stevens*[4] the evils attending its admission "are eloquently pointed out."

That was in 1882. In the year 1929 *Hobbs* v. *C. T. Tinling & Co. Ltd.*[5] came before the Court of Appeal, and though the question in that case was not precisely the same, the court made it very clear that *Scott* v *Sampson*[5a] had been correctly decided. The judgment of Cave J., said Scrutton L.J., had been accepted as an accurate statement of the law. But, said the appellants, it had never been reviewed in this House. That is true and, long though the decision has stood unchallenged, I should not hesitate to reverse it, if (to use the language of Lord Wright in *Admiralty Commissioners* v. *Valverda* (*Owners*)[6]) it was one of those cases in which serious inconvenience would follow from perpetuating an erroneous construction or ruling of law. But it is far, indeed, from being such a case. That the law was misunderstood or misstated by Cave J. and Scrutton L.J. seemed to me after a fresh review of all the authorities discussed in *Scott* v. *Sampson*[7] an impossible contention. In effect, therefore, the plea of the appellants was that the law was not what it ought to be. That is a plea to which this House is not inclined to listen when it is sitting as a supreme appellate tribunal, and perhaps I should ignore it. But I cannot refrain from observing how emphatically I dissent from the view that the law should be altered to the advantage of those who make defamatory statements about others. The defences that are open to one who does so are numerous and adequate. If none of them is available to him what excuse has he, and why should any indulgence be shown him? It is, of course, possible that the so-called "notorious rogue" may recover damages which a perfect system of justice would deny him. But it does not follow that, because he receives more than he ought, the libeller pays less than he ought. I have some sympathy for the view expressed so eloquently by Wood B. in *Jones* v. *Stevens*[8] that even evidence of general bad reputation should be excluded. But I recognise that the law admits it. It is, no doubt, true that in practice it may be difficult to define exactly either the borderline between evidence of general bad reputation and that of specific conduct which has led to it or the area of conduct which the general bad reputation is to cover. That is only to say that a libel action is an imperfect instrument for doing justice in every case. There may, in the result, be cases in which a rogue survives both evidence of general bad reputation and, where he has gone into the witness-box, a severe cross-examination nominally directed to credit, and recovers more damages than he should. But I would rather have it so than that the law should permit the injustice and, indeed, the cruelty of an attack upon a plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by them have been forgotten. I say nothing more of the inconvenience of having one or more trials within the original trial. The main issue has been determined when the defendant has failed in his plea of justification. How many other trials of the offences pleaded in mitigation are to be permitted?

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[3] (1859) 1 F. & F. 536.

[4] 11 Price 235.

[5] [1929] 2 K.B. 1; 45 T.L.R. 328, C.A.

[5a] 8 Q.B.D. 491.

[6] [1938] A.C. 173, 194; 54 T.L.R. 305; [1938] 1 All E.R. 162, H.L.

[7] 8 Q.B.D. 491.

[8] 11 Price 235.

There is one aspect of the appellants' plea in mitigation which deserves special mention. They plead that the respondent has been depicted in the film as having been "guilty of the conduct "hereinafter set out the truth of which the plaintiff . . . does not "deny." It surprises me that it should be considered a proper matter for pleading that a plaintiff has not thought fit to include in his action every libellous statement made about him by a defendant. It is, in my opinion, wholly improper.

My Lords, I do not think it necessary to say anything about R.S.C., Ord. 36, r. 37. Its operation is expressly limited to those cases in which justification is not pleaded, and no relevant implication can be fairly drawn from it in regard to cases in which it is pleaded. I am the less inclined to do so because the very experienced counsel who appeared at the bar on this appeal professed great doubt as to its meaning and effect. In any case, it does not, and does not purport to, alter the common law as laid down in *Scott* v. *Sampson*[9]: see *Mangena* v. *Wright*.[10]

Finally, I must say something upon a question which was much discussed before your Lordships, though it does not arise upon the face of the order under appeal. In his judgment Devlin L.J. said[11]: "It will also be for him [the trial judge] to "determine whether the jury should see the whole film, including

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[9] 8 Q.B.D. 491.

[10] [1909] 2 K.B. 958; 25 T.L.R. 534.

[11] [1960] 3 W.L.R. 391, 396; [1960] 2 All E.R. 521.

"those parts which are supposed to represent the plaintiff as a "war criminal, or whether they should see only the parts that are "relevant to the libel. We express no opinion on these matters "because we are concerned with questions of the admis- "sibility of evidence only in so far as they enter into the point "of pleading." It was urged on behalf of the appellants that it is a rule of law that in a libel action the defendant has the right to have exhibited to the jury the whole of the film or other publication in which the libel is contained, and that the judgment of the Court of Appeal implied that there was no such right, but that it lay in the discretion of the trial judge to determine whether there should be such an exhibition. I am not sure that the Court of Appeal meant to decide anything of the kind. But, in any event, I think it right to say that it will be the duty of the trial judge first to determine whether (as the appellants allege) in all circumstances the defendant has such a right and, if he answers this question in the negative, then to consider whether in the circumstances of this case the right should be conceded. These are matters upon which it would not be right at this stage for your Lordships to come to any conclusion.

The appeal should, in my opinion, be dismissed with costs.

LORD RADCLIFFE. My Lords, this appeal is wholly concerned with questions of pleading in preparation for a trial which has not yet taken place, and the points of pleading that arise are confined to issues in mitigation of damages. These issues are pleaded by defendants who have put in a separate defence of justification in respect of the matters alleged as libels by the plaintiff. Necessarily, therefore, one must restrict what one says at this stage to what requires to be said in advance of the trial with regard to the law bearing upon the disputed pleadings.

The pleading in question is paragraph 5 of the defence, which has been recited in full in the speech of my noble and learned friend on the Woolsack. Essentially, that paragraph seeks to do two things: (a) to rely on the fact that the film which contained the alleged libels depicted the plaintiff as having been responsible for or associated with other actions of a shameful nature which he had not complained of in his statement of claim and which, they pleaded, he did not therefore deny; (b) to assert with regard to the character of the plaintiff that he was both widely reputed to have been, and in fact was guilty of the matters complained of in the statement of claim, and these other matters, and also certain additional activities discreditable to him.

That part of paragraph 5 which is summarised under (A) above has been struck out by the orders in the courts below. In my opinion, these orders should stand. I do not think that what is there alleged is a matter of pleading at all, where mitigation of damages is in question, and I know of no rule of court which can be vouched as requiring it. If it is said that other parts of the entire film constitute "circumstances in which the alleged libel "was published" (in themselves a recognised head of mitigation), I think that that is a highly artificial meaning to attribute to the phrase. The real purport of this portion of paragraph 5 of the defence seems to be to make the point that the plaintiff must be taken to have admitted the truth of such accompanying derogatory statements as he has not challenged in his libel claim. That is not a matter for pleading. If it amounts to anything at all, it is a matter for comment. As a proposition of law designed to set up some sort of estoppel, I think that it has no foundation. As a comment, if it is permissible to make the comment at any stage of the hearing, that must be at the trial and not before. I agree, therefore, that paragraph 5 (A) of the defence should remain expunged from the pleadings.

It was argued that the allowance or rejection of this pleading involved a decision of law as to whether at the trial the defendants would be entitled to require that the entire film should be shown to the jury, and not merely those portions that made up the sound track and pictures conveying the libels complained of. In my opinion, this point, which is not one of pleading, is not involved in our decision today. It can only be dealt with as part of the conduct of the trial. Certainly I do not regard the elimination of paragraph 5 (A) as affecting one way or the other the general rule recognised in *Cooke* v. *Hughes* [12] as to a defendant's right to have the whole of a publication placed before the jury; but that principle leaves open the question what in any particular case constitutes the publication or article in which the libel is contained.

Paragraph 5 (B) raises more than one question, but the main one, which seems to be the core of this appeal, is whether a defendant may offer in mitigation of damages evidence which bears upon the disposition of the plaintiff as distinct from his reputation or only such evidence as bears upon his reputation. On this main point I am clearly of opinion that in law he has normally been, and ought to be, confined to the latter branch of evidence.

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[12] (1824) Ry. & M. 112.

I think that the law on all this question of mitigation of damages by proving bad character or reputation depends upon two points of principle and, surrounding them, a number of rules which are primarily rules of practice or convenience designed for such purposes as to contain the length of trials within manageable limits, to prevent the jury being avoidably confused as to the bearing of evidence on different issues, and to limit the grosser abuses of too great a liberty of reference given to either plaintiff or defendant. No one can regard these rules as constituting an instrument of precision for determining the vague concepts which themselves make up the definition of libel. I will only say that, in my view, either side may from time to time need protection from abuse of the permitted liberties: but this is better achieved by a sense of responsibility on the part of the counsel and by the judge's handling of the trial itself than by any close restriction of the range of evidence or cross-examination in matters of mitigation.

The two matters of principle are these. First, is it to be permissible to call evidence of character at all by way of mitigation? There is much to be said against allowing it, because, if it is allowed, there come in all the difficulties of limitation and possible unfairness of which we have been made conscious by the arguments in this case. On the other hand, there is, I think, the preponderating consideration in favour of this head of evidence that it would be outrageous that a person should recover damages for injury to a character that he is generally known not to possess, or, to put it another way, to a reputation that is not his. In my opinion, therefore, the decision of *Scott* v. *Sampson* [13] ought to be treated as settled law on this point, as, indeed, it has been for more than 80 years. It follows, too, that *Jones* v. *Stevens*,[14] which was a decision that a defendant cannot mitigate damages by any evidence of bad character whatsoever, is not good law and represents a wrong line of reasoning.

The second matter of principle turns on this point to which I have alluded, whether evidence of a plaintiff's bad character is to be understood as meaning the character which he bears in public estimation, by which I mean his reputation, or the character which might be attributed to him on a nice assessment of all his actions, if not his thoughts and desires, by which I mean his disposition. In my opinion, character in this context ought to mean the former conception exclusively. No evidence should be admitted which is not directed to that head of proof. It is quite true that in many of the earlier cases disposition, character and reputation are spoken of without any clear distinction between the different ideas which they convey; it is true, too, that on several occasions judges and text writers have spoken of the character which a man " ought to have " as being the relevant matter of proof; but I think that the essential contrast between reputation and disposition was explained clearly enough in the judgment of Cave J. in *Scott* v. *Sampson*,[15] and was reaffirmed in the judgment of Scrutton L.J. in *Hobbs* v. *Tinling*.[16] In my opinion, this is the right line of distinction. I do not believe that " the character that a man ought to have " or to enjoy has any intelligible meaning. It is not possible for a jury, learning, perhaps long after the event, of this or that discreditable action in a man's life, to remake the current public estimation of him by some ideal piece of analysis. The materials themselves could not be available. Moreover, any rule that made it possible for a defendant to put in evidence by way of mitigation some discreditable action of the plaintiff, irrespective of whether it was publicly known or not and so contributed to his reputation, would be a rule so inherently unfair that it ought not to be accepted.

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[13] 8 Q.B.D. 491, 498, 503.

[14] 11 Price 235.

These two principles commend themselves, I believe, to all your Lordships. But it does not seem to me at all clear that by settling them one has done enough to establish a workable rule governing the limits of evidence that can be called on the issue of reputation. This is not a question upon which I myself can find any certain guide in the numerous decisions prior to *Scott* v. *Sampson*.[17] Most of them were given at nisi prius, few are reasoned, they are in some cases inextricably associated with rules of pleading that no longer obtain; and, in fact, you could find among these decisions authority for almost any of a number of conflicting propositions. I am content to start with *Scott* v. *Sampson*,[17] which certainly reviewed and less certainly reconciled the previous decisions.

In *Scott* v. *Sampson*[17] Cave J. identified three classes of evidence more or less bearing on proof of reputation. The first he described as general " evidence of reputation " or bad character: " the estimation in which he stands in the opinion of others." This was admissible. He rejected the second class, " evidence of " rumours and suspicions to the same effect as the defamatory

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[15] 8 Q.B.D. 491.

[16] [1929] 2 K.B. 1.

[17] 8 Q.B.D. 491.

"matter complained of." The third class was also rejected, "evidence of particular facts tending to show the character and "disposition of the plaintiff." *Hobbs* v. *Tinling*[18] does nothing to extend or limit this classification, which it purports to follow, although Scrutton L.J. does not lighten the difficulties of maintaining the distinctions by treating "general evidence of bad "character" as a term interchangeable with evidence of "general "bad character" or reputation.

I think that one can safely get rid of the second class. If a man cannot justify the libel he has actually published, it would be too confusing to the jury to allow him nevertheless to put in evidence on the mitigation issue evidence of rumours or suspicions to the same effect, the more so as the two issues, justification and mitigation, are often not tried in successive stages. Such evidence is a poor sort of evidence at best: and, although it is not irrelevant on the question of a defendant's express malice in issuing the libel and, originally, was probably admitted on this basis, I think that the better rule of practice is not to allow it at all: see *Watt* v. *Watt*.[19] A jury will have a difficult enough time in learning to distinguish between the loss of credit which may result from a cross-examination of a plaintiff imputing to him a number of specific incidents bearing on his uprightness and probity and the retention of the same plaintiff's reputation if the same incidents are not or are not allowed to be proved in evidence by way of mitigation of damages.

I cannot see, however, how it can prove possible to treat the first and third classes as altogether exclusive of each other and I do not believe that in practice anyone ever does. The difficulty is that "general evidence of reputation" does not convey an idea of any content. Life not being a morality play or a Victorian melodrama, men do not enjoy reputations for being bad or good simpliciter: nor if they did, would the proof of such generalities throw any light upon the loss of reputation suffered from a particular libel. So far as the ordinary man enjoys a public reputation at all, it is a reputation, favourable or unfavourable, in respect of particular aspects or sectors of his life, and, of course, he is likely to have a good reputation in some aspects and a bad reputation in others. In any event, the existence of these reputations will, if tested, be found to rest on nothing more than particular incidents of some general notoriety or else on rumour or suspicion, which may or may not be well founded.

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[18] [1929] 2 K.B. 1.

[19] [1905] A.C. 115; 21 T.L.R. 386, H.L.

What, then, do we mean when we say that we affirm the principle of *Scott* v. *Sampson*[20] that general evidence of bad reputation is admissible but that evidence of particular facts tending to show the character and disposition of the plaintiff is not? I have not been able to find that the authorities supply any satisfactory answer to this. To begin with, there is a fallacy in supposing that some general phrase can govern the variety of situations that a libel can create, in particular in supposing that the admissible evidence ought to be the same, whether the libel is very particular or very general or whether the plaintiff is a public figure, whose reputation is largely based on notorious incidents, favourable or unfavourable, or a private individual whose affairs may well escape the burden of notoriety altogether. These considerations lead me to the opinion that it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse. It remains true that the issue is not whether the incidents actually happened but whether it is common report that they did. If it is, that seems to me the best available evidence of a plaintiff's reputation. I find it difficult to combine an aversion from rumour with an indulgence for general evidence of reputation which, unvouched, is virtually the same thing.

We seem to have reached a situation in which, while it is regularly said that only general evidence of reputation can be given, and that evidence of particular facts cannot, yet in practice, when before trial there are furnished particulars of evidence of character intended to be called in mitigation, the particulars just as regularly refer to specific incidents. This seems to me very unsatisfactory, because it makes the worst of both worlds. I have no liking for the rule which admits evidence of reputation at all; I regard it as a disagreeable necessity to take care of certain libel cases which require such a rule; but if we are to have it, I think that there is everything to be said for trying to express it in the fairest and most workable form. I doubt if that is what we achieve today.

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[20] 8 Q.B.D. 491.

It must be remembered that Cave J. in his judgment confined his exclusion of particular facts to those "tending to show the "character and disposition of the plaintiff," that is, those which go to disposition as contrasted with reputation. As I have said, I am sure that this principle ought to be maintained. But I think that it goes beyond either what he said or what he would seem to have wished to imply to treat general evidence of reputation as excluding all reference to particular facts, if they are of notoriety. If evidence were to be admitted but confined in this way and fair warning were given in advance of any particular incidents to be raised, as is now done, it would not be realistic to apply to it the description which in *Jones* v. *Stevens*[21] was thought to render inadmissible evidence of character, that it would "allow defendants to impeach all that transactions of "a man's life . . . and throw on him the difficulty of showing an "uniform propriety of conduct during all his existence."

If I apply what I have said to paragraph 5 (B) of the defence and compare it with the truncated form allowed by the order of the Court of Appeal, the plea that the plaintiff "in fact was" guilty of the conduct alleged would go out, since it is the repute, not the fact, that matters; and the references to paragraphs 3 and 4 in sub-head (i) would also go out, since those paragraphs are justification paragraphs which cannot be repeated as mere repute by way of mitigation. For the rest, I think that it would have been better to allow paragraph 5 (B) to stand as pleaded, subject to its reference to paragraph 5 (A), which will have disappeared, being rewritten. All that remains would be governed by the opening words "the plaintiff is widely reputed to have "been," which seem to me to apply the right limitation in law. I do not know that the Court of Appeal's more restricted version of the pleading would make substantial difference to whatever may happen at the trial: but it does not seem to me any fairer to the plaintiff than to the defendants to face him with so vast and vague a denunciation as that he is reputed to have been party to or responsible for acts which were war crimes or crimes against humanity or atrocities.

Subject to this, I would dismiss the appeal.

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[21] 11 Price 235, 265.

LORD DENNING. My Lords, the appellants here challenge the correctness of the judgment of Cave J. in *Scott* v. *Sampson.*[22] This is a bold thing to do, seeing that it has been accepted for so long as good law. But, as the challenge was supported by a considerable show of authority, I would like to meet it on its own ground. The law on the subject cannot properly be understood without some knowledge of the old forms of action. From the earliest writ in 1536 in the Year Books [23] down to the year 1852 the declaration contained three parts: First, The *prefatory averment* in which the plaintiff asserted that he was a man of good character. It usually said that he was a man of good character and reputation and had never before been suspected of misconduct of the kind which was imputed to him. Second: The *wrong done*. The plaintiff here alleged that the defendant had falsely and maliciously published of him the words following (here they were set out) imputing to him misconduct. Third: The *conclusion*. In this the plaintiff stated that by reason of the foregoing he had been injured in his character and reputation and claimed damages.

The defendant could not and did not plead to damages. He could only dispute them under the *general issue*, that is, not guilty. And this gave rise to several important questions. The first was whether, under the general issue, the defendant could give in evidence the *truth* of the words in mitigation of damages, even though he had not pleaded a justification. In 1701 Sir John Holt C.J. ruled that he could: see *Smithies* v. *Harrison.*[24] But in 1737 there was a celebrated case where the beer butler of Christchurch in Oxford brought an action because it was said of him: "John Smith is a rogue and has stolen my beer." All the twelve judges met to consider it and it was held by eight to four that, as the words imputed a felony, the defendant could not give evidence of truth in mitigation of damages but had to plead it specially by a plea of justification: see *Smith* v. *Richardson.*[25] And in 1750 this ruling was "extended to all sort of words, and "not barely to such as imported a charge of felony": see *Underwood* v. *Parks.*[26] The reason given for requiring it to be pleaded was so that the plaintiff might be prepared to defend himself. From *Underwood* v. *Parks* [26] it followed inexorably that any evidence of particular facts which tended to prove a justification was not admissible in mitigation of damages but only in support of a plea of justification, if made: see Starkie on Slander and Libel, 2nd ed. (1830), vol. II, pp. 90–95.

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[22] 8 Q.B.D. 491.

[23] Y.B. Easter, 27 Hen. 8, f. 11, pl. 27 (see Fifoot's History and Sources of the Common Law, p. 141).

[24] (1701) 1 Ld.Raym. 727.

[25] (1737) Willes 20.

[26] (1743) 2 Stra. 1200.

The second question which arose for decision was whether, under the general issue, the defendant could give in evidence the bad character of the plaintiff. In 1809 Sir James Mansfield C.J. held that it was open to the defendant (in answer to the prefatory averment of the plaintiff) to call general evidence to prove that the plaintiff was a man of bad character and had, previously to the slander, been generally reputed to be guilty of misconduct of the kind imputed to him (see *Earl of Leicester* v. *Walter* [27]), and his decision was thereafter upheld by the full Court of King's Bench in *Anon.* v. *Moor* [28] and followed thenceforward by many other judges: see *Thompson* v. *Nye*,[29] by Erle J. But the judges did not allow the defendant to go into particular instances of misconduct, as distinct from general evidence: see *Smithies* v. *Harrison*,[30] by Holt C.J.; *Waithman* v. *Weaver*,[31] by Abbott C.J. The reason for the distinction was well put by Mr. Starkie: "The principle on which such general evidence is "admitted, whilst evidence of particular facts is excluded, has "been frequently recognised: it is this—that the party may be "prepared with general evidence in support of character, though "he cannot be supposed to be prepared with evidence to justify "his conduct through life": Starkie on Slander and Libel, 2nd ed., vol. II, at p. 93 in notis.

It is only right to say, however, that the Barons of the Exchequer took a different view. They did not admit even general evidence of bad character: see *Jones* v. *Stevens*.[32] But the judges of the King's Bench took no notice of what the Barons said. They continued to go the circuits of England and admitted general evidence of bad character just as they had done before. Mr. Starkie tells us that such good judges as Holroyd J., Lord Tenterden C.J., Lord Denman C.J. and Coltman J. all received general evidence of bad character despite the ruling of the Barons: see Starkie on Evidence, 3rd ed., vol. II, pp. 641–642. But they did not allow the defendant to go into particular instances of misconduct: see *Moore* v. *Oastler*,[33] by Lord

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[27] (1809) 2 Camp. 251.

[28] (1813) 1 M. & S. 284.

[29] (1850) 16 Q.B. 175, 180.

[30] 1 Ld.Raym. 727.

[31] (1822) Dow. & Ry.N.P. 10.

[32] 11 Price 235.

[33] (1836) Starkie on Evidence, 3rd ed., vol. II, p. 642, n. (*e*).

Denman C.J., after consulting Parke B., and *Bracegirdle* v. *Bailey*,[34] by Byles J., after consulting Willes J.

There was once a suggestion that where the defendant pleaded a justification he could not give general evidence of bad character: see *Snowdon* v. *Smith*,[35] in notis by Chambre J. The reason is not far to seek. Suppose a man accused another of theft and sought to justify it. If he had to make good this charge with the same strictness as in a criminal court, he would not be allowed to bring in evidence of bad character to support it. Could he be allowed to get it in by a side-wind in mitigation of damages? The judges eventually held that he could. In *Kirkman* v. *Oxley* [36] Heath J. allowed a defendant, who had justified a charge of theft, to go into evidence of the plaintiff's bad character in mitigation of damages: see Starkie on Evidence, vol. II, p. 306; and in 1826 Lord Tenterden did the same: see *Mawby* v. *Barber*.[37] On principle this is sound. The object of "general "evidence of character," as Mr. Starkie says, "is to diminish "the damages: and this the defendant is entitled to do, though "he fail to establish his justification": see Starkie on Slander and Libel, 2nd ed., vol. II, p. 97.

Such was the law as it stood in 1873. In that year the old system of pleading was replaced by the modern system of pleading: see section 69 of the Supreme Court of Judicature Act, 1873, and the Rules of Court, 1875. Each party was by Order 19 r. 4, required to plead all the material facts on which he relied: but by Order 21, r. 4, no denial or defence was necessary as to damages claimed or their amount, but they were deemed to be put in issue in all cases. These Rules did not affect the law as to the admissibility of evidence. But the new Rules did—and do—make it necessary for the defendant to plead the material facts on which he relies: and these facts include the plaintiff's bad character if and in so far as he relies on it. In this respect I agree with what was said in *Scott* v. *Sampson* [38] and the Court of Appeal in the present case. *Wood* v. *Earl of Durham* [39] is not good law.

This brings me to the case in 1882 of *Scott* v. *Sampson* [40] itself, the first decision after the new rules of pleading. Scott was a dramatic critic for the "Daily Telegraph." Sampson ran a weekly paper called "The Referee." Sampson wrote an article in "The Referee" to this effect: "Scott has systematically "abused his position as a dramatic critic so as to extort money. "He even threatened Admiral Glyn. He said he would publish "some unpleasant facts about Miss Neilson unless he were paid "£500: and Admiral Glyn paid him £500 to keep it out." Scott sued for libel. Sampson pleaded justification and failed. The jury found for Scott with £1,500 damages. But in the course of the trial Lord Coleridge C.J. rejected certain evidence which Sampson sought to adduce: and Sampson appealed on the ground that it ought to have been admitted.

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[34] (1859) 1 F. & F. 236, 237.

[35] (1811) 1 M. & S. 286n.

[36] Starkie on Evidence, 3rd ed., vol. II, p. 306, n. (*k*).

[37] (1826) ibid. 642n.

[38] 8 Q.B.D. 491, 495–496, 507.

[39] (1888) 21 Q.B.D. 501; 4 T.L.R. 778, D.C.

[40] 8 Q.B.D. 491.

Most of the rejected evidence related to particular instances of misconduct. For instance, Sampson sought to give evidence that Scott had, when reviewing "Othello" in the "Daily Tele"graph," grossly abused the actor who took the part of Iago because he disliked him personally. This evidence was clearly inadmissible. Such evidence of particular misconduct has never been allowed in any of the cases save one—*Knobell* v. *Fuller*,[41] where Eyre C.J. held that a defendant might, in mitigation of damages, give evidence of suspicion tending to justification but falling short of it. That case was so severely handled by Mr. Starkie that no one has taken any notice of it since: see Starkie on Slander and Libel, 2nd ed., vol. II, pp. 93–97. It was clearly wrong.

The rest of the rejected evidence related to rumours to the same effect as the libel. Sampson sought to call a witness to say that, before the article appeared in "The Referee," he had heard the same story in a London club. It seems perfectly obvious to us today that such evidence was not admissible. But at that time there was a considerable body of authority in support of it. Rumours were admissible, it was said, to the same effect as the libel so long as they were in existence previously to the publication. The point had been left open in *Thompson* v. *Nye* [42] in 1850, and there had been a division of opinion on it in Ireland in 1860 in *Bell* v. *Parke*.[43] I need add nothing to the forceful remarks made by Cave J. in rejecting it. Was the court to receive the gossip of some idler in a club? Rumour is a lying jade, begotten by gossip out of hearsay, and is not fit to be admitted to audience in a court of law.

Nothing in that decision touches the admissibility of general evidence of bad character. No such evidence was submitted. But Cave J. made it quite clear that in his opinion it would have been admissible. He summarised the former practice succinctly when he said that "general evidence of bad character was allowed "to be given under a plea of not guilty": see p. 503. And I have no doubt he was correct. But you must remember that, up to his day, the decisions were conflicting. The King's Bench judges had decided in favour of its admissibility, the Barons of the Exchequer against it. Cave J. came down on the side of the King's Bench judges. But it would appear that Hawkins J. from what he said later in *Wood* v. *Earl of Durham*[44] would have come down in favour of the Barons. The Divisional Court in *Scott* v. *Sampson*[45] did not overrule *Jones* v. *Stevens*[46]: but your Lordships can, and I hope you will; and will hold that general evidence of bad character is admissible. The reasons in favour of it were given by Mr. Starkie (Starkie on Slander and Libel, 2nd ed., vol. II, p. 88) 130 years ago in a passage, part of which was quoted by Cave J.[47]: "General evidence . . . seems "in principle to be admissible, as immediately and necessarily "connected with the question of damages. He complains of loss "of reputation, and that he has been deprived of his character "by the act of the defendant. Is not the defendant, then, to be "permitted to show that the plaintiff's character was previously "tainted . . . or that he had in fact little character or reputation "to lose? To deny this, would be to decide that a man of the "worst character was entitled to the same measure of "damages with one of unsullied and unblemished reputation. A "reputed thief would be placed on the same footing with the "most honourable merchant, a virtuous woman with the most "abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained a knowledge of the party's "previous character is not only material but seems to be "absolutely essential."

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[41] (1797) Peake Add.C. 139.

[42] 16 Q.B. 175.

[43] (1860) 11 Ir.C.L.R. 413.

My Lords, up till this point I have spoken of "general "evidence of *character*" because that is how it was usually referred to before *Scott* v. *Sampson*.[48] But Cave J. seems to prefer the expression "general evidence of *reputation*." The reason is, no doubt, because the words "character" and "reputation" have various meanings and he wished to make clear what he meant. A man's "character," it is sometimes said, is *what he in fact is*, whereas his "reputation" is *what other people think he is.* If this be the sense in which you are using the words, then a libel action is concerned only with a man's reputation, that is, with what people think of him: and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition. That is why Cave J. spoke of "reputation" rather than "character."

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[44] 21 Q.B.D. 501, 508.

[45] 8 Q.B.D. 491.

[46] 11 Price 235.

[47] 8 Q.B.D. 491, 503.

[48] 8 Q.B.D. 491.

The truth is that the word "character" is often used, and quite properly used, in the same sense as the word "reputation." Thus, when I say of a man that "He has always borne a good character," I mean that he has always been thought well of *by others*: and when I want to know what his "character" is, I write, not to him, but to *others* who know something about him. In short, his "character" is the esteem in which he is held by others who know him and are in a position to judge his worth. A man can sue for damage to his character in this sense, even though he is little known to the outside world. If it were said of Robinson Crusoe that he murdered Man Friday, he would have a cause of action, even though no one had ever heard of him before. But a man's "character," so understood, may become known to others beyond his immediate circle. In so far as the estimate spreads outwards from those who know him and circulates among people generally in an increasing range, it becomes his "reputation," which is entitled to the protection of the law just as much as his character. But here I speak only of a reputation which is built upon the estimate of those who know him. No other reputation is of any worth. The law can take no notice of a reputation which has no foundation except the gossip and rumour of busybodies who do not know the man. Test it this way. Suppose an honourable man becomes the victim of groundless rumour. He should be entitled to damages without having this wounding gossip dragged up against him. He can call people who know him to give evidence of his good character. On the other hand, suppose a "notorious rogue" manages to conceal his dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, one would think, be people who know him and can come and speak to his bad character.

This leads me to the conclusion that, in order to arrive at a man's character and reputation, you should call those who know him and have had dealings with him: for they provide the only sound foundation on which to build. And in actual practice it is only such persons who are called. I have looked into many of the cases where evidence of good or bad character has been given, and I have been engaged in quite a number myself. It usually takes this form:

(1) If it is evidence of *good* character, a witness of good standing is called, such as a clergyman, a schoolmaster or an employer, and is asked such questions as these: "What are "you? How long have you known him? Have you known him "well? Have you had an opportunity of observing his conduct? "What character has he borne during that time for honesty, "morality or loyalty?" (according to the nature of the case). "As "far as you know, has he deserved that character?" A good instance is *King* v. *Waring*.[49] A servant girl was given a reference accusing her of dishonesty. In support of her claim for damages, Lord Alvanley C.J. allowed a former employee to come and give evidence of her general character for honesty. But the witness cannot be asked questions in examination-in-chief about particular facts so as to illustrate the plaintiff's good behaviour on particular occasions. In cross-examination, however, he may be asked what are the grounds of his belief, and he may be asked as to particular facts known to him tending to shake it.

(2) If it is evidence of *bad* character which is given (such as that a man is a reputed thief or a woman is a common prostitute), the evidence often takes the form of a police officer who knows him being called and saying: "I know the defendant and have known "him (or her) for some time. He is a well known pickpocket," or "She is a common prostitute," or as the case may be. In such cases the witness usually speaks from his own observation and knowledge. The greater his personal knowledge, the more valuable his evidence. A good illustration is *Wood* v. *Cox*.[50] There a jockey had been accused of "pulling" a horse called Success. It was said that "he nearly pulled his head off." He sued for damages. Lord Coleridge C.J. admitted evidence of four officials of the Jockey Club who gave evidence of the plaintiff's bad character for foul riding and not trying to win. (Incidentally, his employer, the Duke of Portland, gave evidence in the jockey's favour, though he seems to have been cross-examined to some effect.)

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[49] (1803) 5 Esp. 13.

[50] (1888) 4 T.L.R. 652, 656; (1889) 5 T.L.R. 272, C.A.

The jockey got only one farthing damages. When general evidence of bad character is given, the witness cannot in chief give particular instances: though he can, of course, in cross-examination be asked the grounds of his belief and on what it is based.

When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector.

In the year following *Scott* v. *Sampson*,[51] Order 36, r. 37, was made. It is confined to cases where justification is not pleaded. This looks as if someone thought that the evidence receivable in mitigation of damages was different according as justification was pleaded or not: just as Chambre J. did in 1811. But this is not true. There is no difference in principle between the two cases. I prefer, however, to think that the makers of the rule thought that, when justification was pleaded, as it was in *Scott* v. *Sampson*,[51] that case made it clear that, if the defendant intended to give evidence in mitigation of damages, he had to include the material facts in his defence. See what Mathew J. said[52] and Cave J.[53] Then in order to cover cases where justification was not pleaded, Order 36, r. 37, was passed so as to require the defendant to give particulars. The rule did not enlarge the matters of which he could give evidence. So far as evidence of "character" was concerned, the defendant could still only give in chief general evidence of bad character and not particular instances: see *Mangena* v. *Wright*[54]; but henceforward he had to give notice to the plaintiff of his intention in that behalf at least seven days before the trial. These particulars may or may not be included in the pleadings. But in either case the court has, I think, power to strike them out if, and in so far as, they consider specific instances which would be likely to embarrass the fair trial of the action.

This brings me, however, to *Scaife* v. *Kemp & Co.*[55] Kemp & Co. were a trade protection society. They received an inquiry about the plaintiff, one J. Scaife of Liverpool. They mistook him for another man of the same name, J. Scaife of Liverpool, and they answered: "He is a bad payer, is frequently sued, and "nothing can be got out of him." When the plaintiff sued for libel, the defendants found out that he, too, was a bad payer.

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[51] 8 Q.B.D. 491.

[52] Ibid. 494–495.

[53] Ibid. 507.

[54] [1909] 2 K.B. 958, 979.

[55] [1892] 2 Q.B. 319; 61 L.J.Q.B. 515.

Both the Scaifes were apparently bad payers. But instead of pleading justification, as they should have done, the defendants furnished particulars under Order 36, r. 37. These particulars specified certain cheques dishonoured, executions levied, and so forth. And the defendants followed up these particulars with interrogatories asking whether certain cheques of the plaintiff at certain dates had not been dishonoured, whether or not certain executions had been levied on his goods, and so on. The master refused these interrogatories. But Denman J. allowed them: and on appeal Mathew and A. L. Smith JJ. affirmed his decision. It seems to me that both the particulars and the interrogatories were an attempt to get in evidence of particular facts which, if proved, would constitute a justification: and as such they were not admissible in mitigation of damages. In the absence of a plea of justification, they ought not to have been allowed. *Scaife* v. *Kemp & Co.*[55] was, I think, a wrong decision.

Finally, in the review of the cases I come to *Hobbs* v. *Tinling.*[56] It was a distinct affirmation of *Scott* v. *Sampson.* Hobbs had been convicted of conspiracy to blackmail. A newspaper thereupon accused him of a lot of other offences which it did not attempt to justify. But, in order to mitigate damages, it delivered particulars under Order 36, r. 37, giving many instances of specific misconduct. Scrutton L.J. said that this was wrong. The only matter which was properly included was this[57]: " That the plaintiff is a man of worthless reputation and " character, being known to the police, and in the profession of " the law as such." Then the newspaper, in order to mitigate damages, cross-examined Hobbs on specific instances of misconduct. This, too, it was held, was wrong. Such instances cannot be adduced in cross-examination to damages any more than they can be in chief. The defendants ought to have called the police officers and lawyers (indicated in their particulars) to prove he was a rogue.

Notwithstanding this weight of authority, Mr. Gerald Gardiner argued that in principle specific misconduct should be admitted in mitigation of damages. He put this instance: suppose a newspaper said of a man: " He has been convicted six times for " dishonesty," but, on being sued, the newspaper finds that he has in fact only been convicted twice. The newspaper cannot justify, he said, because it cannot prove the words were true.

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[55] [1892] 2 Q.B. 319.

[56] [1929] 2 K.B. 1.

[57] Ibid. 11–12.

Nor can it bring forward the two convictions in mitigation of damages because they are specific misconduct. So the plaintiff will get damages on the footing that he has never been convicted at all. If such were the law, I would agree with Mr. Gardiner that it would be most unjust and ought to be remedied. But it is not the law. Although the newspaper cannot justify in whole it can justify in part. It can plead that, in so far as the words meant that he had been convicted twice, they were true and thus bring the two convictions before the jury. In *Clarkson* v. *Lawson*[58] Sergeant Wilde put the very case: "If [the defendant] "had charged the plaintiff with stealing three horses, he might "have justified as to one," and Park J. said he could. "It was "the common practice," said Sir James Scarlett in one of the cases cited to your Lordships, "if a defendant could not justify "all, to justify a part of the libel, and produce witnesses to prove "the part justified, as a ground of mitigation and reduction of "damages": see *Waithman* v. *Weaver*.[59] This rule is based on sound sense. Seeing that the law does not permit a defendant, in mitigation of damages, to adduce evidence which tends to justification, it must permit him to adduce the selfsame evidence when pleaded in partial justification: see *Vessey* v. *Pike*[60] by Lord Tenterden C.J. If it were not so, the plaintiff would recover damages for a character which he did not possess or deserve; and this the law will not permit.

But then Mr. Gardiner says that there are cases where not even a partial justification is open to the defendant, because of the way the plaintiff frames his action. He took this case. Suppose a newspaper said of a man: "He has murdered his "father, stolen from his mother and does not go to church on "Sundays," and the plaintiff brings a libel action complaining only of the imputation that he does not go to church. The defendants, said Mr. Gardiner, cannot justify the major charges of murder and theft, because the plaintiff has not complained of them. They cannot give evidence of them in mitigation of damages because they are only specific instances. What is, then, the position? It would, says Mr. Gardiner, be most unjust that the plaintiff should get damages for the minor matter when, if the jury had had the whole before them, they would have given him nothing. I agree it would. But the answer is that the defendants, who had produced such a piece of bathos, would be entitled, in the apt words of Lord Coke, to "have showed all the "words and the coherence of them," see *Brittridge's Case*[61]: and the jury would no doubt only have given one farthing, as they did in *Cooke* v. *Hughes*.[62] In those cases the words so "cohered "together" that it was necessary for the jury to see all the words in order to make a correct appreciation of their impact. Whether the present is such a case, the judge will say at the trial. Your Lordships can hardly do so at this stage, not having seen the film.

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[58] (1830) 6 Bing. 587, 591.

[59] Dow. & Ry.N.P. 10, 11.

[60] (1829) 3 C. & P. 512.

Mr. Gardiner referred also to the Report of the Committee on the Law of Defamation in 1948 (Cmd. 7536): in which it was suggested that, as a result of *Scott* v. *Sampson*,[63] a libel action may resolve itself into a tactical battle so as to force the plaintiff into the witness-box where he can be cross-examined to credit. I agree that, if this were the result, it would be plainly undesirable. The only legitimate purpose of cross-examination to credit is to damage or destroy the plaintiff's credibility: but, as often as not, the plaintiff will have said nothing to warrant it. The plaintiff cannot speak as to his own character and reputation because he does not know what other people think of him, or, at any rate, he cannot give evidence as to what they think of him. And if the purpose of the cross-examination is to introduce illegitimately specific instances of misconduct—which cannot be legitimately put in evidence—then it should be discouraged. It is not good for the law that a judge admit a "roving" cross-examination to credit and then go on to tell the jury to ignore it when they come to assess damages, knowing that it is an impossible thing to ask them to do. Better not to have it introduced at all. Better to keep to general evidence of bad character which, when given by people who know the plaintiff and can judge his worth, is worth more than many instances and does not embarrass the trial as they would do.

My Lords, I think I have now dealt with all the points raised by the appellants, save the seduction cases and the cases in aggravation of damages, but these are so far removed from the present case that I will not spend time on them. It remains only to apply the law to the present case. The original particulars under 5 (A) were misconceived because there is no need for the defendant to give evidence in chief about the rest of the film. If it is one single publication, in which it is necessary to see the whole in order correctly to appreciate the impact of the parts,

[61] (1602) 4 Co.Rep. 18b, 19b.

[62] (1824) Ry. & M. 112.

[63] 8 Q.B.D. 491.

the judge will let the jury see the whole and both sides can make any fair comment on it. The original particulars under 5 (B) were misconceived in so far as they related to specific instances of misconduct. The amended particulars, as allowed by the Court of Appeal, are permissible in so far as they relate to general evidence of bad character in a relevant sector.

I would therefore dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, if a plaintiff complains that a defendant has published defamatory matter concerning him the defendant may in civil proceedings absolve himself from any liability to pay damages by showing that what was published was no more than the truth. But if a defendant fails to do that or is not otherwise protected, is he to be entitled to reduce his liability to pay damages for having published false defamatory matter by making new and further accusations and asserting that they reveal the plaintiff in his true light? Is a defendant in an action for defamation to be allowed for the purpose of reducing his liability in damages to say in effect: "Though "what I have published was false, if I had published what I "now assert all of that would have been true"? Or is he to be entitled to say: "If what is complained of is false, then the "damages which I ought to pay should be diminished because I "have in fact published other defamatory statements of the "plaintiff and I say that those are true"?

My Lords, though it would seem incongruous if someone with a bad reputation could claim damages for injury to his reputation without risk of the fact of his bad reputation being made known to the court, it would seem objectionable if the measuring of the damages that should be paid for publishing some false defamatory matter could be made the occasion for asserting and investigating other allegations against a plaintiff with a view to disclosing his true character and disposition. If in a quest to discover or to assess the true character and disposition of a plaintiff a defendant could assert and seek to prove certain deeds which were discreditable to the plaintiff, the latter could hardly be denied the right to counter-balance them by asserting and seeking to prove deeds which redounded to his credit. The limits of roving inquiry would be hard to control. There would be trials within a trial. The last stage of a trial would be far removed from the first. While in some cases any unseemly use of opportunity to expose a plaintiff might dangerously react, there might be cases in which the possession of some piece of information as to the past could in callous and unscrupulous hands be the means of deflecting a plaintiff from pursuing a just claim.

It is the contention of the appellants that in an action for defamation a defendant should be allowed, on giving due notice, to adduce evidence in mitigation of damages not only of the circumstances under which the matter complained of was published but also of the true character and disposition (at the material time) of the plaintiff. This should, however, be limited (according to the appellants' contention) to what is relevant to the nature of the allegations made against the plaintiff in the publication complained of though not otherwise limited inasmuch as all facts intended to be alleged in the damages-mitigating process ought, it is contended, to be pleaded with particularity.

If the considerations both favourable to and adverse to these contentions were being judicially examined for the first time, there would be much to be said for being sparing (when the sole issue is that of the amount of the damages) in giving protection to those who give currency to defamatory statements the accuracy of which they cannot defend. But, my Lords, the vexing issues to which the appellants' contention gives rise were often before the courts in the periods before the decision in *Scott* v. *Sampson*.[63] In some cases a person who was sued sought to defend himself by showing that he had merely said what was currently and widely being said about the plaintiff. "If so many are saying this, what injury "has my mere repetition done?": such was one form of the plea. My Lords, had such a plea found any lasting favour, the ugly voices of rumour and gossip with their furtive breathing of scandal would have gained a hearing which the law denies to them. In other cases it was sought (as it is now sought) to give evidence of particular facts tending to show the character and disposition of the plaintiff. If that could be done without prior notice it would be manifestly unfair. A plaintiff might not be prepared with the material to refute some suggestion which, had there been knowledge that it would be raised, could convincingly have been refuted. But even after due notice (the desirability of which the appellants recognise) ought such procedure to be allowed? A man should have damages, say the appellants, for injury to such reputation as he deserves to have and not for injury to a reputation that he does not deserve. The reason, they say, why justification is recognised as a defence in defamation proceedings is that if truth is shown it is thereby shown that a plaintiff cannot assert injury to a character which he neither does nor ought to possess. In *M'Pherson* v. *Daniels* [64] Littledale J. said: ". . . the truth is an answer to the action, "not because it negatives the charge of malice . . . but because "it shows that the plaintiff is not entitled to recover damages. "For the law will not permit a man to recover damages in respect "of an injury to a character which he either does not, or ought "not, to possess." But, in my judgment, that applies to the character which a plaintiff ought to possess in relation to the particular matters which are the subject of the libel complained of. A true statement made of a plaintiff may damage his reputation, but so far as civil proceedings are concerned a defendant may say that inasmuch as the statement was true he is not liable for having caused the damage.

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[63] 8 Q.B.D. 491.

In his notable judgment in *Scott* v. *Sampson* [65] Cave J. traced the evolution of certain underlying principles, though he recognised and demonstrated that as to some issues there was a considerable conflict of judicial opinion. "Speaking generally," he said,[66] "the law recognises in every man a right to have the "estimation in which he stands in the opinion of others unaffected "by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to "the person of whom they are made, he has a right of action. "The damage, however, which he has sustained must depend "almost entirely on the estimation in which he was previously "held." It was a logical step from this to conclude that those who have to award damages should be entitled to know, if it be the fact, that a plaintiff is a man of no reputation and that general evidence of reputation should be admitted: the balance of previous authority, the learned judge concluded, supported that view. One of the further issues in the case related to the admissibility of evidence of particular facts tending to show the character and disposition of a plaintiff. As to this Cave J. concluded that both principle and authority were equally against its admissibility: no case that had been cited to him supported its admissibility.

Although the principles which were classified and stated in *Scott* v. *Sampson* [67] have now stood for nearly 80 years it would be open to your Lordships, if so persuaded, to hold that the case was wrongly decided. My Lords, I am not so persuaded. It records and sets out what might be regarded as the greatest common measure of principle which emerged from the progressive experience of trial courts over many years. It may nevertheless be recognised that criticisms can be directed against the rule which it affirmed: that general evidence of reputation can be admitted but not evidence of particular facts tending to show the character and disposition of a plaintiff. The line, it may be said, between general evidence of reputation and evidence as to rumour may often become slender. If there be cross-examination of a witness who has given general evidence of reputation then the floodgates may be opened through which streams of details and particular facts may flow. Furthermore, it may be said that under existing practice in cases where cross-examination of a plaintiff as to his credibility is legitimate the range of the questioning may be wide and the length of a trial correspondingly extended. Also it may be said that there may in some cases be difficulties in having available a witness who can speak as to a man's reputation. If there is force in some or all of these criticisms it may be that even more forceful criticisms could be directed against some proposed new rule. These matters, however, do not so much present themselves as the problems of the court but rather of any who might wish by legislation to seek to change the law as it has been evolved.

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[64] (1829) 10 B. & C. 263, 272.

[65] 8 Q.B.D. 491.

[66] Ibid. 503.

[67] 8 Q.B.D. 491.

One of the complications in the present case arises from the circumstance that the appellants are seeking to assert that the film not only depicts the respondent as guilty of the particular conduct of which the respondent complains in the action but that the film further depicts him as having been guilty of other particularised conduct and they seek to be entitled in order to mitigate damages to prove that he was in fact guilty of such other conduct. For the reasons that I have indicated I do not consider that they ought to be entitled to do more than to adduce such evidence as the trial judge admits within the pleading in the form allowed by the Court of Appeal. I cannot think that the appellants should be entitled to give evidence of particular facts tending to show the character and disposition of the respondent merely because those alleged facts are said to be asserted or presented in some parts of the film itself. I furthermore cannot agree that it is legitimate to plead that it was a "circumstance" under which certain defamatory pictures and words complained of were published in a film that there were other pictures and words in the film "the truth of which the plaintiff in his amended "statement of claim does not deny."

The appellants have submitted that "the decision of the "Court of Appeal that the defendants did not have the right to "require that those parts of the film referred to in paragraph "5 (A) be shown to the jury at the trial of this action was "wrong." My Lords, it seems to me that it will be for the judge at the trial to decide whether the appellants will have the right to insist that the whole of the particular film should be seen by the jury. The Court of Appeal recognised that the appellants might wish to make a comment to the jury that the respondent was prepared "to sit down under" charges made in the film and not complained of by the respondent in the action. My Lords, I do not consider that we are called upon to express opinion upon any of these matters. It will be for the judge at the trial to decide whether, either as of the right of one or other of the parties or otherwise, the jury should see the whole film, and it will also be for him to decide what evidence is admissible as being relevant to the issues raised by the pleadings.

I would dismiss the appeal.

LORD GUEST. My Lords, I have had the opportunity of reading the speech delivered by my noble and learned friend on the Woolsack and I agree with the reasons which he gives for dismissing this appeal. I only desire to add these observations.

It was argued by the appellants that although the decision in *Scott* v. *Sampson*[68] was averse to their contention it should not be followed because it has led to inconvenience and injustice. I am not satisfied that it has led to these results. In my view, inconvenience and injustice would certainly follow if the law were to be as the appellants argued that it ought to be. If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral and which had but an indirect bearing on the main question in the case. It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject-matter of the libel, introduced by the defendants for the purpose of mitigating damages.

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[68] 8 Q.B.D. 491.

It is satisfactory that the law of Scotland has been for a number of years in consonance with the law of England on the matter (*C.* v. *M.*[69]). The decision in that case derived authority from an earlier case of *A.* v. *B.*[70] and I quote the opinion of Lord President Robertson: " But, then, courts of law are not bound to " admit the ascertainment of every disputed fact which may con- " tribute, however slightly or indirectly, towards the solution of " the issue to be tried. Regard must be had to the limitations " which time and human liability to confusion impose upon the " conduct of all trials. Experience shows that it is better to " sacrifice the aid which might be got from the more or less " uncertain solution of collateral issues, than to spend a great " amount of time, and confuse the jury with what, in the end, " even supposing it to be certain, has only an indirect bearing on " the matter in hand."

Upon the question of the extent to which the film should be exhibited to the jury the Court of Appeal have left that matter to the judge at the trial. The appellants submit that even if paragraph 5 (B) is to be struck out, they are still entitled to have paragraph 5 (A) remain as this is the only method of ensuring that the whole film will be shown to the jury. In my view, paragraph 5 (A) is objectionable and should be struck out. It contains the objectionable expression in relation to the allegations " the truth of which the plaintiff in his amended statement of " claim does not deny." It also contains the defendants' gloss on the passages of the film referred to. The plaintiff is not, in my opinion, called upon at this stage to admit or deny this gloss.

The appellants base their argument for the retention of paragraph 5 (A) upon the decision in *Cooke* v. *Hughes* [71] where it was held that the defendant was entitled to have the whole publication in which the libel was contained read to the jury. The decision must be read in the light of the facts of that case. I have no doubt that in some cases it may be necessary in order to explain the context in which the libel is contained to put the whole publication before the jury. But this must depend on the circumstances of each case. In any event, the point taken by the appellants relates not to pleading but is a question of evidence. This House is being asked in advance to rule upon a question of evidence which will arise for the decision of the judge as a matter of law at the trial. In my view paragraph 5 (A) should be struck out for the reason I have given. But this does not mean that the defendants may not be entitled at the trial to have the whole film exhibited to the jury, if they can persuade the judge that in order to explain the libel it is necessary to do so. In my opinion the Court of Appeal were right in declining to make any comment on the question and leaving it to the judge at the trial.

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[69] 1923 S.C. 1.

[70] (1895) 22 R. 402, 404.

[71] Ry. & M. 112.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Garber, Vowles & Co.; Holland & Co.*

F. C.

END OF VOLUME AND OF APPEAL CASES FOR 1961.

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Ashford Shire Council v. Dependable Motors Pty. Ltd., P.C. 336.

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Furnace oil spilled on harbour waters—Fire—Foreseeability of consequences the test of liability—Remission of claim founded on nuisance.
Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound), P.C. 388.

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Sunshine Porcelain Potteries Pty. Ltd. v. Nash, P.C. 927.

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Corporation sole—Code of Civil Procedure (Legislative Enactments of Ceylon, 1938 Rev., c. 86), s. 520. **Salih v. Atchi,** P.C. **778.**

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Court of Criminal Appeal
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" *Annual payment* "—Income Tax Act, 1918, r. 21 of General Rules, Sch. D, Case III, r. 1 (*a*). **Whitworth Park Coal Co. Ltd. (In Liquidation) v. Inland Revenue Comrs.,** H.L.(E.) **31.**

" *At any time* "—Workmen's Compensation Act, 1951 (Victoria) (No. 5601), s. 12 (1). **Sunshine Porcelain Potteries Pty. Ltd. v. Nash,** P.C. **927.**

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" *Fee simple* "—Valuation of Land Act (No. 2), 1916–1951 (N.S.W.), s. 5. **Gollan v. Randwick Municipal Council,** P.C. **82.**

" *Final and binding* "—Annual Conference of Delegates, r. 11 (7). **Annamunthodo v. Oilfields Workers' Trade Union,** P.C. **945.**

" *Income* "—Income tax. **Whitworth Park Coal Co. Ltd. (In Liquidation) v. Inland Revenue Comrs.,** H.L.(E.) **31.**

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" *Intent to defraud* "—Forgery Act, 1913, s. 4 (1). **Welham v. Director of Public Prosecutions,** H.L.(E.) **103.**

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" *Structure* "—Local Government Act, 1948, s. 56. **Imperial Tobacco Company (of Great Britain and Ireland) Ltd. v. Pierson,** H.L.(E.) **463.**

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